PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Filed Feb. 5, 2019)

No. 18-1159

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

6.56 ACRES OF LAND, OWNED BY SANDRA TOWNES POWELL, Montgomery County Tax Map Parcel No. 015900 and being MVP Parcel No. VA-MO-3370; 1.81 ACRES OF LAND, OWNED BY ROBERT M. JONES AND DONNA THOMAS JONES, Montgomery County Tax Map Parcel No. 024588 and being MVP Parcel No. VA-MO-5511; 1.29 ACRES OF LAND, OWNED BY ROBERT M. JONES AND DONNA THOMAS JONES, Montgomery County Tax Map Parcel No. 024591 and being MVP Parcel No. VA-MO-5512; 0.52 ACRES OF LAND, OWNED BY EMILIE M. OWEN AND RICHARD CLARK OWEN, Franklin County Tax Map Parcel No. 0380002204B and being MVP Parcel No. VA-FR-4129 (AR FR-294),

Defendants - Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge, (7:17-cv-00492-EKD).

No. 18-1165

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

TERESA D. ERICKSON, POA for Gerald Wayne Corder (Parcel ID NO. 20-362-20. An Easement to construct, operate and maintain a 42-inch gas transmission line across properties in the counties of Braxton, Lewis, Harrison, Webster, and Wetzel, WV; LORENA B. KRAFFT, POA for Randall N. Corder (Parcel ID NO. 20-362-21. An Easement to construct, operate and maintain a 42-inch gas transmission line across properties in the counties of Braxton, Lewis, Harrison, Webster, and Wetzel, WV,

Defendants - Appellants.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg, Irene M. Keeley, Senior District Judge, (1:17-cv-00211-IMK).

No. 18-1175

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

0.335 ACRES OF LAND, OWNED BY GEORGE LEE JONES, Giles County Tax Map Parcel No. 47-1-1 and being MVP Parcel No. VA-GI-200.044; 0.65 ACRES OF LAND, OWNED BY MICHAEL S. HURT AND MARY FRANCES K. HURT, Franklin County Tax Map Parcel No. 0380002204A and being MVP Parcel No. VA-FR-4130 (AR FR-294); 1.52 ACRES OF LAND, OWNED BY VERNON V. BEACHAM, SR. AND VERNON V. BEACHAM, II, Giles County Tax Map Parcel No. 44A-1-34 and being MVP Parcel No. VA-GI-051; 2.83 ACRES OF LAND, OWNED BY VERNON V. BEACHAM, SR. AND VERNON V. BEACHAM, II, Giles County Tax Map Parcel No. 44A-1-33 and being MVP Parcel VA-GI-052; 4.88 ACRES OF LAND, OWNED BY CLARENCE B. GIVENS AND KAROLYN W. GIVENS, Giles County Tax Map Parcel No. 47-9 and being MVP Parcel No. VA-GI-200.041; 2.01 ACRES OF LAND, OWNED BY GEORGE LEE JONES, Giles County Tax Map Parcel No. 47-1-2 and being MVP Parcel No. VA-GI-200.045; 2.09 ACRES OF LAND, OWNED BY STEVEN C. HODGES AND JUDY R. HODGES, Craig County Tax Map Parcel No. 120-A-10 and 120-A-10A and being MVP Parcel No. VA-CR-200.047; 0.66 ACRES OF LAND, OWNED BY GORDON WAYNE JONES AND DONNA W. JONES, Craig County Tax Map Parcel No. 120-A-13 and being MVP

Parcel No. VA-CR-200.049; 0.71 ACRES OF LAND, OWNED BY ROANOKE VALLEY 4-WHEELERS ASSOCIATION, Montgomery County Tax Map Parcel No. 031198 and being MVP Parcel No. VA-MO-4264 (AR-MN-276); 1.53 ACRES OF LAND, OWNED BY ROANOKE VALLEY 4-WHEELERS ASSOCIATION, Montgomery County Tax Map Parcel No. 016068 and being MVP Parcel No. VA-MO-4265 (AR MN-276); 1.53 ACRES OF LAND, OWNED BY STEPHEN W. BERNARD AND ANNE W. BERNARD, Franklin County Tax Map Parcel No. 0370001901 and being MVP Parcel No. BVA-FR-13; 5.88 ACRES OF LAND, OWNED BY WENDELL WRAY FLORA AND MARY MCNEIL FLORA, Franklin County Tax Map Parcel No. 0380002000 and being MVP Parcel No. VA-FR-017.21; 3.70 ACRES OF LAND, OWNED BY MICHAEL S. HURT AND MARY FRANCES K. HURT, Franklin County Tax Map Parcel No. 0380002204 and being MVP Parcel No. VA-FR-017.25; 1.97 ACRES OF LAND, OWNED BY KEITH M. WILSON AND MARY K. WILSON, Franklin County Tax Map Parcel No. 0370009906 and being MVP Parcel No. VA-FR-017.44; 6.50 ACRES OF LAND, MORE OR LESS, OWNED BY NEW RIVER CONSERVANCY, INC., Located in Giles County, Virginia being a portion of Giles County Tax Map Parcel No. 29-25B and being MVP Parcel No. VA-GI-035,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge, (7:17-cv-00492-EKD).

No. 18-1181

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

0.01 ACRES OF LAND, OWNED BY BENNY L. HUFFMAN, Giles County Tax Map Parcel No. 46-25 B and being MVP Parcel No. VA-GI-5779; 0.01 ACRES OF LAND, OWNED BY JEREMY JOSEPH RICE AND MICHELLE RENEE RICE, Roanoke County Tax Map Parcel No. 111.00-01-58.00-0000 and being MVP Parcel No. VA-RO-5627; 0.01 ACRES OF LAND, OWNED BY ROY A. STEVENS, Franklin County Tax Map Parcel No. 0440018800 and being MVP Parcel No. VA-FR-5496; 0.02 ACRES OF LAND, OWNED BY DANIEL G. MYERS AND DEBORAH L. MYERS, Franklin County Tax Map Parcel No. 0440019801 and being MVP Parcel No. VA-FR-5502; 0.04 ACRES OF LAND, OWNED BY BRUCE M. WOOD AND JENNIFER M. WOOD, Franklin County Tax Map Parcel No. 0440200600 and being MVP Parcel No. VA-FR-5791; 2.75 ACRES OF LAND, OWNED BY HELENA DELANEY TEEKELL, TRUSTEE OF THE HELENA DELANEY TEEKELL TRUST, Craig County Tax Map Parcel No. 120-A-12 and being MVP Parcel No. VA-CR-200.048; 2.81 ACRES OF LAND, OWNED BY ROBERT W. CRAWFORD OR PATRICIA D. CRAWFORD, TRUSTEES UNDER THE CRAWFORD LIVING TRUST, AND ANITA NEAL HUGHES, Craig County Tax Map Parcel No. 121-A-15 and being MVP Parcel No. VA-CR-200.053; 2.60 ACRES OF LAND, OWNED

BY HELENA DELANEY TEEKELL, TRUSTEE OF THE HELENA DELANEY TEEKELL TRUST, Craig County Tax Map Parcel No. 120-A-14A and being MVP Parcel No. VA-CR-5343; 0.15 ACRES OF LAND, OWNED BY DONALD W. LONG AND EVELYN W. LONG, Montgomery County Tax Map Parcel No. 021560 and being MVP Parcel No. BVMO-25; 0.07 ACRES OF LAND, OWNED BY GEORGE A. CRAIGHEAD AND HELEN P. CRAIGHEAD, Montgomery County Tax Map Parcel No. 016298 and being MVP Parcel No. VA-MO-011; 1.90 ACRES OF LAND, OWNED BY JOSEPH PATRICK TOMELTY, Montgomery County Tax Map Parcel No. 013819 and being MVP Parcel No. VA-MO-060; 0.89 ACRES OF LAND, OWNED BY DONALD W. LONG AND EVELYN W. LONG, Montgomery County Tax Map Parcel No. 021559 and being MVP Parcel No. VA-MO-062; 0.392 ACRES OF LAND, OWNED BY TRAVIS SCOTT LANCASTER AND TRACY LYNN TAYLOR, Montgomery County Tax Map Parcel No. 033280 and being MVP Parcel No. VA-MO-064 (AR-MN-271); 23.74 ACRES OF LAND, OWNED BY MARK W. CRONK, ALISON G. CRONK AND THE NATURE CONSERVANCY, Roanoke County Tax Map Parcel No. 093.00-01-44.00-0000 and being MVP Parcel No. VA-RO-038; 1.89 ACRES OF LAND, OWNED BY TRUSTEES OF EVANGEL FOURSQUARE CHURCH, Roanoke County Tax Map Parcel No. 093.00-01-47.00-0000 and being MVP Parcel No. VA-RO-039; 5.38 ACRES OF LAND, OWNED BY LUCY A. PRICE, Franklin County Tax Map Parcel No. 0240003400 and being MVP Parcel No. VA-FR-008; 3.11 ACRES OF LAND, OWNED BY RUSSELL E. CALLAWAY AND HEIDE K. CALLAWAY, Franklin County Tax Map Parcel No. 0240005400 and being MVP Parcel No. VA-FR-015.02; 5.93 ACRES OF LAND,

OWNED BY CHARLES FREDERICK FLORA AND STEPHANIE M. FLORA, Franklin County Tax Map Parcel No. 0380002002 and being MVP Parcel No. VA-FR-017.20; 0.07 ACRES OF LAND, OWNED BY DALE E. ANGLE AND MARY A. ANGLE, TRUSTEES OF THE DALE E. ANGLE AND MARY A. ANGLE JOINT REVOCABLE TRUST, Franklin County Tax Map Parcel No. 0440006400 and being MVP Parcel No. VA-FR-077.01; 2.14 ACRES OF LAND, OWNED BY DALE E. ANGLE AND MARY A. ANGLE, TRUSTEES UNDER THE DALE E. AND MARY A. ANGLE JOINT REVOCABLE TRUST, Franklin County Tax Map Parcel No. 0440006501 and being MVP Parcel No. VA-FR-078; 11.86 ACRES OF LAND, OWNED BY DONALD B. BARNHART, Franklin County Tax Map Parcel No. 0440007300 and being MVP Parcel No. VA-FR-081; 10.21 ACRES OF LAND, OWNED BY WILLIAM DAVID BOARD, JAMES R. BOARD, SUSAN BOARD MYERS, NANCY B. FLORA, AND KENNETH CRAIG BOARD, Franklin County Tax Map Parcel No. 0450006100 and being MVP Parcel No. VA-FR-128; 0.30 ACRES OF LAND, OWNED BY ROBERT ALAN PEGRAM, Franklin County Tax Map Parcel No. 0650401600 and being MVP Parcel No. VA-FR-155.01; 1.85 ACRES OF LAND, OWNED BY OYLER LAND AND LEASING, LLC, Franklin County Tax Map Parcel No. 0240004000 and being MVP Parcel No. VA-FR-4126 (AR FR-291); 0.83 ACRES OF LAND, OWNED BY SUSAN BOARD MYERS, WILLIAM DAVID BOARD, KENNETH CRAIG BOARD, AND NANCY BOARD FLORA, a/k/a William D. Board, Franklin County Tax Map Parcel No. 0450012003 and being MVP Parcel No. VA-FR-4141 (AR FR-313); 0.56 ACRES OF LAND, OWNED BY OWNED BY [sic] WILLIAM D. BOARD, Franklin County Tax Map Parcel No.

0450012005 and being MVP Parcel No. VA-FR-4277 (AR FR-313); 0.97 ACRES OF LAND, OWNED BY WILLIAM DAVID BOARD, KENNETH CRAIG BOARD, SUSAN B. MYERS, NANCY B. FLORA, AND JAMES R. BOARD, Franklin County Tax Map Parcel No. 0450012001 and being MVP Parcel No. VA-FR-4278 (AR FR-313); 0.12 ACRES OF LAND, OWNED BY ANGELA L. MCGHEE AND FREDRICK C. MCGHEE, Franklin County Tax Map Parcel No. 0370009905 and being MVP Parcel No. VA-FR-5411; 0.07 ACRES OF LAND, OWNED BY RUSSELL W. LAWLESS, Franklin County Tax Map Parcel No. 0370009907 and being MVP Parcel No. VA-FR-5413; 0.04 ACRES OF LAND, OWNED BY RONALD B. EDWARDS, SR., GLORIA MARTIN, TERRANCE EDWARDS, LINDA WHITE, RUBY PENN, JANIS E. WALLER, CRYSTAL DIANE EDWARDS, AND PENNY EDWARDS BLUE, Franklin County Tax Map Parcel No. 0660009502 and being MVP Parcel No. VA-FR-5434; 0.44 ACRES OF LAND, OWNED BY SHELBY A. LAW, Franklin County Tax Map Parcel No. 0440200400 and being MVP Parcel No. VA-FR-5492; 3.15 ACRES OF LAND, OWNED BY ROBERT WAYNE MORGAN AND PATRICIA ANN MORGAN, Franklin County Tax Map Parcel No. 0440018700 and being MVP Parcel No. VA-FR-5493; 3.11 ACRES OF LAND, OWNED BY JAMES GLYNWOOD HAYNES, JR., Franklin County Tax Map Parcel No. 0440020001 and being MVP Parcel No. VA-FR-5504; 0.95 ACRES OF LAND, OWNED BY JAMES GLYNWOOD HAYNES, JR., Franklin County Tax Map Parcel No. 0440019500 and being MVP Parcel No. VA-FR-5505; 0.38 ACRES OF LAND, OWNED BY JAMES GLYNWOOD HAYNES, JR., Franklin County Tax Map

Parcel No. 0440019300 and being MVP Parcel No. VA-FR-5507,

Defendants - Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge, (7:17-cv-00492-EKD).

No. 18-1187

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

0.09 ACRES OF LAND, OWNED BY GARY HOLLOPTER AND ALLISON HOLLOPTER, Giles County Tax Map Parcel No. 30-4B and being MVP Parcel No. VA-GI-5310; 0.18 ACRES OF LAND, OWNED BY GEORGIA LOU HAVERTY, Giles County Tax Map Parcel No 30-4A and being MVP Parcel No. BVGI-10; 6.50 ACRES OF LAND, OWNED BY SIZEMORE INCORPORATED OF VIRGINIA, f/k/a National Committee for the New River, Giles County Tax Map Parcel No. 29-25B and being MVP Parcel No. VA-GI-035; 1.23 ACRES OF LAND, OWNED BY EAGLE'S NEST MINISTRIES, INC., Giles County Tax Map Parcel No. 29-25 and being MVP Parcel No VA-GI-035.01; 10.67 ACRES OF LAND, OWNED BY DOE CREEK FARM, INCORPORATED, Giles County Tax Map Parcel No.30-4 and being MVP Parcel No. VA-GI-049; 2.19

ACRES OF LAND, OWNED BY STEPHEN D. LEGGE, DAVID LEGGE, AND PHYLLIS J. LEGGE, Giles County Tax Map Parcel No. 44-3-3A and being MVP Parcel No. VA-GI-057; 5.25 ACRES OF LAND, OWNED BY MARY VIRGINIA REYNOLDS, SAMUEL HALE REYNOLDS, AND MARY SUTTON REYNOLDS, Giles County Tax Map Parcel No. 46-1-3 and being MVP Parcel No. VA-GI-097.01; 8.60 ACRES OF LAND, OWNED BY DOWDY FARM LLC, Giles County Tax Map Parcel No. 46-52 and being MVP Parcel No. VA-GI-4250; 0.22 ACRES OF LAND, OWNED BY DOWDY FARM, LLC, Giles County Tax Map Parcel No. 46-52A and being MVP Parcel No. VA-GI-5790; 10.26 ACRES OF LAND, OWNED BY SAMUEL HALE REYNOLDS AND MARY SUTTON REYNOLDS, Giles County Tax Map Parcel No. 46-1-2A and being MVP Parcel No. VA-GI-5922; 7.18 ACRES OF LAND, OWNED BY MICHAEL EDWARD SLAYTON, TRUSTEE OR MARGARET MCGRAW SLAYTON, TRUSTEE, MARGARET MCGRAW SLAYTON LIVING TRUST, Montgomery County Tax Map Parcel No. 024590 and being MVP Parcel No. VA-MO-3371; 0.22 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-41.00-0000 and being MVP Parcel No. BVRO-12; 0.41 ACRES OF LAND, OWNED BY JAMES D. SCOTT AND KAREN B. SCOTT, Roanoke County Tax Map Parcel No. 093.00-01-34.01-0000 and being MVP Parcel No. VA-RO-030 (AR RO-281); 2.17 ACRES OF LAND, OWNED BY JAMES D. SCOTT AND KAREN B. SCOTT, Roanoke County Tax Map Parcel No. 093.00-01-33.00-0000 and

being MVP Parcel No. VA-RO-042; 0.341 ACRES OF LAND, OWNED [sic] JAMES D. SCOTT AND KAREN B. SCOTT, Roanoke County Tax Map Parcel No. 093.00-01-33.01-0000 and being MVP Parcel No. VA-RO-043; 0.41 ACRES OF LAND, OWNED BY LENORA W. MONTUORI, Roanoke County Tax Map Parcel No. 110.00-01-54.00-0000 and being MVP Parcel No. VA-RO-058; 4.31 ACRES OF LAND, OWNED BY JAMES T. CHANDLER AND KATHY E. CHANDLER, Roanoke County Tax Map Parcel No. 111.00-01-62.01-0000 and being MVP Parcel No. VA-RO-060; 4.31 ACRES OF LAND, OWNED BY JAMES T. CHANDLER AND KATHY E. CHANDLER, Roanoke County Tax Map Parcel No 117.00-01-38.00-0000 and being MVP Parcel No. VA-RO-061; 1.91 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTIN MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-43.02-0000 and being MVP Parcel No. VA-RO-062; 0.91 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-43.00-0000, Being MVP Parcel No. VA-RO-063; 2.99 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-46.00-0000 and Being Parcel No. VA-RO-064; 0.20 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI

FAMILY TRU [sic], Roanoke County Tax Map Parcel No. 117.00-01-43.01-0000 and being MVP Parcel No. VA-RO-065; 0.19 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-42.00-0000 and being MVP Parcel No. VA-RO-066; 2.43 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LEMORA [sic] MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-45.00-0000 and being MVP Parcel No. VA-RO-067; 0.50 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-41.01-0000 and being MVP Parcel No. VA-RO-4124; 0.33 ACRES OF LAND, OWNED BY LENORA W. MONTUORI AND LENORA MONTUORI AND KRISTINA MONTUORI HILLMAN, TRUSTEES OF THE ANTONIO MONTUORI FAMILY TRUST, Roanoke County Tax Map Parcel No. 117.00-01-41.02-0000 and being MVP Parcel No. VA-RO-4125; 8.21 ACRES OF LAND, OWNED BY OCCANNEECHI, INC., Franklin County Tax Map Parcel No. 0250004100 and being MVP Parcel No. VA-FR-017.11; 21.98 ACRES OF LAND, OWNED BY OCCANNEECHI, INC., Franklin County Tax Map Parcel No. 0380001501 and being MVP Parcel No. VA-FR-017.15; 8.67 ACRES OF LAND, OWNED BY JAMES D. SCOTT AND KAREN B. SCOTT, Roanoke County Tax

Map Parcel No. 093.00-01-34.00-0000 and being MVP Parcel No. VA-RO-040,

Defendants - Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge, (7:17-cv-00492-EKD).

No. 18-1242

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

0.09 ACRES OF LAND, OWNED BY LARRY BERNARD CUNNINGHAM AND CAROLYN A. CUNNINGAM, Roanoke County Tax Map Parcel No. 063.00-01-20.03-0000 and being MVP Parcel No. VA-RO-5781; 0.11 ACRES OF LAND, OWNED BY JUNE SMITH, RAY SMITH, PATRICIA S. DEVECHA, STEPHEN R. SMITH, BARRY SCOTT SMITH, DOUGLAS F. SMITH, DAVID L. SMITH, FRED APGAR, RUTH APGAR GLOCK, DONALD APGAR, GREGORY M. A, a/k/a Raymond Foster Smith, a/k/a Fred I. Apgar, a/k/a Frederick Apgar, a/k/a Gregory M. Apgar, a/k/a Angela H. Apgar, Unknown Heirs and Assigns of the Following June Smith, and Ray Smith, Roanoke Co. Tax Map Parcel No. 063.00-01-25.00-0000 and being MVP Parcel No. VA-RO-033; 0.14 ACRES OF LAND, OWNED BY UNKNOWN HEIRS OR ASSIGNS OF ANTHONY B. NOVITZKI AND JOANNE A. LOFARO, Franklin

County Tax Map Parcel No. 0440206600 and being MVP Parcel No. VA-FR-5500; 4.90 ACRES OF LAND, OWNED BY BRENDA LYNN WILLIAMS, Giles County Tax Map Parcel No. 46-15 and being MVP Parcel No. VA-GI-200.019; 0.19 ACRES OF LAND, OWNED BY CLETUS WOODROW BOHON AND BEVERLY ANN BOHON, Montgomery County Tax Map Parcel No. 030271 and being MVP Parcel No. VA-MN-5233 (AR MN-278.01); 0.39 ACRES OF LAND, OWNED BY JAMES C. LAW AND CAROLYN D. LAW, Montgomery County Tax Map Parcel No. 032431 And being MVP Parcel No. VA-MN-5234 (AR MN-278.01); 2.08 ACRES OF LAND, OWNED BY DONALD D. APGAR AND MILDRED M. APGAR, Montgomery County Tax Map Parcel No. 000843 and being MVP Parcel No. VA-MO-012; 2.69 ACRES OF LAND, OWNED BY BRIAN DAVID GLOCK AND SUSAN ELIZABETH GLOCK BUCH, Montgomery County Tax Map Parcel No. 000844 and being MVP Parcel No. VA-MO-013; 2.74 ACRES OF LAND, OWNED BY CLETUS WOODROW BOHON AND BEVERLY ANN BOHON, Montgomery County Tax Map Parcel No. 017761 and being MVP Parcel No. VA-MO-022; 2.12 ACRES OF LAND, OWNED BY JAMES CABEL LAW AND CAROLYN DIANA EANES LAW, Montgomery County Tax Map Parcel No. 018808 and being MVP Parcel No. VA-MO-024; 4.67 ACRES OF LAND, OWNED BY JAMES CABEL LAW AND CAROLYN DIANA EANES LAW, Montgomery County Tax Map Parcel No. 011673 and being MVP Parcel No. VA-MO-025; 12.20 ACRES OF LAND, OWNED BY JUNE SMITH, RAY SMITH, PATRICIA S. DEVECHA, STEPHEN R. SMITH, BARRY SCOTT SMITH, DOUGLAS F. SMITH, DAVID L. SMITH, FRED APGAR, RUTH APGAR GLOCK, GREGORY M. APGAR, AND ANG,

a/k/a Raymond Foster Smith, a/k/a Fred I. Apgar, a/k/a Frederick I. Apgar, Unknown Heirs or Assigns of the Following June Smith, and Ray Smith, Montgomery Co. Tax Map Parcel No. 120001 and MVP Parcel No. VA-MO-084; 3.35 ACRES OF LAND, OWNED BY THOMAS W. TRIPLETT AND BONNIE B. TRIPLETT, Montgomery County Tac [sic] Map Parcel No. 024589 and being MVP Parcel No. VA-MO-5514; 2.07 ACRES OF LAND, OWNED BY PHYLLIS M. HUTTON, Montgomery County Tax Map Parcel No. 009443 and being MVP Parcel No. VA-MO-5515; 3.01 ACRES OF LAND, OWNED BY PHYLLIS M. HUTTON, Montgomery County Tax Map Parcel No. 026945 and being MVP Parcel No. VA-MO-5516; 6.86 ACRES OF LAND, OWNED BY JULIANA BERNHOLZ AND IRINA BERNHOLZ SIEGRIST, Montgomery County Tax Map Parcel No. 015895 and being MVP Parcel No. VA-MO-5526; 0.38 ACRES OF LAND, OWNED BY JAMES C. LAW AND CAROLYN D. LAW, Montgomery County Tax Map Parcel No. 002833 and being MVP Parcel No. VA-MO-5626; 4.03 ACRES OF LAND, OWNED BY MATTHEW D. ROLLIER AND DEANNA D. ROBINSON, Roanoke County Tax Map Parcel No. 102.00-01-12.00-0000 and Bring [sic] MVP Parcel No. BVRO-04; 0.47 ACRES OF LAND, OWNED BY BRUCE M. COFFEY AND MARY E. COFFEY, Roanoke County Tax Map Parcel No. 102.00-01-13.00-0000 and being MVP Parcel No. BVRO-05; 13.47 ACRES OF LAND, OWNED BY JOHN COLES TERRY, III, Roanoke County Tax Map Parcel No. 102.00-01-08.00-0000 and being MVP Parcel No. VA-RO-045; 8.37 ACRES OF LAND, OWNED BY FRANK H. TERRY, JR., JOHN COLES TERRY, III, AND ELIZABETH LEE TERRY, a/k/a Elizabeth Lee Reynolds, Roanoke County Tax Map Parcel No. 102.00-01-02.00-0000 and being MVP

Parcel No. VA-RO-046; 1.40 ACRES OF LAND, OWNED BY MARY ELLEN RIVES, Roanoke County Tax Map Parcel No. 103.00-02-43.00-0000 and being MVP Parcel No. VA-RO-051; 1.85 ACRES OF LAND, OWNED BY JACQULINE J. LUCKI, Roanoke County Tax Map Parcel No. 102.00-01-14.00-0000 and being MVP Parcel No. VA-RO-052; 9.89 ACRES OF LAND, OWNED BY ELIZABETH LEE TERRY, a/k/a Elizabeth Lee Reynolds, Roanoke County Tax Map Parcel No. 110.00-01-44.00-0000 and being MVP Parcel No. VA-RO-054; 4.72 ACRES OF LAND, OWNED BY FRED W. VEST, Roanoke County Tax Map Parcel No. 110.00-01-56.00-0000 and being MVP Parcel No. VA-RO-056; 2.93 ACRES OF LAND, OWNED BY LOIS KING WALDRON AND LOIS MABEL WALDRON MARTIN, Roanoke County Tax Map Parcel No. 110.00-01-50.00-0000 and being MVP Parcel No. VA-RO-057; 2.05 ACRES OF LAND, OWNED BY HOWARD M. THOMPSON AND CHRISTINE W. THOMPSON, Roanoke County Tax Map Parcel No. 118.00-01-09.00-0000 and being MVP Parcel No. VA-RO-068; 0.94 ACRES OF LAND, OWNED BY MARTIN G. MORRISON AND PATRICIA A. BOYD, Roanoke County Tax Map Parcel No. 063.00-01-20.00-0000 and being MVP Parcel No. VA-RO-4115; 2.20 ACRES OF LAND, OWNED BY HILAH PARKS TERRY, FRANK H. TERRY, JR., ELIZABETH LEE TERRY, JOHN COLES TERRY III, GRACE MINOR TERRY, Unknown Heirs or Assigns of Frank H. Terry, Sr., Roanoke County Tax Map Parcel No. 103.00-02-01.00-0000 and being MVP Parcel No. VA-RO-4118 (AR RO-283); 0.28 ACRES OF LAND, OWNED BY JACQULINE J. LUCKI, Roanoke County Tax Map Parcel No. 102.00-01-13.01-0000 and being MVP Parcel No. VA-RO-50; 0.32 ACRES OF LAND, OWNED BY GRACE MINOR TERRY, Roanoke

County Tax Map Parcel No. 102.00-01-01.02-0000 and being MVP Parcel No. VA-RO-5149 (AR RO-279.01); 0.34 ACRES OF LAND, OWNED BY ROBIN B. AUSTIN AND ALLEN R. AUSTIN, Roanoke County Tax Map Parcel No. 110.00-01-45.00-0000 and being MVP Parcel No. VA-RO-5222 (AR RO-285); 0.33 ACRES OF LAND, OWNED BY ELIZABETH LEE TERRY, a/k/a Elizabeth Lee Reynolds, Roanoke County Tax Map Parcel No. 093.00-01-46.00-0000 and being MVP Parcel No. VA-RO-5228 (ATWS-1224); 0.31 ACRES OF LAND, OWNED BY REBECCA JANE DAMERON, Roanoke County Tax Map Parcel No. 111.00-01-61.00-0000 and being MVP Parcel No. VA-RO-5383; 0.15 ACRES OF LAND, OWNED BY FRANK W. HALE AND FLOSSIE I. HALE AND ROBERT MATTHEW HAMM AND AIMEE CHASE HAMM, Roanoke County Tax Map Parcel No. 110.00-01-56.01-0000 and being MVP Parcel No. VA-RO-5748; 0.26 ACRES OF LAND, OWNED BY LARRY BERNARD CUNNINGHAM AND CAROLYN A. CUNNINGHAM, Roanoke County Tax Map Parcel No. 063.00-01-21.00-0000 and being MVP Parcel No. VA-RO-5785; 1.38 ACRES OF LAND, OWNED BY ALVIN E. WRAY, LINDA L. WRAY, L. BENTON WRAY, JR., AND DIANE S. WRAY, Franklin County Tax Map Parcel No. 250002100 and being MVP Parcel No. VA-FR-017; 11.45 ACRES OF LAND, OWNED BY L. BENTON WRAY, JR., DIANE S. WRAY, ALVIN E. WRAY, AND LINDA L. WRAY, Franklin County Tax Map Parcel No. 0250002200 and being MVP Parcel No. VA-FR-017.02; 2.74 ACRES OF LAND, OWNED BY MARK A. PETTIPIECE AND TERESA J. PETTIPIECE, Giles County Tax Map Parcel No. 47-1-3 and being MVP Parcel No. VA-GI-200.046; 0.87 ACRES OF LAND, OWNED BY BOBBY I.

JONES AND RICHARD WAYNE JONES REVOCABLE TRUST, RICHARD WAYNE JONES, TRUSTEE, Franklin County Tax Map Parcel No. 0430105200 and being MVP Parcel No. VA-FR-070.01; 1.60 ACRES OF LAND, OWNED BY SANDRA H. LANCASTER, Franklin County Tax Map Parcel No. 0430105000 and being MVP Parcel No. VA-FR-073; 3.70 ACRES OF LAND, OWNED BY DAVID J. WERNER, BETTY B. WERNER, IAN ELLIOTT REILLY, AND CAROLYN ELIZABETH REILLY, Franklin County Tax Map Parcel No. 0440004300 and being MVP Parcel No. VA-FR-076.01; 1.72 ACRES OF LAND, OWNED BY GUY W. BUFORD AND MARGARET S. BUFORD, Franklin County Tax Map Parcel No. 0440004400 and being MVP Parcel No. VA-FR-077; 0.292 ACRES OF LAND, OWNED BY GAIL DUDLEY SMITHERS AND GINGER K. SMITHERS, Franklin County Tax Map Parcel No. 0450008100 and being MVP Parcel No. VA-FR-113; 8.56 ACRES OF LAND, OWNED BY GAIL DUDLEY SMITHERS AND GINGER K. SMITHERS, Franklin County Tax Map Parcel No. 0450000902 and being MVP Parcel No. VA-FR-114; 8.60 ACRES OF LAND, OWNED BY GAIL DUDLEY SMITHERS, Franklin County Tax Map Parcel No. 0450001600 and being MVP Parcel No. VA-FR-117; 3.92 ACRES OF LAND, OWNED BY GAIL DUDLEY SMITHERS AND GINGER K. SMITHERS, Franklin County Tax Map Parcel No. 0450006800 and being MVP Parcel No. VA-FR-119; 0.32 ACRES OF LAND, OWNED BY GAIL DUDLEY SMITHERS, Franklin County Tax Map Parcel No. 0450001500 and being MVP Parcel No. VA-FR-5151 (ATWS-1266); 0.15 ACRES OF LAND, OWNED BY RUSSELL R. BARKSDALE, JR., Franklin County Tax Map Parcel No. 0370009904 and being MVP Parcel No. VA-FR-5415; 4.14 ACRES OF LAND, OWNED BY

MARK E. DANIEL AND ANGELA D. DANIEL, Franklin County Tax Map Parcel No. 0440011600 and being MVP Parcel No. VA-FR-5476; 7.82 ACRES OF LAND, OWNED BY THOMAS O. WHITE, JR., TRUSTEE OF THE BEVERLY A. MCLAUGHLIN TESTAMENTARY TRUST, Pittsylvania County Tax Map Parcel No. 1489-86-7542 and being MVP Parcel No. VA-PI-029.05; 1.23 ACRES OF LAND, OWNED BY JAMES M. GRUBBS, EVELENA GRUBBS ROUSE, AND ENZY GRUBBS ANDERSON, UNKNOWN HEIRS OR ASSIGNS OF JAMES M. GRUBB [sic], a/k/a Evelyn Rouse, Pittsylvania County Tax Map Parcel Nos. 2436-05-4452 and 2436-05-2564 and being MVP Parcel No. VA-PI-104; 3.42 ACRES OF LAND, OWNED BY HENRY COX AND JANET DEGROFF, Montgomery County Tax Map Parcel No. 032870 and being MVP Parcel No. VA-MO-5520; 3.74 ACRES OF LAND, OWNED BY JEROME DAVID HENRY AND DORIS MARIE HENRY, Roanoke County Tax Map Parcel No. 110.00-01-46.00-0000 and being MVP Parcel No. VA-RO-055,

Defendants - Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge, (7:17-cv-00492-EKD).

No. 18-1300

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff - Appellee,

v.

CHERYL L. BOONE, Parcel ID No. 7-7-27.2; KERRY N. BOONE, Parcel ID No. 7-7-27.2; ORUS ASHBY BERKLEY, Parcel ID No. 7-15A-13, 7-15A-13.1; TAMMY A. CAPALDO, Parcel ID No. 7-15-125; CARLA D. FOUNTAIN, Parcel ID No. 05-19-36, 05-19-24; DENNIS F. FOUNTAIN, Parcel ID No. 05-19-36, 05-19-24; ROBERT M. JARRELL, Parcel ID No. 7-11-15; DAVID ALLEN JOHNSON, Parcel ID No. 05-19-9; EVERETT JOHNSON, JR., Parcel ID No. 05-19-9; WAYNE JOHNSON, Parcel ID No. 05-19-9; MAURY JOHNSON, Parcel ID No. 05-19-9; ELISABETH TOBEY, Parcel ID No. 11-84-10; RONALD TOBEY, Parcel ID No. 11-84-10; PATRICIA J. WILLIAMS, Parcel ID No. 05-25-1.13,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, John T. Copenhaver, Jr., Senior District Judge, (2:17-cv-04214)

Argued: September 25, 2018
Decided: February 5, 2019.

Before GREGORY, Chief Judge, and WYNN and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Chief Judge Gregory and Judge Wynn joined.

ARGUED: Derek Owen Teaney, APPALACHIAN MOUNTAIN ADVOCATES, INC., Lewisburg, West Virginia; Christopher Stephen Johns, JOHNS & COUNSEL PLLC, Austin, Texas, for Appellants. Wade Wallihan Massie, PENN, STUART & ESKRIDGE, Abingdon, Virginia; Nicolle Renee Snyder Bagnell, REED SMITH, LLP, Pittsburgh, Pennsylvania, for Appellee. **ON BRIEF:** Jeremy Hopkins, CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina, for Appellants in 18-1159 and 18-1242. Charles M. Lollar, LOLLAR LAW, PLLC, Norfolk, Virginia, for Appellants in 18-1159, 18-1242, and 18-1300. Isak J. Howell, LAW OFFICE OF ISAK HOWELL, Roanoke, Virginia, for Appellants in 18-1165, 18-1175, and 18-1300. Kevin DeTurris, BLANKINGSHIP & KEITH, P.C., Fairfax, Virginia, for Appellants in 18-1181. Stephen J. Clarke, WALDO & LYLE, P.C., Norfolk, Virginia, for Appellants in 18-1187. Mark E. Frye, Seth M. Land, PENN, STUART & ESKRIDGE, Abingdon, Virginia; Colin E. Wrabley, REED SMITH LLP, Pittsburgh, Pennsylvania, for Appellee.

PAMELA HARRIS, Circuit Judge:

In October 2017, the Federal Energy Regulatory Commission approved the application of Mountain Valley Pipeline, LLC, to construct a natural gas pipeline through West Virginia and Virginia. Building and maintaining that pipeline would require access to thousands of private properties, under which the pipeline would be buried. Accordingly, the Commission's

approval permits Mountain Valley to obtain easements along the pipeline route through eminent domain where it cannot do so through private agreements.

Mountain Valley successfully negotiated easements allowing access onto the land of most of the affected landowners. To obtain the rest of the required easements, it initiated condemnation proceedings. Three district courts granted partial summary judgment to Mountain Valley, recognizing its right to take the easements. And because the eminent domain proceedings – including multiple trials to determine the amount of just compensation for each easement – would take years to complete, the courts also issued preliminary injunctions granting Mountain Valley immediate possession of the easements, so that it could begin construction without delay. To ensure that the landowners would be compensated fully, the district courts required Mountain Valley to post deposits, which the landowners could draw upon while the proceedings continued.

On appeal, the landowners do not dispute the grant of partial summary judgment to Mountain Valley, conceding that Mountain Valley has the substantive right to take easements by eminent domain. Thus, the only question before us is whether Mountain Valley may gain access to those easements now, or whether it must wait to start construction until the district courts can sort out just compensation. We hold that the district courts did not abuse their discretion in allowing Mountain Valley immediate possession, and therefore affirm the injunction orders.

I.

A.

In October 2015, Mountain Valley applied to the Federal Energy Regulatory Commission ("FERC" or the "Commission") for authorization to construct a 303.5-mile-long, 42-inch-diameter pipeline from Wetzel County, West Virginia, to Pittsylvania County, Virginia. When complete, the pipeline would transport up to two million dekatherms of natural gas per day, enabling shippers to access markets in the Northeast, Mid-Atlantic, and Southeast. Close to 300 parties, including residents and environmental groups, intervened in the Commission's process, and FERC received more than 2,000 written and oral comments during its review.

On October 13, 2017, the Commission issued a "certificate of public convenience and necessity" (the "Certificate") under the Natural Gas Act, 15 U.S.C. § 717f(e). The Commission found that the proposed pipeline is in the public interest, would meet a market demand, and is "environmentally acceptable." J.A. 2853. The Certificate authorized Mountain Valley to construct and operate the proposed pipeline, contingent on numerous conditions. Most significant for this appeal, the Certificate requires that the pipeline be complete and available for service within three years – that is, by October 2020.

Under the Natural Gas Act, legal challenges to a Commission certificate and its underlying public-interest determination may proceed only through

specified routes. A party wishing to contest a certificate first must apply for rehearing before the Commission. 15 U.S.C. § 717r(a). After that, review may be had in the United States Court of Appeals for the District of Columbia or another federal circuit court with jurisdiction. *Id.* § 717r(b). Here, though numerous parties have challenged the Certificate, their efforts thus far have been unsuccessful. In November 2017, various intervenors applied to the Commission for rehearing and a stay of the Certificate, which ultimately was denied. While that request was pending, at least three petitions for review and for stay pending review were filed with the D.C. Circuit, which denied the stay requests.[1] *Appalachian Voices v. Fed. Energy Reg. Comm'n*, No. 17-1271, 2018 U.S. App. LEXIS 2924 (D.C. Cir. Feb. 2, 2018). Importantly, the Certificate remains effective while these legal challenges proceed. *See* 15 U.S.C. § 717r(c) (neither the filing of an application for rehearing nor commencement of judicial proceedings stays a FERC order).

By late November 2017, within weeks of obtaining the Certificate, Mountain Valley had entered into three

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[1] The Commission denied the request for rehearing and to stay the Certificate in June 2018, several months after the issuance of the district court orders challenged in this appeal. *Mountain Valley Pipeline, LLC, Equitrans, L.P.*, 163 FERC ¶ 61,197 (June 15, 2018). This prompted the filing of at least five new petitions for review of the Certificate and for stay pending review in the Court of Appeals for the District of Columbia. The D.C. Circuit denied those additional stay requests, as well, and those cases are ongoing. *See Appalachian Voices v. Fed. Energy Reg. Comm'n*, No. 17-1271, 2018 WL 4600685 (D.C. Cir. Aug. 30, 2018).

master construction services agreements to lay the pipeline. Mountain Valley sought to commence construction by February 2018 with completion anticipated for December 2018, well before the Commission's deadline of October 2020. Because tree-clearing in areas with protected bats must be completed during the winter season (between mid-November and March), even a brief delay would have postponed the project's start date until November 2018. However, Mountain Valley had developed a schedule to proceed in the event of that contingency, under which it still expected to meet the Commission's in-service deadline.

Mountain Valley acquired rights-of-way to portions of approximately 85 percent of the properties along the approved pipeline route in anticipation of construction. These include both permanent easements along the pipeline route, allowing its pipeline to lie underneath the land, and temporary easements for construction. However, Mountain Valley was unable to reach agreement with the hundreds of landowners who are now parties to this litigation (the "Landowners"[2]).

B.

Under the Natural Gas Act, Mountain Valley's certificate entitles it to exercise the power of eminent domain to obtain any rights-of-way it cannot otherwise

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[2] This opinion typically uses the term "Landowners" to refer to all of the landowners in this consolidated appeal. When used in the context of a particular district court case, however, it refers only to the defendant landowners in that proceeding.

acquire, as necessary to construct, operate, or maintain the planned pipeline. *See* 15 U.S.C. § 717f(h). In other words, where Mountain Valley is unable to negotiate an easement with a landowner along the pipeline route, it may obtain a condemnation order granting an easement for a fair price set by the court.

Between receiving its Certificate in October 2017 and early December of that year, Mountain Valley commenced proceedings in three different district courts to condemn a 50-foot-wide path along the pipeline route in each jurisdiction. Within days of commencing each proceeding, Mountain Valley moved for partial summary judgment on its substantive right to take the easements by eminent domain. In the same motions, the company sought preliminary injunctions granting immediate access and possession during the pendency of the proceedings, in order to prevent construction delays.

Each of the district courts granted Mountain Valley's motion in full.[3] As to partial summary judgment,

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[3] Of the three district court opinions, one is published and two are unpublished. The opinion of the Northern District of West Virginia is published at *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506 (N.D.W. Va. 2018). The unpublished opinion of the Western District of Virginia can be located at *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, & Maintain a Nat. Gas Pipeline*, No. 7:17-cv-00492, 2018 WL 648376 (W.D. Va. Jan. 31, 2018). The unpublished opinion of the Southern District of West Virginia can be located at *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-Inch Gas Transmission Line*, No. 2:17-cv-04214, 2018 WL 1004745 (S.D.W. Va. Feb. 21, 2018). For ease of reference, we will refer to these opinions as the "N.D.W. Va. Opinion,"

the district courts each held that Mountain Valley was entitled, as a matter of law, to acquire the necessary easements along the pipeline route by eminent domain. Under 15 U.S.C. § 717f(h), the courts explained, the holder of a duly issued Commission certificate has the right to condemn property if it is necessary for pipeline construction and operation and cannot be acquired by private agreement. And that is so, they continued, regardless of pending legal challenges to that certificate or related litigation; only FERC itself or the appropriate court of appeals may stay enforcement of a Commission certificate while other legal proceedings are resolved. Because there was no factual dispute as to satisfaction of the necessary conditions, the courts concluded, Mountain Valley was entitled to exercise eminent domain and condemn the specified portions of the Landowners' properties.

But that eminent domain process, one district court estimated, could take more than three years to complete – bringing it outside FERC's in-service deadline of October 2020 – as the courts conducted proceedings to determine the amount of just compensation for each of the hundreds of easements in question. Accordingly, the courts turned to Mountain Valley's motions for preliminary injunctions, which sought immediate access while those proceedings were ongoing. Applying the four-pronged test for a preliminary injunction set

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the "W.D. Va. Opinion," and the "S.D.W. Va. Opinion." Citations to the N.D.W. Va. Opinion refer to its published version, and citations to the other two opinions refer to the Joint Appendix filed by the parties on appeal.

out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), which requires the movant to establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest," each district court granted Mountain Valley's request for immediate possession of the easements.

The first element of the *Winter* test – likelihood of success on the merits – was easily satisfied, as the courts "ha[d] already determined on the merits that Mountain Valley has the right to condemn the landowners' property interests." *S.D.W. Va. Opinion*, at J.A. 2715. On the second element – irreparable harm – the district courts held that Mountain Valley would suffer various forms of irreparable injury if it were required to delay construction until after completion of the eminent domain proceedings. Most important, without a preliminary injunction, Mountain Valley would be unable to meet the Commission's October 2020 in-service deadline, which could come and go before the courts had finally determined due compensation for the hundreds of easements at issue.

In response, the Landowners proposed that any injunctive relief be delayed until November 2018, when bat-conservation regulations again would permit seasonal tree-clearing and, according to its own contingency schedule, Mountain Valley could commence construction and still expect to meet the Commission's deadline. But that delay itself, the district courts found, would impose substantial economic losses on

Mountain Valley, in the form of lost revenues, carrying costs, and contractual fees that Mountain Valley would not be able to recover "in this or any other litigation." *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 526. The district courts carefully considered Mountain Valley's evidence on this issue, questioning whether Mountain Valley's losses might be mitigated. All concluded, however, that on the facts presented, Mountain Valley had satisfied its burden of establishing irreparable harm.

The district courts further held that Mountain Valley's losses would exceed any harms a preliminary injunction might cause the Landowners, and that the balance of the equities – the third *Winter* factor – therefore favored preliminary relief. The key finding here, as one court explained it, was that virtually all harms identified by the Landowners would be inflicted as a result of the exercise of eminent domain itself, and not because of the preliminary injunction: Completion of the pipeline "will have the same impact on [Landowners'] property whether [Mountain Valley] is granted immediate access or commences construction only after [L]andowners have received just compensation." *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 530.

On the fourth element – the public interest – the district courts relied heavily on the Certificate itself, which was predicated on the Commission's finding that construction of the pipeline is in the public interest. The Landowners disagreed with that assessment, citing the dissenting opinion of one of the FERC commissioners and arguing that pipeline construction in fact would have negative effects on the environment

and areas of historical and cultural importance. As the district courts explained, however, challenges to a FERC certificate must follow the prescribed statutory route, and condemnation proceedings may not be used to mount a collateral attack. "The Court will not second-guess FERC's determination that [Mountain Valley's] project will benefit the public need for natural gas as the [Landowners] request; FERC possesses the expertise necessary to make that determination." *Id.* at 531.

Accordingly, the district courts all found that Mountain Valley satisfied the *Winter* preliminary injunction standard and should be granted immediate possession. At the same time, the courts recognized that the Landowners were entitled to a "reasonable, certain, and adequate provision" for obtaining just compensation at the end of the condemnation proceedings. *See*, *e.g.*, *W.D. Va. Opinion*, at J.A. 1432 (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). The courts thus required that Mountain Valley make a deposit in an amount several times the estimated value of each easement.[4] During the pendency of the proceedings, each Landowner would be entitled to draw on that fund, up to the estimated value of the easement across its property. The district courts also required Mountain Valley to post a surety bond in

[4] Appraisal values ranged from $3,001 for many of the easements to six figures for some. The $3,001 estimate tracks the jurisdictional provision of the National Gas Act, limiting federal jurisdiction to those cases in which "the amount claimed by the owner of the property to be condemned exceeds $3,000." 15 U.S.C. § 717f(h).

an amount double each easement's estimated value, conditioned on its payment of just compensation at the conclusion of proceedings.

II.

The Landowners have not appealed the entry of partial summary judgment against them, nor the merits determination on which it rests: that under 15 U.S.C. § 717f(h), Mountain Valley currently has the right to exercise eminent domain and take easements on their property to build and operate the FERC-approved pipeline. But they do dispute the appropriateness of preliminary relief, and timely appealed the issuance of the three preliminary injunctions awarding Mountain Valley immediate possession of the easements while just compensation is determined.

We "review the decision to grant or deny a preliminary injunction for an abuse of discretion." *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001). A clear error in factual findings or a mistake of law is grounds for reversal. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). But abuse of discretion is a deferential standard, and so long as "the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse," even if we are "convinced that . . . [we] would have weighed the evidence differently." *Walton v. Johnson*, 440 F.3d 160, 173 (4th Cir. 2006) (en banc) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)).

The Landowners advance two principal arguments against the preliminary injunctions. First, they argue that federal courts lack authority to grant immediate possession – that is, possession prior to the determination and payment of just compensation – and that the injunctions therefore are legally infirm. And in the alternative, they argue that the district courts improperly applied the *Winter* factors and abused their discretion in awarding preliminary relief here. For the reasons given below, we disagree on both counts.

A.

We begin with the Landowners' threshold argument: that district courts may not order immediate possession of condemned property under 15 U.S.C. § 717f(h). Instead, the Landowners contend, the district courts were authorized to grant Mountain Valley access to the easements in question only after eminent domain proceedings were completed, with just compensation for each individual easement calculated and paid.

We note at the outset that this is a statutory argument, not a constitutional one. The Landowners concede, as they must, that the Constitution does not prohibit condemnations in which possession comes before compensation. The Supreme Court settled that question nearly 130 years ago in *Cherokee Nation*, holding that the Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken." 135

U.S. at 659. So long as the owner is assured through "reasonable, certain, and adequate" means that he ultimately will be compensated fairly, constitutional requirements are met. *Id.* The district courts in this case carefully followed *Cherokee Nation*, insisting on "adequate protections to [the Landowners] to ensure that they will receive just compensation," *W.D. Va. Opinion*, at J.A. 1432, and the Landowners do not dispute that the required deposits and bonds satisfy this standard.

Instead, the Landowners argue that there was no statutory authority for what they call "take-first, pay-later" condemnations. Under the Natural Gas Act, they insist, the district courts were permitted to grant possession only after the determination and payment of just compensation. This is so, they contend, because the Act does not expressly allow for immediate possession, and thus implicitly forecloses the courts from granting that possession through the equitable remedy of a preliminary injunction.

But as the Landowners recognize, our court has rejected precisely this argument before, holding in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) that a federal court indeed may grant a gas company immediate possession of private property along an approved pipeline route, with payment of just compensation to follow. In *Sage*, as in this case, a gas company filed condemnation proceedings to access numerous properties along the route of a Commission-approved pipeline. 361 F.3d at 819–20. The district court first concluded that the gas company had a substantive right to exercise eminent domain over the

easements sought. *Id.* at 820, 823. It then invoked its traditional equitable authority to grant a preliminary injunction allowing immediate possession, in order to avoid construction delays. *Id.* at 820. The landowners appealed to this court, arguing that the district court lacked "equitable power to order immediate possession in a condemnation case," given the absence of any express authorization in the Natural Gas Act. *Id.* at 820.

We disagreed. What the landowners' argument "overlook[ed]," we explained, was "the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress." *Id.* at 824. Once a gas company had established its substantive right to eminent domain under the National Gas Act, we concluded, it was entitled to apply under Rule 65(a) for a preliminary injunction, subject to the normal rules governing the availability of equitable relief. *Id.* And contrary to the landowners' argument, we found ample "safeguards in place to protect the landowner." *Id.* at 826. The district court's requirement that the gas company deposit with the court an amount equal to the appraised value of the easements satisfied the *Cherokee Nation* standard. *Id.* at 824. And if the deposit turned out to be less than the final compensation awarded, we noted, the landowners would remain protected: When immediate possession is granted through a preliminary injunction, title itself does not pass until compensation is ascertained and paid, so the landowners could proceed with a trespass action if the company did not promptly make up the

difference. *Id.* at 825–26 (citing *Cherokee Nation*, 135 U.S. at 660).

This case is on all fours with *Sage.* As in *Sage*, there already has been a finding that the gas company has a substantive right to condemn the easements in question, here in the form of partial summary judgment rulings that are unchallenged on appeal. And the district courts adequately safeguarded the Landowners' interests with a deposit provision that is similar to but more protective than the one we approved in *Sage*, in that it requires Mountain Valley to deposit with the court an amount that is several times larger than the estimated value of the condemned easements[5] – making it exceedingly unlikely that resort to the trespass actions envisioned in *Sage* ever could be required.

The Landowners do not dispute that *Sage*, by its terms, governs this case. Instead, they argue that *Sage* was wrongly decided, and to give the court an opportunity to correct what they see as an important misstep, they moved for an initial hearing of this appeal en banc.[6] Our court denied that motion. Order,

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[5] Two of the district courts required each deposit to be three times the respective easement's appraisal value, while the third district court required the deposit to be four times the appraisal value.

[6] Among other contentions, the Landowners argue that *Sage* created a circuit split with *Northern Border Pipeline Co. v. 86.72 Acres*, 144 F.3d 469 (7th Cir. 1998), which held that the district court lacked authority to issue a preliminary injunction ordering landowners to grant the pipeline company immediate possession of land. However, as we expressly recognized in *Sage*, the pipeline company in *Northern Border* had not yet obtained a district court

Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, No. 18-1159 (4th Cir. May 25, 2018). Accordingly, we remain bound to follow *Sage*. *See United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." (internal quotation marks omitted)). And as we have explained, *Sage* squarely forecloses the Landowners' argument that the district courts lacked the authority to grant immediate possession in a Natural Gas Act condemnation.

B.

The only remaining question for this panel is whether the district courts abused their discretion in issuing preliminary injunctions under the *Winter* standard. On this question, too, *Sage* is highly instructive. In *Sage*, after holding that district courts may grant immediate possession to a gas company with a valid FERC certificate, we went on to consider whether the gas company could satisfy the standard conditions

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order finding that it was entitled to the land; accordingly, it had no equitable right to seek a preliminary injunction granting immediate possession. *Sage*, 361 F.3d at 828; *see also Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop.*, 550 F.3d 770, 777 (9th Cir. 2008) (distinguishing *Sage* from *Northern Border* on this basis). In this case, however, unlike *Northern Border*, Mountain Valley has obtained such orders of condemnation.

for preliminary relief. 361 F.3d at 828–30.[7] It could, we concluded, and we affirmed the district court's preliminary injunction as within its discretion. *Id.* at 830.

Success on the merits was not only likely but guaranteed, we held, given the district court's determination – uncontested on appeal – that the gas company had the right to condemn the landowners' property. *Id.* at 829–30. We sustained as amply supported by the record the district court's finding that the gas company would suffer irreparable harm in the absence of preliminary relief, both because it would be forced to breach contracts it already had entered into and absorb the financial consequences, and because the "extended period of time" necessary to hold multiple compensation hearings would make it impossible for the company to meet its FERC deadline. *Id.* at 828–29. The landowners, by contrast, had identified no cognizable harm flowing from preliminary relief rather than condemnation itself; any interference with the "productive capacity of their land" would be the same even if compensation was paid and determined before access was granted. *Id.* at 829. Finally, FERC's issuance of a

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[7] At the time *Sage* was decided, we analyzed preliminary injunctions under the balance-of-hardship approach set out in *Blackwelder Furniture Co. of Statesville, Inc. v. Selig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977). We "recalibrated" that approach after *Winter*, which requires a party seeking preliminary relief to satisfy all four prongs of the preliminary-injunction standard, and does not employ a sliding scale. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013); *Winter*, 555 U.S. at 20. But because *Sage* separately analyzed each of the four *Winter* prongs, it remains directly on point.

certificate was enough to establish that the pipeline project would serve the public interest, and a "delay in construction would postpone" the benefits identified by FERC. *Id.* at 830.

Since *Sage* was decided in 2004, many courts, both within and outside this circuit, have issued preliminary injunctions granting immediate possession to gas companies under closely analogous circumstances. *See*, *e.g.*, *S.D.W. Va. Opinion*, at J.A. 2713–14 (collecting district court cases); *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); *cf. Transwestern Pipeline Co. v. 17.19 Acres of Prop.*, 550 F.3d 770, 775–78 (9th Cir. 2008) (holding that immediate possession is appropriate once the court has determined that the gas company has a right to condemn).

It is with *Sage* and this body of authority in mind that we review the district courts' preliminary injunctions for abuse of discretion, applying *Winter*'s four-pronged test. For the reasons given below, we find no abuse of discretion and affirm the entry of preliminary relief.

1.

The first *Winter* prong – likelihood of success on the merits – is uncontested, and for good reason. Mountain Valley has done more than establish a likelihood of success on the merits; it already has succeeded on the merits. The district courts granted

partial summary judgment to Mountain Valley on its claim that it is entitled to exercise the power of eminent domain over the Landowners' property, notwithstanding the pendency of legal challenges to the Certificate, and the Landowners have not challenged those rulings on appeal. There is no question, then, that Mountain Valley may take easements across the properties at issue, making this the rare preliminary-injunction case in which success on the merits is guaranteed.[8]

2.

We also find no clear error or abuse of discretion in the district courts' findings that Mountain Valley would incur irreparable harm absent preliminary injunctions, in satisfaction of *Winter*'s second element. To establish irreparable harm, the movant must make a "clear showing" that it will suffer harm that is "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (internal quotation marks omitted). Additionally, the harm must be irreparable, meaning that it "cannot be fully rectified by the final judgment after trial." *Stuller, Inc. v. Steak N Shake*

[8] This unusual posture also addresses the Landowners' argument that mandatory preliminary injunctions – those that alter rather than preserve the status quo – are disfavored. *See Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994). Whatever the general force of that observation, where "the applicants' right to relief [is] indisputably clear," as here, mandatory injunctive relief remains available. *See Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (1972).

Enters., 695 F.3d 676, 680 (7th Cir. 2012) (internal quotation marks omitted). The district courts properly applied that standard here, and we have no ground for disturbing their conclusions.

First and most important, it is undisputed that without preliminary relief, Mountain Valley almost certainly would be unable to meet FERC's October 2020 in-service deadline. As the court explained in *Sage*, construction of a pipeline is a lengthy and complex process: "Certain portions of the project have to be completed before construction can begin on other portions," and "any single parcel has the potential of holding up the entire project." 361 F.3d at 829. The district courts found that this case is no exception, describing the eleven distinct segments of pipeline construction that must be sequenced around a limited window during which federal regulations allow for necessary tree-clearing. *See N.D.W. Va. Opinion*, 307 F. Supp. 3d at 527. But at the same time, determining just compensation for the multiple tracts of land affected by a pipeline is itself a lengthy and complex process, *see Sage*, 361 F.3d at 828–29, which in this case could extend for three years or more, taking it past the Commission's deadline of October 2020. The combined effect is that without a preliminary injunction, Mountain Valley likely would lose the right to construct the pipeline altogether – an outcome that qualifies as an irreparable injury under *Sage*. *See id.* at 829.

In response to that straightforward case for preliminary relief, the Landowners urged the district courts to adopt a more "narrow[] analy[sis]," focused

on whether Mountain Valley "needs access to their properties now or whether it still can meet FERC's deadline if granted access later." *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 528. Specifically, the Landowners argued that entry of any preliminary injunction should be delayed for approximately nine months, until November 2018 – when the tree-clearing window would reopen, and Mountain Valley's own contingency schedule showed that the company could begin construction and still expect to finish before the FERC deadline of October 2020.

The Landowners' argument assumes that the need to narrowly tailor preliminary relief, *see PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011), means that preliminary injunctions should issue only at the last minute, and places a great deal of confidence in Mountain Valley's ability to complete the work on an expedited schedule. Even so, that leads us directly to the second form of irreparable injury found by the district courts: the significant and unrecoverable financial losses that Mountain Valley would sustain if access were delayed until November 2018, rather than granted immediately.

To establish that injury, Mountain Valley presented evidence of three types of monetary harm: lost revenues from the delay in pipeline service, estimated at $40 to $50 million per month; charges and penalties for the breach of construction contracts, totaling $200 million; and carrying costs to prolong the project, such as storage and personnel expenses, for an additional

$40 to $45 million. The district courts closely scrutinized those alleged losses, noting testimony suggesting that "some of the claimed damage amounts might be lower," *W.D. Va. Opinion*, at J.A. 1423, or be "capable of mitigation," *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 525. But even assuming a "lower amount of loss than estimated by [Mountain Valley]," *id.* at 528, the courts concluded that there still would be enough to show irreparable harm under *Sage*, which credited as irreparable injury not only the prospect of missing the FERC deadline but also "increased construction costs and losses" from the breach of service contracts, *id.* at 526–27 (quoting *Sage*, 361 F.3d at 830).

On appeal, the Landowners raise two principal challenges to the district courts' findings of irreparable injury. Most significantly, they insist that the district courts erred at the threshold in considering Mountain Valley's economic losses at all. According to the Landowners, prospective financial losses can never qualify as "irreparable injury," at least where they do not "threaten the party's very existence." Br. of Appellants at 16. All three district courts rejected that argument as inconsistent with our case law, and we agree.

It is true that when anticipated economic losses will be recoverable at the end of litigation, then those losses generally will not qualify as irreparable for purposes of preliminary relief. *See Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). That makes perfect sense: By definition, a temporary loss is not irreparable. Only when a temporary delay in recovery somehow

translates to permanent injury – threatening a party's very existence by, for instance, driving it out of business before litigation concludes – could it qualify as irreparable. *See Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981). But otherwise, financial losses that can be recovered by a prevailing party at the close of litigation ordinarily will not justify preliminary relief. *See Hughes Network Sys. v. Interdigital Comms. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

This case is different, because here, Mountain Valley's economic losses would *not* be recoverable at the end of litigation. "No party contests that, if [Mountain Valley] suffers financial losses as the result of its inability to access the condemned easements, it will not be able to recover those losses in this or any other litigation." *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 526. As the district courts recognized, that is enough to take this case out of the ordinary presumption against treating economic losses as irreparable injury. *See id.* at 525 ("[W]hile it is beyond dispute that economic losses generally do not constitute irreparable harm, this general rule rests on the assumption that economic losses are recoverable." (internal quotation marks omitted)). In the unusual circumstances presented here, in which monetary damages will be unavailable to remedy financial losses when litigation ends, there is no bar to treating those losses as irreparable injury justifying preliminary relief. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) ("[I]rreparable harm is often

suffered when . . . the district court cannot remedy the injury following a final determination on the merits." (internal alterations and quotation marks omitted)); *cf. Fed. Leasing*, 650 F.2d at 500 (finding irreparable harm when plaintiff's injury was not "otherwise compensable in damages").

Like the district courts, we think all of this is clear enough from our general case law on irreparable injury and preliminary injunctions. But if there were any doubt, it would be resolved by *Sage* – which, as the district courts also recognized, expressly treats prospective economic injuries flowing from a delay in pipeline construction as a form of irreparable injury. Indeed, many of the of [sic] types of financial injury identified by Mountain Valley in this case – including losses flowing from delays in pipeline service and contractual breach – are precisely the same as those we credited in *Sage* as grounds for preliminary relief. *See* 361 F.3d at 828–29. And, as noted above, *Sage* is not alone on this point; subsequent cases have followed *Sage*, relying on similar, unrecoverable financial harms to gas companies to find irreparable injury that justifies immediate access to condemned properties. *See*, *e.g.*, *All. Pipeline L.P. v. 4.500 Acres of Land*, 911 F. Supp. 2d 805, 814–15 (D.N.D. 2012) (finding irreparable harm based in part on carrying costs associated with delay in construction); *Transcon. Gas Pipe Line Co. v. Permanent Easement for 0.03 Acres*, No. 4:17-cv-00565, 2017 WL 3485752, at *3 (M.D. Pa. Aug. 15, 2017) (finding irreparable harm because gas company would "suffer substantial costs and loss of profits if it cannot begin the project as soon as possible"); *see generally Columbia*

Gas Transmission LLC v. 0.85 Acres, No. 1:14-cv-02288, 2014 WL 4471541, at *6 (D. Md. Sept. 8, 2014) ("Many courts [in similar cases] have held that undue delay [and] financial burden . . . satisfy the irreparable harm requirement.").

The Landowners' second challenge to the district courts' findings of irreparable injury fares no better. According to the Landowners, Mountain Valley's prospective financial losses flow entirely from the company's voluntary decision to enter into early construction and service contracts, geared toward starting pipeline service well in advance of the FERC deadline. Harms resulting from breaches of those contracts, the Landowners argue, are thus "self-inflicted," and cannot be the basis for a preliminary injunction. Like the district courts, we disagree.

We do not doubt that some forms of "self-inflicted" harm may be discounted or ignored altogether in the preliminary-injunction analysis. *See Di Biase*, 872 F.3d at 235 (preliminary injunction not warranted where the "moving parties have not shown that they availed themselves of opportunities to avoid the injuries of which they now complain"); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 947 (9th Cir. 2013) ("[T]raditional equitable considerations such as . . . unclean hands may militate against issuing an injunction that otherwise meets *Winter*'s requirements."). But as the district courts here explained, when a gas company is governed by FERC's approval process and in-service deadline, early contractual obligations are not "self-inflicted" in the

relevant sense. *See N.D.W. Va. Opinion*, 307 F. Supp. 3d at 528 (recognizing that "a FERC-governed, natural-gas company's self-inflicted contracts and deadlines are not driven solely by its desire to place the pipeline into service as quickly as possible" (internal quotation marks omitted)). Rather, lining up service contracts years in advance is "encourage[d], if not require[d]" by a FERC approval process that treats such contracts as evidence of market demand. *See S.D.W. Va. Opinion*, at J.A. 2714. And as Mountain Valley's witness testified, once a FERC certificate issues, meeting FERC's three-year in-service deadline requires that the gas company have contractors at the ready and proceed expeditiously with construction. *See W.D. Va. Opinion*, at J.A. 1427. Under those circumstances, the district courts concluded, Mountain Valley's decision to set its schedule as it did, and contract accordingly, was "entirely reasonable." *N.D.W. Va. Opinion*, 307 F. Supp. 3d at 528. And in light of that judgment, the district courts did not err by including harms associated with those contracts in their irreparable injury analyses.

3.

Under *Winter*'s third prong, the district courts were required to weigh the equities, considering the harms the Landowners would suffer if preliminary injunctions issued – that is, if Mountain Valley were permitted to access the condemned land prior to determination and payment of just compensation. The district courts held that the balance of the equities favored Mountain Valley, principally because the

Landowners' harms would be the same whether access was granted prior to or only after just compensation was paid. We find no error in the courts' reasoning.

Before the district courts, the Landowners presented affidavits and testimony about injuries to their property – tree-felling, harms to water sources, and the like – that would be sustained if Mountain Valley were granted access. As the district courts explained, however, those injuries arise not from the grant of preliminary relief – the "take-first, pay-later" condemnations to which the Landowners object – but from construction of the pipeline itself. Whether the Landowners are compensated before or after Mountain Valley takes the easements to which it is legally entitled, the harm to their property will be identical. *See N.D.W. Va. Opinion*, 307 F. Supp. 3d at 530 ("At bottom, it is the [Natural Gas Act] and the FERC Certificate that are responsible for the [Landowners'] injuries, and delaying access until just compensation is paid will do nothing to alleviate those burdens." (citing *Sage*, 361 F.3d at 829)). And either way, the Landowners will be entitled to the same just compensation for the takings. *See S.D.W. Va. Opinion*, at J.A. 2720 ("[J]ust compensation is guaranteed by the Fifth Amendment whether property condemned under the [Natural Gas Act] is taken immediately or after a trial." (citing *Sage*, 361 F.3d at 829)).

It is true, as the Landowners contend, that because the process of determining just compensation will be a lengthy one, the grant of preliminary relief means that their property will be disturbed sooner rather than later. But as we held in *Sage*, that is "simply

a timing argument," not an independent injury traceable to the "taking [of] property *before determining just compensation*." 361 F.3d at 829 (emphasis added). Indeed, as *Sage* explains, any harm that otherwise might be experienced because of a gap in time between possession and compensation is addressed by the right of landowners to draw upon court-ordered deposits during the pendency of condemnation proceedings. *Id.; see also S.D.W. Va. Opinion*, at J.A. 2720 (any injury related to early loss of use is "blunted by the landowners' right to draw down the money that Mountain Valley has indicated it is willing to deposit as assurance for the taking" (internal alterations and quotation marks omitted)). In any event, while a small group of Landowners testified that immediate as opposed to delayed possession would cause them special injury, we cannot say that the district courts abused their discretion in finding that the balance of the equities nevertheless favored Mountain Valley. One Landowner, for instance, operates property that serves as a wedding venue and pick-your-own-apples orchard, and testified that he would suffer greater harm as a result of construction in the spring and summer than if possession were delayed until November 2018. And, to give a second example, another Landowner alleged special disturbances to farm animals and timber values that would result from immediate possession of her land. The district courts concluded, however, that the potential harms to Mountain Valley from delay outweighed the harms to the "very few landowners" who had identified a potential injury arising from immediate possession,

W.D. Va. Opinion, at J.A. 1431, and we think that judgment was well within their discretion.

We note that, compared to the Western District of Virginia, the other two district courts did not address as directly the potential that immediate rather than postponed possession might be especially harmful to certain Landowners. In particular, the Southern District of West Virginia seems to have misapprehended our holding in *Sage* as requiring a finding in favor of a pipeline in the context of [Natural Gas Act] condemnation actions. *S.D.W. Va. Opinion*, at J.A. 2720 ("In *Sage*, the Fourth Circuit conclusively spoke on this issue in the context of [Natural Gas Act] condemnation actions."). Given the Supreme Court's instruction in *Winter* that a preliminary injunction may "never [be] awarded as of right," the district courts were required to consider the particular harms presented by the Landowners in these cases in weighing the balance of the equities and were not constrained by our precedent to find in favor of Mountain Valley on this point. *See* 555 U.S. at 24. To the extent that *Sage* could be read otherwise, we take this opportunity to clarify that while the balance of equities may often tip in favor of the pipeline company in the context of Natural Gas Act condemnations, such an outcome is by no means guaranteed or automatic. Thus, a district court must consider evidence of harm to the particular landowners in a given condemnation action when determining whether the pipeline has met the third preliminary injunction requirement. After thoroughly reviewing the particular evidence presented by the Landowners in

the Northern District of West Virginia and Southern District of West Virginia, we are confident that there was no evidence presented of harm to the Landowners resulting from the injunction, as opposed to the pipeline itself, that would outweigh the harm that Mountain Valley would likely suffer absent an injunction.

Finally, the Landowners point to the possibility that ongoing legal challenges to the Certificate will bear fruit – in which case, they argue, the grant of preliminary relief will have caused them injury by allowing access that later would prove unjustified. The district courts declined to credit this argument, and properly so. As they had explained already in granting partial summary judgment to Mountain Valley on its substantive right to exercise eminent domain, only two entities – FERC and a court of appeals with jurisdiction under 15 U.S.C. § 717r(b) – may stay the enforcement of a FERC certificate pending resolution of legal challenges. "District courts in [Natural Gas Act] condemnation proceedings," by contrast, "do not have authority to consider other legal challenges to the FERC order, [or] . . . the ability to stay condemnation proceedings to wait until other legal challenges are resolved." *W.D. Va. Opinion*, at J.A. 1415–16. The Landowners have not challenged that holding on appeal, and it forecloses their argument here: Any harms that might arise from the pendency of litigation around the Certificate are "not harms that would preclude the grant of immediate possession" to Mountain Valley in a condemnation proceeding. *Id.* at 1429.

4.

Finally, on the fourth *Winter* element, the district courts reasonably determined that the preliminary injunctions were in the public interest, as they would allow for expeditious construction of a FERC-approved pipeline. As we explained in *Sage*, the issuance of a FERC certificate signifies that the Commission – the agency charged with administering the Natural Gas Act – has determined that pipeline construction will advance the congressional purposes behind that Act and "serve the public interest," making available to consumers an adequate supply of natural gas at reasonable prices. 361 F.3d at 830. It follows, we reasoned, that granting a gas company immediate access to necessary easements during the pendency of condemnation proceedings likewise would advance the public interest, because a "delay in construction would postpone these benefits." *Id.*

The district courts did not abuse their discretion in applying *Sage* to the facts of these cases. Mountain Valley's certificate rests on an agency finding that the proposed pipeline will benefit the public by meeting a market need for natural gas, and will do so in a way that is environmentally acceptable. The Landowners disagree with FERC's assessment, and – relying on the opinion of a dissenting FERC commissioner – argued before the district courts that "the public interest in this case does not support allowing the construction of the pipeline, due to the environmental hazards or the other possible effects on historical areas or artifacts as a result of the construction." *W.D. Va. Opinion*, at J.A.

1431. But as the district courts explained, that is a challenge to the Certificate itself that must be raised before the Commission and then, if necessary, the appropriate court of appeals, not by way of collateral attack in a condemnation proceeding: "[A]s the Certificate Order itself makes clear, FERC has considered and rejected the very arguments against the [pipeline] raised in the briefing and in court. Those argument[s] are not properly before the court. They are indirect and collateral attacks on the order itself." *Id*.; *accord N.D.W. Va. Opinion*, 307 F. Supp. 3d at 531 ("The Court will not second-guess FERC's determination that [the] project will benefit the public need for natural gas as the [Landowners] request."); *S.D.W. Va. Opinion*, at J.A. 2721 ("FERC conducted a careful analysis of the [project] and determined that the project will promote [the Natural Gas Act's] goals and serve the public interest." (quoting *Sage*, 361 F.3d at 830)).

That is not to say, of course, that a FERC certificate necessarily will be dispositive of the public interest inquiry under *Winter*. Apart from setting an in-service deadline, a FERC certificate does not address timing, and so cannot establish by itself that immediate possession, as opposed to pipeline construction generally, is in the public interest. But echoing our reasoning in *Sage*, the district courts here concluded that because delaying construction would delay – or, if Mountain Valley were unable to meet its FERC deadline, frustrate entirely – the public benefits identified by the Commission, the public interest factor favored preliminary relief. *See N.D.W. Va. Opinion*, 307

F. Supp. 3d at 531 ("There can be no dispute that delaying [Mountain Valley's] completion of the project will delay the introduction of the benefits identified by FERC."); *W.D. Va. Opinion*, at J.A. 1432 ("*Timely* completion of the [p]roject, FERC has expressed, is in the public interest." (emphasis added)). And while there may be cases in which there are public-interest arguments against immediate possession that were not considered by the Commission in reviewing the public benefit of the pipeline project writ large, this is not one of them. As the Landowners' own brief makes clear, the argument they advanced in the district courts and advance now on appeal – that "the public interest favors protection of their constitutional rights, the environment, and historical resources," Br. of Appellants at 46 – is addressed to the pipeline project generally rather than to immediate possession specifically, raising the same issues that were considered and rejected by FERC when it issued the Certificate.[9]

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[9] We note that the Southern District of West Virginia did not recognize the distinction between the public interest in pipeline construction generally and in immediate access specifically. *See Winter*, 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish . . . that an *injunction* is in the public interest.") (emphasis added). The district court did, however, incorporate our reasoning under the public-interest prong in *Sage*, which does address that issue and finished with the common-sense observation that a construction delay would postpone the benefits relied on by FERC in issuing its certificate. *See S.D.W. Va. Opinion*, at J.A. 2721 (citing *Sage*, 361 F.3d at 830). It also cited the first two district court opinions approvingly, and recognized that it was faced with "virtually identical circumstances." *Id.* at 2713. Under these circumstances, the absence of

III.

For the foregoing reasons, we find that the district courts did not abuse their discretion in granting preliminary injunctive relief to Mountain Valley. Accordingly, we affirm the district courts' orders.

AFFIRMED.

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additional analysis of the public-interest prong does not amount to an abuse of discretion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MOUNTAIN VALLEY PIPELINE, LLC, Plaintiff, v. EASEMENTS TO CONSTRUCT, OPERATE, AND MAINTAIN A NATURAL GAS PIPELINE OVER TRACTS OF LAND IN GILES COUNTY, CRAIG COUNTY, MONTGOMERY COUNTY, ROANOKE COUNTY, FRANKLIN COUNTY, AND PITTSYLVANIA COUNTY, VIRGINIA, *et al.*, Defendants.	Civil Action No. 7:17-cv-00492 By: Elizabeth K. Dillon United States District Judge

MEMORANDUM OPINION

(Filed Jan. 31, 2018)

On October 13, 2017, the Federal Energy Regulatory Commission (FERC) issued an order (the Certificate Order) authorizing plaintiff Mountain Valley Pipeline, LLC (MVP) to construct and operate approximately 300 miles of a new 42-inch diameter natural gas pipeline through Virginia and West Virginia (the Project). That order granted to MVP a certificate of

public convenience and necessity under 15 U.S.C. § 717f, a provision of the Natural Gas Act (NGA).[1] The NGA grants private natural gas companies the federal power of eminent domain where they hold a FERC certificate and either cannot acquire property by contract or are unable to agree with the owner of the property on the amount of compensation to be paid for a necessary right of way for the transportation of gas. 15 U.S.C. § 717f(h).

Relying on the Certificate Order, MVP filed this action on October 24, 2017, pursuant to Federal Rule of Civil Procedure 71.1. Its complaint seeks to condemn portions of almost 300 properties located within this district, both for permanent easements for the path of the pipeline itself and for temporary easements to allow access needed during the construction of the pipeline.[2] Most of the properties needed for pipeline construction—about 85% of the properties in both states—MVP has acquired by agreement. (Day 1 Hr'g Tr. 112, Dkt. No. 300.) The remaining properties in

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[1] *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017 Order Issuing Certificates and Granting Abandonment Authority), docketed in this case as Exhibit 1 to the Complaint. (Dkt. No. 1–1.)

[2] MVP also filed a companion action in the United States District Court for the Southern District of West Virginia, and a portion of that action was later dismissed and refiled in the Northern District of West Virginia. *See generally Mountain Valley Pipeline, L.L.C. v. An Easement to Construct Operate & Maintain A 42-Inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, & Summers*, No. 2:17-cv-4214 (S.D.W. Va.); *Mountain Valley Pipeline, L.L.C. v. Simmons*, No. 1:17-cv-211 (N.D.W. Va.).

Virginia are identified in this lawsuit, and the defendants in this case are the landowners of (or easement holders on) the Virginia properties that MVP seeks to condemn.[3] According to its complaint and the declaration of Robert J. Cooper, who is MVP's Senior Vice President of Engineering and Construction, MVP has been unable to acquire the properties identified in the complaint by agreement, despite having offered at least $3,000 for each such property.[4]

Shortly after it filed its original complaint, MVP filed a motion for partial summary judgment and for a preliminary injunction seeking immediate possession of the properties. (Dkt. No. 4.) One group of defendant landowners filed a motion to dismiss (Dkt. No. 132), and four different groups filed motions to stay the proceedings on various grounds (Dkt. Nos. 234, 241, 243, 247), including their asserted need for discovery. The court allowed limited discovery on certain topics (*see*

[3] Although many of the defendants have made, or incorporated by reference, the same arguments, not every defendant or every attorney in the case has made precisely the same arguments. Identifying which defendants have made each particular argument, however, would be needlessly confusing. So, unless otherwise specified, the term "defendants" used in this opinion means "some or all defendants."

[4] MVP has since reached agreements as to some of the properties, and those have been dismissed from the complaint. It has also amended its complaint to account for a variation in the route ordered by FERC, Variation 250. Amended answers by parties affected by that amendment were filed on January 23 and 24, 2018. In light of the entire history of the case and the parties' filings, the court construes MVP's motion for partial summary judgment and for immediate possession as relating to its complaint and all amendments thereto.

Dkt. No. 205 (allowing expedited discovery)), and it held a hearing to resolve all outstanding discovery objections on December 28, 2017, issuing its order the next day. (Dkt. Nos. 254, 255.)

After extensive briefing, the court held a hearing on all pending motions on January 12 and 13, 2018, which included testimony from a number of different witnesses, including landowners, related to MVP's motion for immediate possession. (*See generally* Day 1 & 2 Hr'g Trs., Dkt. Nos. 300, 306.) The court took all of the pending motions under advisement, but it permitted the parties to file post-hearing briefs (including written closing arguments), which have now been filed and which the court has considered.

For the reasons discussed in more detail below, the court will deny the motion to dismiss because it is procedurally improper, although the court has considered the arguments raised therein when ruling on other motions. The court also denies the motions to stay for several reasons, all discussed below.

As to MVP's motion for partial summary judgment and for a preliminary injunction, the court considers that motion in two parts. First, the court concludes that MVP has established that there are no disputes of fact and that it is entitled to condemn the land as a matter of law. Thus, it will grant MVP's motion for partial summary judgment.

Finally, as to MVP's motion for immediate possession, the court has carefully considered the evidence before it and concludes that MVP has shown that it can

satisfy the four factors required under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008), to receive a preliminary injunction. As to most of the properties, however, MVP has not yet presented sufficient evidence to ensure that it can provide the landowners with "reasonable, certain, and adequate provision for obtaining compensation," which it must do before their "occupancy is disturbed." *Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641, 659 (1890); *see Sweet v. Rechel*, 159 U.S. 380 (1895). Consequently, as to all but nine properties, the court cannot yet set adequate security in this matter. Thus, the court will conditionally grant the motion for immediate possession but possession will not be permitted until MVP presents sufficient additional evidence to satisfy this constitutional requirement. As to the nine properties for which the court currently has appraisals, the court will conditionally grant the motion for immediate possession and, upon MVP's posting of a deposit equal to three times the amount of each appraisal—which will be subject to a draw-down procedure by those landowners—and the posting of a bond conditioned on payment of just compensation, the court will enter an order allowing MVP immediate possession of those properties.

I. BACKGROUND

A. Pertinent Provisions of the Natural Gas Act

The NGA, 15 U.S.C. §§ 717-717z, permits FERC to grant certificates that confer the NGA's power of eminent domain on gas companies for the purpose of

constructing or maintaining pipelines and related facilities. Once a FERC order or certificate is granted, there are limited routes for challenging it. As this court recently explained in a related case,

> [t]he NGA provides its own framework for challenges to FERC orders. Effectively, to challenge a FERC order, a party must first apply for rehearing before FERC and, thereafter, may obtain judicial review before either the United States Court of Appeals for the D.C. Circuit or any other court of appeals where the natural gas company related to the order "is located or has its principal place of business." 15 U.S.C. § 717r(b).
>
> The pertinent language from NGA § 19, codified at 15 U.S.C. § 717r, provides that "[a]ny person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order." § 717r(a). If, and only if, a person files for rehearing, however, may the person obtain judicial review: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." *Id.* Subsection (b) explains that a person may obtain review of FERC's order "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia."

> § 717r(b). It describes that review as "exclusive," noting that "[u]pon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Id.*

Berkley v. Mountain Valley Pipeline, No. 7:17-cv-357, 2017 WL 6327829, at *3 (W.D. Va. Dec. 11, 2017).[5]

In addition to the process for review of a FERC order, a separate provision of the NGA expressly grants district courts authority to decide a condemnation proceeding like this one. 15 U.S.C. § 717f(h). The role of courts in such proceedings is circumscribed, however. *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 481 (W.D.N.Y. 2011), *aff'd*, 552 F. App'x 37 (2d Cir. 2014). That is, "[t]he NGA does not allow landowners to collaterally attack the FERC certificate in the district court, it only allows enforcement of its provisions." *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 778 n.9 (9th Cir. 2008); *see also Columbia Gas Transmission, LLC v. 252.071 Acres More or Less*, No. 15-cv-3462, 2016 WL 1248670, at *5 (D. Md. Mar. 25, 2016) ("The jurisdiction of this court is limited to evaluating the scope of the FERC Certificate and ordering condemnation as authorized by that Certificate. . . . This court's role is mere enforcement."

[5] The landowners in the *Berkley* case have appealed the judgment of this court, and that appeal is pending. *See Berkley v. Mountain Valley Pipeline, LLC*, No. 18-1042 (4th Cir.). The Fourth Circuit has ordered accelerated briefing, which should be complete by March 6, 2018. *Id.* (January 16, 2018 Order Granting Accelerated Briefing).

(quoting *Guardian Pipeline, L.L.C. v. 529.42 Acres*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002))). Condemnation cases under the NGA are governed procedurally by Federal Rule of Civil Procedure 71.1.

B. *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004)

The Fourth Circuit's decision in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), bears at least a brief discussion at the outset because it is a focal point of the parties' arguments and the court's analysis, especially as it pertains to MVP's request for immediate possession.[6] In *Sage*, the Fourth Circuit affirmed the district court's grant of partial summary judgment to a natural gas company, ETNG, where the district court determined that ETNG had established its right to exercise eminent domain over the landowners' properties based on a FERC certificate of public convenience and necessity. The court also affirmed the district court's grant of the remedy of immediate possession through the issuance of a preliminary injunction. The bulk of the appellate opinion consisted of analysis leading to two conclusions: (1) district courts have equitable authority to grant immediate possession in this circumstance; and (2) the district court did not abuse its discretion in granting a preliminary injunction, based on the facts before it. *Sage* has been followed by a number of courts throughout the

[6] Although some of the defendants urge that *Sage* was wrongly decided, they nonetheless acknowledge that it is binding on this court. (*See, e.g.*, Dkt. No. 305 at 1–3.)

country, and MVP has cited to a long list of cases in which immediate possession has been similarly granted, both before and after *Sage.* (*See, e.g.*, Dkt. No. 219 at 25–27) (collecting authority).) *Sage* will be discussed in more detail in context.

C. Procedural Background

Before FERC issued MVP its certificate, it considered MVP's application for approximately three years. As part of that process, FERC received public comments and input from landowners and other interested parties. Indeed, many of the witnesses who testified before this court indicated that they had previously provided statements to FERC. Many of the challenges and arguments raised by the parties here were addressed explicitly by FERC in the Certificate Order, and others formed the basis for one commissioner's dissent from the order. FERC, however, largely rejected those arguments. The Certificate Order concludes that the "public at large will benefit from the increased reliability of natural gas supplies" and that "upstream natural gas producers will benefit . . . by being able to access additional markets for their product." (FERC Cert. Order ¶ 62, Dkt. No. 1–1.) It also considered potential impacts to landowners, geologic resources, groundwater, rivers and streams, wetlands, wildlife, and cultural and historical resources, concluding that the project's benefits outweigh any adverse impacts. (*Id.* ¶¶ 41, 55, 57, 62, 74, 157, 177, 190, 209, and 286.)

The Project is designed to take natural gas from the producing regions in the Marcellus and Utica shales south through West Virginia and Virginia. It will connect, in Pittsylvania County, Virginia, to the Transco pipeline system, which provides gas to the east. It will also interconnect with a gas line supplying gas to the Washington, D.C. area, and a very small portion of its capacity (about a half-percent of total capacity) will supply gas to Roanoke Gas Company, a local natural gas distributor. (Cooper Decl. ¶ 6, Dkt. No. 4–1.)

The Certificate Order requires that the Project be constructed and placed in service by October 2020, and MVP contends that it will be unable to meet that deadline if it cannot obtain possession of the properties until the conclusion of the proceedings in this case. Additionally, MVP plans to place the Project in service even earlier—by the end of 2018. (Cooper Decl. ¶ 20.) MVP claims that, to meet its preferred schedule, for which it has already hired various contractors, it needs possession of the properties in this case by February 1, 2018. (*Id.* ¶¶ 12, 24.) The claimed reasons for this urgency are described in the context of addressing the motion for immediate possession below.

MVP filed its action in this court less than two weeks after the FERC Certificate Order issued. As already noted, the court allowed expedited discovery prior to holding a hearing on MVP's motion for partial summary judgment and for preliminary injunction. All of the motions have been fully briefed and are ripe for disposition.

II. DISCUSSION

A. Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim (Dkt. No. 132)

The motion to dismiss is based on two contentions: (1) that the "conditional" nature of the FERC Certificate Order precludes these condemnation proceedings and means that MVP does not have the authority to condemn property until is [sic] satisfies all of the conditions; and (2) that a private entity cannot condemn private property unless it first demonstrates an ability to pay just compensation to all those whose property they seek to take and that "MVP has not even attempted to do" so. (Dkt. No. 132 at 3; *see id.* at 40.) Based on these two arguments, defendants argue both that MVP has failed to state a claim and that this court lacks jurisdiction over the case.[7]

The court does not reach the merits of the motion to dismiss—although it addresses the arguments it raises in the context of the partial summary judgment motion—because a motion to dismiss is not permitted under the plain language of Rule 71.1 and *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455 (4th Cir. 1963). Rule 71.1(e)(3) allows defendants to file a notice of appearance and an answer, and it expressly

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[7] Defendants also argue that FERC does not make a determination of "public use" as is required to render a taking constitutional under the Fifth Amendment. This argument is a collateral challenge to the FERC Certificate Order, which this court may not entertain. Furthermore, established authority holds that a FERC certificate is sufficient to confer eminent domain authority on a natural gas company. *See generally Sage*, 361 F.3d 808.

states: "No other pleading or motion asserting an additional objection or defense is allowed." Fed. R. Civ. P. 71.1(e)(3). Based on this language, the *Atlantic Seaboard Corp.* court held that a motion to dismiss for failure to state a claim is "unallowable" in a condemnation action, but noted that all defenses could be raised in an answer. 318 F.2d at 458 (explaining that Rule 71.1's "prohibition of any pleading other than an answer is clear and unequivocal");[8] *see also Columbia Gas Transmission, LLC v. 370.393 Acres*, No. 1:14-cv-0469, 2014 WL 2919709, at *1 (D. Md. June 26, 2014) (denying motions for more definite statement on that ground and citing *Atlantic Seaboard Corp.*). Based on this clear authority, the court denies the motion to dismiss as procedurally improper.

B. Motions to Stay (Dkt. Nos. 234, 241, 243, 247)

Two of the four motions to stay simply incorporate a third by reference, and so these three motions to stay make the same arguments. (Dkt. Nos. 234, 241, 247.) The fourth motion (Dkt. No. 243) raises some different arguments, and the court will address that motion first. In that motion to stay, defendants argue that the lawsuit has become a "hyper-accelerated litigation driven by the self-proclaimed necessity" of MVP to begin construction early, despite not having all the approvals. (Dkt. No. 244 at 2.) Defendants also note the

[8] *Atlantic Seaboard* cited Rule 71A, which was renumbered as Rule 71.1 by the 2007 Amendments to the federal rules, although the text remained largely unchanged. Fed. R. Civ. P. 71.1 advisory committee's note to 2007 amendment.

court's inherent power to stay proceedings and to control its cases.

The motion also points to landowners who claim the property sought in the complaint differs from what MVP previously offered to purchase. Specifically, it relies on the declarations of James Scott and Michael Slayton. Scott's property contains a historic cemetery, and he avers that MVP offered to purchase a different route from him (that would avoid the cemetery), but that the complaint references the original route of the FERC application, which would go through the cemetery. The Slayton declaration is similar, although the route in the complaint would go through an area with a known sinkhole (Slusser's Chapel sinkhole).

These discrepancies are purportedly offered to show that the pipeline route is not yet firmly established and that MVP may still amend it. (Dkt. No. 264.) Based on this, defendants argue that granting immediate possession would be premature and that the case should be stayed until MVP can provide assurances that the route they are seeking to condemn is in fact the proper route.

In response, MVP offers several assertions that the court finds persuasive. First, as to the Slayton property, the complaint in this matter has been amended to conform with a variation required by FERC known as "Variation 250." This is a variation to the pipeline route in Montgomery County that the FERC Certificate Order required MVP to adopt. (Cert. Order ¶¶ 152–54.) The variation did not require the addition of any new

landowners, but instead adjusted the route as to several landowners already in the case, including Slayton. As is undisputed, MVP has made the necessary filings with FERC to adjust the route and also amended its complaint in this case to incorporate Variation 250. The defendants affected by Variation 250 were served with that amendment and their answers, if any, were due and have been filed since the hearing.[9] Thus, the amended complaint seeks to condemn the same property that FERC required as part of Variation 250.

As to the Scott property, MVP acknowledges that it seeks to condemn the original route, instead of the route that would avoid the cemetery. As MVP correctly notes, the only route that it has authority to condemn is the FERC-approved route. Put differently, it cannot unilaterally alter the route across properties that it has to obtain by condemnation. If it reaches an agreement with a landowner, however, the owner and MVP can jointly seek approval from FERC for a route

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[9] The amended complaint served as another basis for defendants' requested stay. Defendants affected by the amendment argued that the hearing should not have gone forward and no decision should be issued because they had not had the full 21-day period to file their answers. The court concludes that, as a procedural matter, a summary judgment motion can be asserted and addressed even before the filing of an amended answer and nothing in the federal rules expressly precludes the court from addressing the summary judgment motion. The court also acknowledges, though, that it would have the discretion to delay a ruling on summary judgment until after the filing of the amended answers. At this point, however, the answers have been filed, and they do not appear to raise different or additional defenses. Thus, the court declines to grant a stay on this basis.

variation, and those requests are usually granted. So MVP is going forward with the original route on the Scott property—the only FERC-approved route—because that is the only route it is authorized to obtain by condemnation and it has been unable to obtain it by agreement. Nonetheless, MVP explains that it continues to survey the property and that it is willing to consider an alternative route if it can reach an agreement with the Scotts. In the absence of an agreement, however, it will condemn the original route approved by FERC, and that is where it will build.

The fourth motion to stay also argues that the discovery permitted by the court, while "appreciate[d]," was so limited in time and scope that "meaningful review and preparation" were made "nearly impossible." Defendants assert that forcing such hurried discovery "raises significant due process implications, especially when coupled with the extraordinary relief requested by MVP and the fundamental nature of the property rights of which MVP seeks to divest the Defendants." (Dkt. No. 244 at 6.) Despite these complaints, defendants presented a spirited defense at the hearing and did not identify any specific discovery that they believed they needed to adequately respond to the motions, aside from evidence regarding MVP's financial strength and viability (on which the court declined to allow discovery), and perhaps discovery as to offers on all outstanding properties (which the court excluded in any event). Thus, the court does not believe that equity required a stay postponing the hearing or that it

requires the postponement of its decision to allow for unspecified discovery.

In the other three motions to stay (Dkt. Nos. 234, 241, and 243), defendants argue that the court should not grant immediate possession to MVP or consider injunctive relief until the landowners can obtain further review of the Certificate Order. They are not asking that this proceeding be stayed in its entirety, but only that the court withhold ruling on the motion for immediate possession. The court does not believe the requested stay is appropriate in this case.

The defendants' arguments are two-fold. First, they argue that there are a number of other legal proceedings that could affect, delay, or halt the building of this pipeline and so to allow immediate possession before it is assured that the pipeline will be completed will irreparably harm defendants and their property, especially if the pipeline ultimately is not built. They cite often to the example of a woman with a maple syrup business whose property was left littered with felled maple trees after a court granted immediate possession and the pipeline project subsequently ceased.

Second, they argue that the combined effect of the statutory review scheme and FERC's so-called "tolling order" is to allow MVP to obtain possession under a FERC Certificate Order that is effectively insulated from any judicial review. That is, in this case, a number of defendants and others filed petitions for rehearing with FERC, a step that the NGA requires before seeking judicial review of a FERC order in a court of

appeals. As has become commonplace, FERC issued an order essentially taking the petition under advisement and stating that it needed more time to consider rehearing. (Dkt. No. 234–1.) That tolling order allowed FERC to give itself additional time to consider the petition for rehearing. Such orders also typically prevent challengers to a FERC order from obtaining judicial review because courts have held there is no jurisdiction in the courts of appeals until FERC actually rules on the petition for rehearing. *See, e.g.*, *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002); *City of Glendale v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004); *see also Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. Nov. 8, 2017) (denying emergency motion for a stay where FERC tolling order was in effect and petition for rehearing had not yet been ruled on).[10] Defendants argue that the entire scheme denies them due process because the Certificate Order is "final" for purposes of MVP condemning property, but not "final" so as to allow review in the court of appeals. (Dkt. No. 234 at 3–4; *id.* at 4 (asserting that the tolling order "gores Landowners on the horns of a dilemma").) In short, they argue that they are left without recourse to challenge the Certificate Order before their property is condemned.

[10] Despite this precedent, some of the landowners have filed an appeal in the United States Court of Appeals for the D.C. Circuit challenging the FERC Certificate Order. Some defendants have also filed motions to stay with that court and with FERC, but no action has been taken on those requests.

The court addresses each of these arguments in turn. First, as to the argument that the court should stay the request for injunctive relief until other judicial challenges can be decided or until all conditions on the FERC Certificate Order are satisfied, defendants cite to no authority for their request. Moreover, a stay of the order by this court is not permitted under the plain language of the statute. *See Steckman Ridge GP v. Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, No. 08-cv-168, 2008 WL 4346405, at *3–4 (W.D. Pa. Sept. 19, 2008) (analyzing issue); 15 U.S.C. §717r(c) (FERC order is not stayed unless specifically ordered by the Commission, nor does the commencement of judicial proceedings operate as a stay of the FERC order unless ordered by the court). Instead, requests for a stay must be directed to FERC or to the appropriate court of appeals. By the express provisions of the statutory scheme and the cases interpreting it, then, this court does not have authority to stay the Certificate Order. And despite the landowners' claim that they are not seeking to stay the order, that seems to be the relief they ask for, albeit "indirectly." *See Sabal Trail Transmission, LLC v. Real Estate*, No. 1:16-cv-63, 2016 WL 8919397, at *3 (N.D. Fla. May 23, 2016) (declining defendants' "invitation to indirectly stay FERC's order").

Defendants urge, though, that this court has inherent authority to stay proceedings and that a stay is warranted if the party seeking it makes out a "clear case of hardship or inequity in being required to go forward." (Dkt. No. 234 at 2 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)).) Put differently, they

seem to be requesting that the court circumvent the statutory scheme in the name of equity. (Dkt. No. 287 at 3–4, 6 (arguing that this court's role as "chancellor" allows it to stay the proceedings to ensure the landowners receive due process).) This court will not stay this action where other courts statutorily authorized to do so have not. Again, this court's task is to enforce the Certificate Order, not stay its own proceedings to give the landowners more time to challenge it. Thus, the court does not believe that equity requires a stay in this case.

As to defendants' second argument—that the tolling order denies defendants due process—defendants argue that this is an issue of first impression. They contend that "no court has addressed a request for a stay of proceedings on a motion for a preliminary mandatory injunction on the basis of" a FERC tolling order, although they admit that the decision in *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres* ("*Transco*"), No. 17-cv-1725, 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017), "comes the closest." According to defendants, though, the *Transco* court's reasoning was "wrong" because it incorrectly concluded that process delayed was not process denied.

Nonetheless, both *Transco* and the decision in *Steckman Ridge* (which did not involve a motion to stay, but did involve a FERC tolling order) rejected the landowners' argument that the court should not address the condemnation claims until after FERC rehearing was concluded, and granted the pipeline company's request for immediate possession. The court

finds the reasoning in these cases persuasive. Furthermore, it is worth noting that FERC tolling orders have been repeatedly upheld against challenges. *See, e.g.*, *Kokajko v. FERC*, 837 F.2d 524, 525–26 (1st Cir. 1988) (holding that the delay in FERC's final resolution of a challenge to a rate order, which involved both a five-year delay from the filing of the case, in which two prior FERC orders on rehearing had been issued, and a four-month delay from the last tolling order, was insufficient to constitute a due process violation and thus declining to issue a writ of mandamus to compel agency action); *see also City of Glendale*, No. 03-1261, 2004 WL 180270, at *1 (denying petition for review of FERC order and dismissing appeal where tolling order left petition for rehearing pending, although not addressing a due process argument); *Towns of Wellesley, Concord, & Norwood v. FERC*, 829 F.2d 275, 278 (1st Cir. 1987) (denying writ of mandamus in case challenging FERC rates where FERC had taken 14 months to issue its final order, after court had remanded and instructed FERC to issue ruling).

The court must also acknowledge the numerous district court cases to which MVP cites for two propositions: (1) a FERC certificate is binding in eminent domain proceedings even if subject to rehearing as long as neither FERC nor a court of appeals has issued a stay; and (2) the fact that rehearing is pending is no reason to delay summary judgment or immediate possession. (*See* Dkt. No. 263 at 3–4.) Those cases further support the court's conclusion that a stay here is inappropriate.

For the reasons set forth above, all of the motions to stay will be denied.

C. Motion for Partial Summary Judgment

MVP's motion for partial summary judgment seeks a declaration that it is entitled to condemn the properties referenced in the complaint. Although the Fourth Circuit's decision in *Sage* is instructive on a number of issues, the landowners there did not challenge on appeal the district court's ruling that ETNG had the right to take their property. As a result, that case did not address the requirements for determining that an entity has the right to exercise eminent domain as outlined in a FERC certificate of public convenience and necessity. In other cases, though, courts have laid out three requirements, all of which come from 15 U.S.C. § 717f(h). It provides:

> When 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, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h).

Based on this provision, courts have explained that, "[o]nce a [certificate of public convenience and necessity] is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking." *Maritimes & Northeast Pipeline, L.L.C. v. Decoulos*, 146 F. App'x 495, 498 (1st Cir. 2005); *Millennium Pipeline Co.*, 777 F. Supp. 2d at 479.

Thus, courts have held that a plaintiff must satisfy three requirements to exercise eminent domain under § 717f(h): (1) it holds a valid FERC certificate; (2) the easements it seeks are necessary; and (3) it has been unable to acquire easements by agreement. *See Columbia Gas Transmission Corp. v. An Easement to Construct, Operate, & Maintain a 24-inch Gas Transmission Pipeline*, No. 3:07-cv-28, 2007 WL 2220530, at

*3 (W.D. Va. July 31, 2007). Some courts have omitted the "necessary" second element and instead added as a third element that the "value of the subject property claimed by the owner exceeds $3,000.00." *See, e.g.*, *Steckman Ridge*, 2008 WL 4346405, at *13 (setting forth three elements).

Some of the defendants argue that there is also a requirement that the certificate holder have negotiated in "good faith" in order to obtain the easements, and at least one court has so stated. *See Transcon. Gas Pipe Line Corp. v. 118 Acres*, 745 F. Supp. 366, 369 (E.D. La. 1990). But MVP correctly notes that that court cited no authority for the proposition. And numerous district courts in the Fourth Circuit (and elsewhere) have rejected any requirement of "good faith negotiation." *See, e.g.*, *Columbia Gas Transmission Corp. v. Easement to Construct, Operate & Maintain 24-Inch Pipeline*, No. 5:07-cv-04009, 2008 WL 2439889, at *2 n.4 (W.D. Va. June 9, 2008) ("[N]othing in the NGA or Rule 71A requires the condemnor to negotiate in good faith."). (*See also* Dkt. No. 219 at 22–23 (collecting authority).) Although MVP has not cited to a case from the Fourth Circuit rejecting a "good faith" requirement, the overwhelming lower court authority does, and there is no firm basis for it in the statute. Thus, the court rejects defendants' argument that MVP must show it engaged in "good faith" negotiations.[11]

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[11] Mr. Keuling-Stout, who is representing himself, also notes that the Certificate Order itself references assurances by MVP that it "will make good faith efforts to negotiate with landowners for any needed rights, and will resort only when necessary to the

Defendants also raise a number of factual and legal challenges to MVP's right to condemnation, which the court addresses next.

1. MVP's alleged failure to show it can pay just compensation is not part of the summary judgment inquiry.

One of the primary arguments raised by the defendants is that MVP has not proven it can pay just compensation for all of the easements it seeks, which is a requirement that is imposed by the Fifth Amendment of the United States Constitution (in addition to requirements that it holds a certificate, needs the land, and could not acquire it by agreement). (Dkt. No. 196 at 15–19.) While the court agrees that the Fifth Amendment confers the due process protection of an assurance of just compensation before occupancy is disturbed, *Cherokee Nation*, 135 U.S. at 659, the court does not agree that this issue is properly considered as part of the motion for summary judgment.

Defendants attempt to include the payment of just compensation as an element of MVP's condemnation claim, but it is not identified that way in the cases they cite, including *Sage* itself. Indeed, *Sage* first addressed the district court's grant of summary

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use of eminent domain." (Dkt. No. 98 at 2 (citing FERC Cert. Order ¶ 57).) He cites to no authority suggesting that MVP has an obligation to negotiate in good faith, however, or that its assurances to FERC somehow translate into an added statutory requirement to do so. Compliance with any condition in the certificate is an issue for FERC, not this court.

judgment. Separately, as part of determining whether immediate possession could be permitted, it addressed the landowners' argument that their possession could not be disturbed unless an owner has "reasonable, certain, and adequate provision for obtaining compensation." *Sage*, 361 F.3d at 824 (quoting *Cherokee Nation*, 135 U.S. at 659). Thus, the court concludes that this issue does not affect MVP's right to condemn, as implicated by its motion for summary judgment. Rather, this issue is properly addressed as part of MVP's request for immediate possession. Accordingly, the court will discuss this issue—and all of the related issues concerning who bears the burden to establish value, or a sufficient amount for security—in ruling on MVP's motion for immediate possession.

2. The conditional nature of the certificate does not preclude entry of summary judgment.

Defendants also argue that, because the FERC order at issue here is conditional, summary judgment is precluded until all conditions are satisfied.[12] They note that MVP has satisfied most, but not all of the conditions FERC imposed in its Certificate Order.

At the hearing, Cooper testified about the status of various conditions in the FERC Certificate. He noted

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[12] They also make the related argument that because MVP has not yet satisfied pre-construction conditions, it cannot show irreparable harm. The court addresses that argument in the context of the motion for preliminary injunction.

that, in Virginia, MVP does not yet have approved erosion and sediment control plans from the Virginia Department of Environmental Quality, which are required to conduct earth-disturbing tree-cutting, but not to fell trees using chainsaws and leaving the stumps. (Day 1 Hr'g Tr. 123–24, 154–55, 185–86.) MVP also has not yet received approval to proceed from certain Virginia historical agencies and the concurrence of those agencies is one of the conditions set by FERC. (*Id.* at 186–90.) Other approvals it has obtained are being challenged in court. *See, e.g.*, *Rasoul v. State Water Control Bd.*, No. 17-2433 (4th Cir.); *Sierra Club v. State Water Control Bd.*, No. 17-2406 (4th Cir.) (consolidated cases challenging approval given to MVP by Virginia's State Water Control Board).

The NGA itself allows conditions on the "issuance of the certificate" as well as on the "exercise of the rights granted thereunder." 15 U.S.C. § 717f(e). Defendants acknowledge this, but argue that the conditions set in this case are more like "prerequisites." They assert that when Congress allowed FERC to place conditions on a certificate, it only meant the types of conditions that limit performance under the certificate. Thus, they argue, many of the conditions issued here—which are effectively prerequisites—are not permitted by the statute. Defendants therefore claim that MVP's conditional certificate is not the sort of certificate contemplated by Congress when it drafted § 717f(h) to allow the exercise of eminent domain.

While creative, this argument is unsupported by any case authority. Indeed, the cases that have addressed

the issue head-on reject the argument. Instead, those cases make clear that where a condition to the FERC certificate expressly limits eminent domain authority—which was the situation in *Mid Atlantic Express, LLC v. Baltimore Cty.*, 410 F. App'x 653 (4th Cir. 2011)—then such authority is limited; otherwise, it is not. In *Mid Atlantic Express*, the court reversed the district court's grant of an injunction to allow immediate possession to a company building a natural gas pipeline because one of the conditions set forth by FERC in the certificate said that "Mid-Atlantic shall not exercise eminent domain authority granted under [the Natural Gas Act] section 7(h) to acquire permanent rights-of-way on [residential] properties until the required site specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects ("OEP")]." *Id.* at 657. Because of the condition, the Fourth Circuit concluded that Mid-Atlantic did not have the authority to condemn property and thus that the district court lacked jurisdiction over the condemnation proceedings. *Id.* Defendants have not pointed to any similar condition in this case and acknowledged at the hearing that no such limitation on MVP's eminent domain authority was set forth in the FERC Certificate. (Day 1 Hr'g Tr. 60.)

Furthermore, there are a number of cases holding that a conditional FERC certificate does not preclude exercise of eminent domain. *McCurdy v. Mountain Valley Pipeline, LLC*, No. 1:15-cv-03833, 2015 WL 4497407, at *3 (S.D.W. Va. July 23, 2015) ("[E]ven conditional

Certificates can provide a party with a route to condemnation. . . ."); *Columbia Gas Transmission, LLC v. 370.393 Acres*, 1:14-cv-0469, 2014 WL 5092880, at *4 (D. Md. Oct. 9, 2014) (collecting authority and holding that FERC may address a holder's failure to comply with certain conditions, but the court's role in the condemnation proceeding is only to determine whether the complaint "complies with the scope of the FERC Certificate"); *Columbia Gas Transmission LLC v. 0.85 Acres*, No. 14-cv-2288, 2014 WL 4471541, at*4 (D. Md. Sept. 8, 2014) ("Even assuming, for argument's sake, that the certificate holder is violating the FERC Certificate conditions, this would not affect the validity of the FERC Certificate or the certificate holder's ability to exercise its authority of eminent domain."); *Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 336 (D.N.H. 1998) ("Compliance with FERC conditions cannot be used as a defense to the right of eminent domain and cannot be cited to divest the court of the authority to grant immediate entry and possession to the holder of a FERC certificate."); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less*, 749 F. Supp. 427, 432–33 (D.R.I. 1990) (reasoning that conditions in FERC order did not preclude "condemnation of property based on the possibility that approval will not be granted" because they "do not operate as a 'shield' against the exercise of eminent domain power").[13]

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[13] Defendants acknowledge this authority, but claim that the cases are unpublished, mostly out-of-circuit district court decisions that are not binding on this court. While these cases may

3. The pendency of other cases or other legal challenges with the potential to halt construction does not render the motion for partial summary judgment premature.

As discussed with regard to the motion to stay, generally district courts in NGA condemnation proceedings do not have authority to consider other legal challenges to the FERC order, nor does this court have the ability to stay condemnation proceedings to wait until other legal challenges are resolved. Instead, the NGA directs that a petition for rehearing does not stay a FERC order, unless FERC itself says so. 15 U.S.C. § 717r(c). A court of appeals could also stay enforcement, *id.*, because those courts are tasked with reviewing FERC orders. MVP cites to ample authority showing that this court does not have authority to stay enforcement of the Certificate Order to allow other legal challenges to proceed or be completed. (Dkt. No. 219 at 42–44.) As MVP summarizes, "[d]efendants do not cite a single

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not be binding, the court is convinced by this authority and thus concludes that a conditional FERC certificate is sufficient to confer eminent domain authority. The other authority cited by defendants (*see, e.g.*, Dkt. No. 187 at 5) does not alter the court's conclusion because defendants cite those cases for far broader propositions than the cases actually support. *Cf. Columbia Gas Transmission, LLC v. 76 Acres More or Less*, No. 14-cv-0110, 2014 WL 2960836, at *4 (D. Md. June 27, 2014), *aff'd in part and vacated in part*, 2017 WL 2983908 (4th Cir. July 13, 2017) (noting an argument was made about a failure to satisfy conditions, but concluding it was mooted by subsequent events); *Del. Dep't. of Nat. Res. v. FERC*, 558 F.3d 575, 579 (D.C. Cir. 2009) (stating that a FERC conditioned certificate "cannot possibly authorize" the project, but in an unusual factual context involving an issue of standing).

case in which immediate possession was denied because the rehearing process was incomplete, and MVP is aware of none." (*Id.* at 44.) For these reasons, and the reasons discussed above in denying the requested stay, this argument does not defeat summary judgment.

4. *Sage* addressed and rejected the argument that courts cannot grant equitable relief similar to quick-take authority without violating the separation of powers doctrine.

Next, some of the defendants argue that the lack of quick-take authority granted in the NGA precludes the judicial branch from effectively granting such authority because it would violate the separation-of-powers doctrine. Whatever the merits of this argument might be, *Sage* addressed this argument and rejected it. In *Sage*, the court disagreed that "only Congress can grant the right of immediate possession." 361 F.3d at 824. It further noted that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." *Id.* Instead, the court explained that the substantive right to condemn was conferred by Congress in the NGA itself and that the court could implement the procedural right to take the land early, where the right to condemn had already been established, such as via an order granting a motion for partial summary judgment. *Id.* at 828. *See also Columbia Gas Transmission, LLC v. 76 Acres*, 701 F. App'x 221, 231 n.7 (4th Cir. 2017) (explaining that even though *Sage* did not

mention the words "separation of powers," the *Sage* court rejected the argument "that only Congress can grant the right of immediate possession" and further stated that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid.") (quoting *Sage*, 361 F.3d at 824). Thus, this argument is foreclosed by *Sage.*[14]

5. Other legal arguments by defendants as to the summary judgment motion fail.

Before turning to the issue of whether there are any factual disputes precluding the entry of summary judgment, the court notes that defendants have also raised some other arguments in opposition to MVP's motion. These include arguments that: (1) MVP has no right to condemn because it failed to comply with the requirements of, for example, the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4651 (Dkt. No. 187 at 16); and (2) that MVP's failure to define "temporary" in its complaint is either misleading or unclear such that the reference to

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[14] The other cases cited by defendants, including *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 472 (7th Cir. 1998), and *Transwestern Pipeline Co. v. 9.32 Acres*, 544 F. Supp. 2d 939, 948–49 (D. Ariz. 2008), *aff'd sub nom., Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770 (9th Cir. 2008), are factually distinguishable. In those cases, equitable power to condemn did not exist because neither summary judgment nor any order had yet been issued by a court conferring the power to condemn. Furthermore, although the district court in *Transwestern* noted its disagreement with *Sage*, this court is bound by *Sage.*

"temporary access easement" cannot be granted. (Dkt. Nos. 98, 218.) The court has considered those arguments, but concludes that they do not prevent the grant of summary judgment.

6. There are no factual disputes that preclude entry of summary judgment.

Having rejected defendants' legal challenges to the entry of summary judgment in MVP's favor, the court turns to whether any factual disputes prevent the entry of summary judgment. This issue is a narrow one since MVP need only establish three elements to prevail: (1) it holds a valid FERC certificate; (2) the easements it seeks are necessary; and (3) it has been unable to acquire easements by agreement. *See Columbia Gas Transmission Corp*, No. 3:07-cv-28, 2007 WL 2220530, at *3. There are no genuine disputes of fact about any of these three elements.

As to the first, it is clear that MVP holds a valid FERC certificate and, under the authority already discussed, that certificate confers the power to condemn. To establish the second element and show that the easements are necessary, MVP need only show that the easements it seeks align with the FERC-approved route. *Id.* (citing only to the FERC certificate as proof that the easements to be condemned are necessary for the pipeline). No landowner has offered any testimony raising a genuine dispute as to that fact.

As to this second element, the court has considered carefully the arguments of two of the *pro se* defendants,

Elijah Howard and Delmar Howard. Both challenged the taking of their property for a temporary easement as unnecessary since MVP had already acquired a forty-foot easement over their neighbor's property for the same temporary access road. It appears, however, that MVP requested, and FERC approved, use of an existing road that crosses back and forth over their respective properties and their neighbor's, sometimes entirely on the neighbor's property and sometimes entirely on one of the Howards' properties. Because MVP has sought and obtained approval to use the existing road, the court cannot say that seeking an easement from the Howards is unnecessary, because portions of the road run only on one of their properties. The court also has considered the testimony of one landowner who testified that MVP's map of his property is incorrect, but he claimed that the "parcels shown by the county are not reflected accurately on the map." (Day 2 Hr'g Tr. 330–31.) This discrepancy, however, does not alter the fact that the route in the complaint matches the FERC alignment sheets.

In short, none of the landowners have shown that the routes that MVP seeks to condemn differ from the routes in the FERC certificate. Thus, MVP has established that the routes it seeks to condemn are "necessary."

As to the third element, MVP has offered testimony that it has made offers of at least $3,000 to every landowner before this court. The fact that it has not been able to reach an agreement with those landowners is further evidenced by its acquiring approximately

85% of the properties by agreement and its having to litigate to obtain the remaining properties.

For all of these reasons, the court concludes that there are no factual disputes preventing the entry of summary judgment. Accordingly, the court will grant partial summary judgment as to MVP's right to condemn all of the properties referenced in the complaint, as amended.

D. Motion for Immediate Possession

Having determined that MVP is entitled to partial summary judgment as to all of the tracts it seeks to condemn, the court turns to whether MVP is entitled to immediate possession. This determination—at least as it has developed in the argument and evidence in this case—is more involved than in many of the cases that the parties have cited.

First, there is the typical inquiry: whether MVP has shown an entitlement to injunctive relief under the factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). Second, there is the issue of security upon the granting of any such injunctive relief. As noted herein, *Sage* instructs that the issue of security is intertwined with the inquiry of whether there are adequate procedural assurances of just compensation. The parties dispute a whole host of issues arising from this interplay, which the court will address. The court turns to the *Winter* factors first.

1. The *Winter* Factors[15]

As the Supreme Court explained in *Winter*, a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." 555 U.S. at 22. Under the applicable standard articulated in *Winter*, the movant "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (quoting *Winter*, 555 U.S. at 20); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 249 (4th Cir. 2014) (discussing and applying *Winter* standard); and *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290–93 (4th Cir. 2011) (discussing and applying *Winter* standard). A plaintiff must satisfy all four of these requirements to obtain preliminary injunctive relief. *Real Truth About Obama, Inc. v. FEC*,

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[15] Some of the defendants have asserted that the defense of unclean hands bars MVP from receiving any equitable relief based on its failure to negotiate in good faith. (*See, e.g.*, Dkt. No. 191 at 3–4.) Having heard the evidence presented, the court does not find an absence of good faith by MVP that would preclude granting it injunctive relief. While MVP may have done a poor job of communicating with at least some of the landowners, there is no evidence that it has not made good faith attempts to purchase the properties it seeks to condemn.

575 F.3d 342, 345–46 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010).[16]

"The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir.2003). A mandatory injunction, however, disturbs the status quo ante, which "in any circumstances is disfavored." *League of Women Voters of N.C.*, 769 F.3d at 235 (citation omitted).

Although *Sage* is controlling precedent on many of the issues before the court, *Sage* was decided before *Winter* and applied the standard from *Blackwelder Furniture Co. of Statesville v. Seilig*, 550 F.2d 189 (4th Cir. 1977), for granting injunctive relief, which is similar but easier to satisfy than *Winter*. *Real Truth About Obama, Inc.*, 575 F.3d at 346. So, in addition to the fact that entitlement to injunctive relief is a fact-intensive issue that must be decided on a case-by-case basis, the court cannot rely on *Sage* to conclude that injunctive

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[16] Some defendants argue that Virginia law applies to the possession decision. (*See* Dkt. No. 187 at 8–10). The court follows the decision in *Sage*, however, in which the court applied federal law (the *Blackwelder* standard) to determine whether the district court had correctly granted immediate possession. As *Sage* indicates, the determination of *when* to allow condemnation, once the substantive right to do so has been established, is a procedural issue governed by federal law. *See Sage*, 361 F.3d at 828.

relief under the *Winter* standard is warranted, even if this case were factually identical.

a. Likelihood of success on the merits

In this context, success on the merits simply means that MVP has shown an entitlement to condemn the property. Some defendants seem to be arguing that in order to establish a likelihood of success on the merits, MVP must show that it will be able to satisfy all the conditions and complete the pipeline. But if MVP is legally entitled to condemn the property, then that is sufficient to show a likelihood of success on the merits. MVP need not make a further showing that it is likely to complete the pipeline or that it is likely to be able to satisfy all the conditions in the Certificate Order. *See, e.g.*, *Dominion Carolina Gas Transmission, LLC v. 1.169 Acres*, 218 F. Supp. 3d 476, 479 (D.S.C. 2016) ("This Court has granted partial summary judgment to DCGT with respect to its right to condemn the requested easements. Thus, DCGT has already succeeded on the merits of this issue.").

b. Irreparable harm

MVP's alleged irreparable harms were first set forth in Cooper's declaration. (Dkt. No. 4–1.) He then discussed them in more detail at the hearing. The construction of the pipeline is divided into 11 segments of approximately 30 miles of pipeline each. Ideally, contractors will be working in straight lines down the path of the pipeline, in which the crew tasked with step 2

follows immediately behind the crew tasked with step 1. (*See, e.g.*, Pl.'s Hr'g Ex. 6 (setting forth a broad pictorial overview of the typical pipeline construction sequence); Cooper Decl. ¶¶ 12–20, Dkt. No. 4–1.) As Cooper explained, skipping parcels to which MVP does not yet have easement access is less than ideal for tree felling, although it can be done to some extent. It does not work for the actual pipeline construction, however. (Day 1 Hr'g Tr. 124–25); *see also Sage*, 361 F.3d at 828 (discussing irreparable harm and noting with approval district court's statement that requiring the gas company to "build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side would prove wasteful and inefficient"). Thus, possession of all of the tracts along the route is needed for efficient construction. MVP had hoped to begin mobilizing construction crews in February 2018, to begin welding pipe in April to early May 2018, and to place meters in late November or December 2018. (Cooper Decl. ¶¶ 15–20.)

Due to environmental restrictions in "species impact areas," Cooper explained that tree clearing may occur only during certain times of the year and that tree clearing had to be done before other steps in the process. For locations with protected bats,[17] the tree

[17] Cooper testified that, of the approximately 100 miles of pipeline being laid in Virginia, at least 20 miles are affected by the bat restrictions, but the number of miles could be up to 75. MVP does not have the ability to determine the full extent of the bat habitats currently because it is "outside of a window where we can . . . mist-net or catch the bats." (Day 1 Hr'g Tr. 123.)

clearing can occur only between November 15 and March 31. In areas with protected migratory birds, the tree clearing must be completed by May 31, 2018. Additionally, MVP must comply with regulations of the United States Fish and Wildlife Service, which require that certain clearing be complete by March 31, 2018, and certain roads constructed by March 31, 2018. (Day 1 Hr'g Tr. 121–23; Cooper Decl. ¶¶ 22, 25.)

Cooper further claimed that, if MVP is unable to complete the work according to its construction schedule, it will incur "delay fees and contractor costs" and be unable to meet its agreements with others to ship gas. (Cooper Decl. ¶¶ 24–26.) He described three categories of harm from a delay in construction. The first was lost revenue (or delayed revenue, as he admitted) due to not shipping gas during the period of delay, which he estimated as $40 to $50 million per month of delay. The second category was penalties to be paid to contractors who have been retained, and the maximum amount for that category would be approximately $200 million if the in-service date were delayed a full year. The third category was for project overhead expenses to keep the project going, such as expenses associated with storing and managing materials and salaries for project personnel, which he estimated at approximately $40 to $50 million. (Day 1 Hr'g Tr. 127–140.) He also stated that a delay could cause intangible

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Instead, it must "assume they might live there" and stop tree felling in those areas as of March 31, 2018. (*Id.*)

damages to MVP in terms of its reputation and the willingness of contractors to work with it in the future.

Although defendants elicited testimony from Mr. Cooper on cross-examination suggesting that some of the claimed damage amounts might be lower and that these damages were a small percentage of the overall budget of $3.7 billion, they do not offer any evidence to dispute that these harms will occur to MVP. Instead, they offer several theories as to why MVP has failed to make a clear showing of irreparable harm.

Defendants first argue that monetary harm alone cannot constitute irreparable harm, citing *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017), and *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970).[18] MVP counters with cases under the NGA where economic losses *are* considered irreparable because they are not recoverable from the defendants. (*See* Dkt. No. 314 at 24 (collecting authorities).)

As discussed in more detail below, the court finds that MVP has shown that it will suffer non-monetary harm from not being granted immediate possession. In any event, even if only monetary damages were shown, other cases in this context have found such damages sufficient. While there are cases stating the general

[18] Additionally, the court in the *Long* case, on which defendants also heavily rely, did not actually say that the harm was not irreparable, but only that any irreparable harm was not entitled to "much weight in light of the historical context in which the litigation" arose. There, it was also a significant factor that that [sic] the irreparable injury claimed by defendants was "of their own making." 432 F.2d at 981.

principle that mere economic damages do not constitute "irreparable harm," the reasoning behind most of those cases, including one of the primary cases relied upon by defendants, is that the economic damages are recoverable against the opposing party at the time of judgment. *See, e.g.*, *Di Biase*, 872 F.3d at 230 ("The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm. A [party seeking an injunction] must overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by money damages at the time of judgment.") (citations and internal quotation marks omitted). Such a remedy is not available to MVP from defendants.

Second, as noted, the court disagrees that only monetary damages have been shown here. Defendants contend that this case differs from *Sage* because there ETNG had evidence that it would be unable to meet the FERC deadline if delayed, while here MVP acknowledges it does not need access in February 2018 to comply with the FERC deadline. In the court's view, that is an inaccurate characterization of the evidence.

In *Sage*, the Fourth Circuit affirmed the district court's finding of irreparable harm to ETNG if made to wait until all condemnation proceedings had been concluded before possession. 361 F.3d at 828. The court noted that it would "not be possible [for ETNG] to meet FERC's deadline without a preliminary injunction," *id.* at 829, and also pointed to ETNG's contractual obligations to provide gas by certain dates. *Id.* Here, there

seems to be slightly less urgency, at least with regard to the FERC deadline. Indeed, Cooper admitted during his testimony that MVP should still be able to complete the pipeline and have it operational by the deadline in the certificate (October 2020), even if it cannot begin tree clearing until the window opens again in November. (Day 1 Hr'g. Tr. 213–17.)

Based on that testimony, defendants contend that the harm to MVP does not implicate its ability to complete the Project by the FERC deadline. But that assertion simply is not accurate if the court were to preclude all possession until completion of these proceedings entirely. Instead, it appears plain that MVP would be unable to satisfy the FERC deadline for completion in October 2020 if it were required to wait until the completion of condemnation proceedings. This case involves almost 300 properties. As MVP points out, in other condemnation cases involving large numbers of properties, the proceedings can take more than three years to complete. (*See* Dkt. No. 219 at 33 (noting 4-, 5-, and 6-year time-frames to complete condemnation proceedings).)

Thus, while MVP may not need to begin in February 2018 to comply with the FERC deadline, there is certainly evidence it would be unable to meet that FERC deadline if it is not given possession of these properties until after nearly 300 hearings on just compensation. It has shown non-monetary harm.

In short, this case is sufficiently similar to *Sage* (both as to the monetary damages and as to the

likelihood that the Project will not be completed by FERC's deadline if delayed until the completion of these proceedings), that the court finds MVP has established irreparable harm. Many other cases, too, relied on harms similar to those articulated by MVP to find that irreparable harm had been shown. *See, e.g.*, *Transcon. Gas Pipe Line v. Permanent Easement for 0.03 Acres*, No. 4:17-cv-565, 2017 WL 3485752, at *3 (M.D. Pa. Aug. 15, 2017) (finding irreparable harm because company would "suffer substantial costs and loss of profits if it cannot begin the project as soon as possible"); *Columbia Gas Transmission LLC v. 171.54 Acres*, No. 2:17-cv-070, 2017 WL 838214, at *8 (S.D. Ohio Mar. 3, 2017) (finding irreparable harm where pipeline "would be subjected to significant monthly revenue losses unless and until it both completes the Pipeline and replaces any volume lost as a result"); *Sabal Trail Transmission, LLC v. +/- 1.44 Acres*, No. 5:16-cv-164, 2016 WL 2991151, at *4 (M.D. Fla. May 24, 2016) (additional construction costs due to delays constitute irreparable injury); *Dominion Carolina Gas Transmission, LLC*, 218 F. Supp. 3d 476, 479 (D.S.C. 2016) (finding irreparable harm where "[f]urther delay also will cause financial harm to both DCGT and its customer").

Defendants also challenge MVP's specific alleged categories of harm. Defendants first devote considerable efforts (both at the hearing and in their briefs) to explaining that the Project is an affiliate pipeline, in which MVP's shipping contracts are primarily with "affiliate entities," *i.e.*, companies that are also owned, at

least in part, by some of the same "parent" companies that own MVP.[19] Thus, they contend that the lost revenue is not really a harm because it is a gain to MVP's affiliates, who do not pay for shipping until the pipeline is in service. That fact, however, is irrelevant to the court's analysis. MVP is the only entity that is before this court, not its parent company—and the court will not consider arguments about corporate structure when evaluating the issue of harm.[20]

Defendants also argue that the penalties MVP would suffer do not constitute irreparable harm because they are self-inflicted. That is, they contend that MVP could have chosen not to enter into those contracts or could utilize certain termination provisions of the contracts to avoid paying those penalties. Mr. Cooper testified, however, that there was a "zero" percent chance that the Project could be completed without those contractors lined up ahead of time. (Day 1 Hr'g Tr. 271.) Notably, defendants have not offered any evidence to show that the Project could be completed by the FERC deadline if MVP waited to secure contractors until after being granted possession of the properties. This is a big and involved project with a large construction budget. There is no evidence that

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[19] MVP is technically an LLC and has "members" that own it rather than a parent corporation. Nonetheless the terms were used interchangeably at the hearing.

[20] FERC also expressly rejected the arguments that the Project, as an affiliate pipeline, should be subject to a heightened scrutiny, although those arguments figured heavily in Commissioner LaFleur's dissent. (Dkt. No. 1–1 at 135–36 (LaFleur dissent at 3–4).)

proceeding the way defendants suggest is customary or feasible.

Defendants' third argument is that, due to other potential obstacles that stand in the way of building the pipeline, MVP cannot show causation. They argue that, given the uncertainties about whether MVP will satisfy all the conditions of the Certificate Order, it cannot be said that the failure to grant an injunction would be the cause of the harm. Cases that have addressed this argument, though, have repeatedly held that challenges to the FERC conditions or allegations that a pipeline has failed to satisfy them, or will fail to satisfy them, are not proper subjects for an NGA condemnation proceeding, even in the context of considering a preliminary injunction. *See, e.g.*, *Portland Nat. Gas Transmission Sys.*, 26 F. Supp. 2d at 335–36 ("Compliance with FERC conditions cannot be used as a defense to the right of eminent domain and cannot be cited to divest the court of the authority to grant immediate entry and possession to the holder of a FERC certificate."); *see also supra* at Section II.C.2 (collecting authority holding that conditional certificates do not preclude eminent domain proceedings by a certificate holder). Defendants cite to no case in which a court has denied immediate possession due to unmet conditions in the certificate. This court will not so rule, either.

For all of the foregoing reasons, this court concludes that MVP has shown it will suffer irreparable harm in the absence of an injunction.

c. Balance of Equities

The court heard testimony from many landowners at the hearing. In part, the court allowed such testimony because of the compressed time-frame for discovery and other limitations the court had placed on discovery, and in order to ensure that any concerns particular landowners had about immediate possession could be adequately brought to the court's attention.

But nearly all of the witnesses testified only about the harms and consequences of the pipeline being built. Harm from the building of the pipeline cannot be considered by the court, though. Those harms are a consequence of the FERC order, not immediate possession. Moreover, as already discussed, harms from the pipeline construction and existence (including environmental harms, harms to water sources, harms to conservation easements, and harms to potential historical sites) are all harms that FERC considered and concluded were outweighed by the benefits of the Project. This proceeding simply is not the forum to challenge those harms anew.

Thus, much of that testimony ultimately has no relevance to the issues before the court. *See Sage*, 361 F.3d at 829. Put differently, "the productive capacity" of the land will "still be disturbed, albeit at a later time, if just compensation was determined first." *Id.* The same is true of the concerns over harms to all the water sources and as to the cutting of trees and other related changes. Similarly, some defendants also claim that the court must consider the harm that would befall

them if MVP is granted immediate possession and begins felling trees or other pre-construction activities and then the pipeline is not built, for whatever reason. The court acknowledges that these are possible harms to the landowners in the event that some other event (whether the outcome of a lawsuit or MVP's inability to fulfill some other condition) stops the building of the pipeline. But again, this court lacks authority to stay the FERC Certificate Order pending resolution of other appeals or pending completion of all conditions. That authority, by statute, resides with FERC and with any appropriate court of appeals. So, those are not harms that would preclude the grant of immediate possession to MVP.

Very little evidence has been offered identifying any harms from allowing MVP access now versus some later date. Several of the landowners argued, though, that they would be harmed by earlier possession, claiming that either the productive capacity of their land would be disturbed, or that they would have to outlay monies and do not currently have funds to sustain their businesses during construction or to move to avoid the construction. As to these landowners, many acknowledged that a draw-down procedure, such as was used in *Sage* and which this court is also going to utilize, would "blunt" the harms from an early loss of use. *See* 361 F.3d at 829.

The court acknowledges that there were a few landowners who testified about particular harms that would occur if construction began now versus in November, as an alternative. These included the property

operated by Doe Creek Farms, whose business as a wedding venue and pick-your-own apple orchard would suffer greater harms as a result of construction over the spring and summer than it would if construction occurred over the winter. (Day 2 Hr'g Tr. 249–260.) The court also has evidence before it of certain properties that may contain historical artifacts of archaeological significance, and a delay in construction might allow those sites to be explored and artifacts to be retrieved. (*Id.* at 306–08, 325–26; Defs.' Hr'g Ex. 11.) The court also heard about potential harms caused by the pipeline's proposed route through the Town of Chatham, which currently proceeds through a closed landfill with unknown contents and thus poses a potential risk to property and people if disturbed. The Town has suggested that a delay in possession would allow additional time to study the possible harms from the landfill and ways to minimize or prevent them.

At least two of the defendants (the Nature Conservancy and the New River Conservancy) hold conservation easements over properties along the pipeline route. While most of the claimed harm to them falls into the category of harm that results simply from the building of the pipeline, they also assert that they will suffer special harms from allowing possession now, as opposed to later. For example, the Nature Conservancy claims giving MVP possession now would affect its ability to work with MVP to develop a "crossing plan"

for its property, which FERC has directed be discussed.[21] (See Defs.' Hr'g Ex. 27).

These harms from early possession are real, and this court does not intend to trivialize them. But under established law, a person's right to his or her real property is not absolute. As *Sage* noted, one of the burdens of "common citizenship" is that a person's land is sometimes taken for the common good. 361 F.3d at 829 (explaining that this burden of citizenship can include the loss of "nontransferable values deriving from his unique need for property or idiosyncratic attachment to it.") (citation omitted). The court recognizes that many landowners, and others, vehemently disagree that this Project serves the common good, but that decision is not for this court. Many, if not all of these concerns were considered by FERC over a period of years, and FERC considered various routes and the competing harms associated with them. (FERC Cert. Order ¶¶ 297, 306.) But FERC ultimately selected the route it did, and this court has no authority to alter the route or select a "better" one.

Accordingly, on the one hand, the court must consider the potential harms to MVP of a delay that would result in the pipeline not being built, which includes a consideration of all of the of the [sic] benefits that FERC has determined will result from the timely completion

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[21] This issue may be particularly urgent since the Nature Conservancy's easement is located on one of the nine properties that has already been appraised. In any event, as already noted, any failure to abide by a FERC condition is an issue for FERC, not this court.

of the Project. Balanced against that, the court must consider the harms to the very few landowners who identified harms resulting from earlier possession (as opposed to just harms from the pipeline) Ultimately, the court concludes that the balance of equities favors MVP. Thus, the court concludes MVP has satisfied this *Winter* factor, as well.

d. The public interest

Defendants argue that the public interest in this case does not support allowing the construction of the pipeline, due to the environmental hazards or the other possible effects on historical areas or artifacts as a result of the construction. The court, however, has no authority in this proceeding to consider collateral attacks on the FERC Certificate Order. Thus, this court has no authority to conclude that the pipeline itself does not serve the public interest on the grounds cited by defendants.

Tellingly, defendants rely on the dissent from the FERC Certificate Order for their arguments that the project is not in the public interest. As MVP's counsel repeatedly elicited from landowner witnesses and as the Certificate Order itself makes clear, FERC has considered and rejected the very arguments against the Project raised in the briefing and in court. Those argument [sic] are not properly before the court. They are indirect and collateral attacks on the order itself. And, as already noted, although it is true that FERC has not said that immediate possession is in the public

interest, the evidence shows that waiting until the conclusion of the condemnation proceedings would preclude timely completion of the Project. Timely completion of the Project, FERC has expressed, is in the public interest. Thus, the court concludes that MVP has also established this fourth *Winter* factor.

2. Assurance of "reasonable, certain, and adequate provision" for compensation

Although the court has concluded that MVP has established its entitlement to a preliminary injunction under *Winter*, there remains to be determined the issue of adequate protections to landowners to ensure that they will receive just compensation. The Supreme Court in *Cherokee Nation* made clear that the constitution does not require that compensation be paid in advance of land occupancy; however, it does require that there be a process in place to give the owner "reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." 135 U.S. at 659. After approving the grant of summary judgment in *Sage* and before turning to whether the preliminary injunction standard was met, the Fourth Circuit, quoting *Cherokee Nation*, addressed whether district courts have the equitable authority to order immediate possession in appropriate circumstances and affirmed these same principles. It expressly agreed with *Cherokee Nation* that the landowner, prior to any disturbance to his land, is entitled to "reasonable, certain, and adequate provision for obtaining compensation." *Sage*, 361 F.3d at 824. But, "the Constitution does

not prevent a condemnor from taking possession of property before just compensation is determined and paid." *Id.*

a. Burden of proof is on MVP

While not set forth specifically in any case cited by the parties or found by the court, the court concludes, based on *Sage*, that the condemning entity has the burden to show that it has met this constitutional requirement because it is something to which the owner is entitled. The analysis of this burden issue is made difficult, however, by the overlapping nature of the constitutional requirement and the requirement that the court set adequate security (whether by bond or deposit) if it grants a preliminary injunction.

In the preliminary injunction context, there are two lines of cases that, at first blush, seem to suggest that the burden should be on defendants. The first line of authority holds that, at the preliminary injunction stage, the burdens of proof "track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). The parties do not dispute that, at trial, the burden is on the property owner in an eminent domain case to prove the fair market value of the property as of the date of the taking. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 273 (1943).

The cases in the second line, including one from this court, hold that the burden of establishing the proper amount of security for a preliminary injunction

rests with the party to be enjoined. *E.g.*, *Volvo Grp. N. Am. v. Truck Enters., Inc.*, No. 7:16-cv-25, 2016 WL 1479687, at *6 (W.D. Va. Apr. 14, 2016). In part, this is appropriate because the potentially enjoined party is "in the best position to determine the harm he will suffer from a wrongful injunction." *Id.* (citing *Lab. Corp. of Am. Holdings v. Kearns*, 84 F. Supp. 3d 447, 466 (M.D.N.C. 2015)).

Based on both lines of cases, MVP argues that defendants have the burden in this case and that they have failed to meet that burden. Defendants counter, though, that the "tracks the burden at trial" language refers only to the *Winter* prong dealing with the likelihood of success on the merits and does not apply to issues like damages or, in a takings case, the *Cherokee Nation* requirement that assurances of just compensation be given before occupancy is disturbed.

Other defendants argue that placement of the burden on the party to be enjoined might be appropriate with regard to a prohibitory injunction, but is not proper for the type of mandatory injunction here, particularly where constitutional rights are at stake. They argue that, at the preliminary injunction stage, in which MVP must establish its entitlement to an injunction, it "stands to reason" that MVP also bears the burden of establishing the appropriate amount of security. (Dkt. No. 316 at 5.)

In this case, the court concludes that neither line of cases is controlling because a constitutional requirement exists separate and apart from the security

requirements of a preliminary injunction. Oftentimes, this constitutional requirement is met by statutory provisions provided under federal and state law when a governmental entity is the party exercising quick-take options to possess the property immediately. In analyzing whether the constitutional requirement was met in *Sage*, the court "compar[ed] the protections of the DTA [Declaration of Taking Act] to those in injunction proceedings," and concluded that "the procedural safeguards in the preliminary injunction process," while "not a perfect match," nonetheless offer comparable protections to the DTA. 361 F.3d at 825. Although the DTA is not applicable here because the United States is not taking the property, under the DTA, the government provides an estimate of just compensation, not the landowner. 40 U.S.C. § 3114(a)(5). Additionally, the policy that guides all federal agencies seeking to acquire real property (and ultimately to condemn property—including under the DTA), also known as the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4651, requires that "[r]eal property shall be *appraised* before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property." *Id.* at § 4651(2) (emphasis added).[22] In light of this reliance on the DTA by *Sage* and the fact that the constitutional requirement is separate from

[22] This appraisal requirement does not apply to properties where the anticipated value is estimated to be $10,000 or less. 49 C.F.R. § 24.102(c)(1).

the preliminary injunction security analysis, the court concludes that the burden is on MVP to come forward with assurances of just compensation.

b. What constitutes assurance of "reasonable, certain, and adequate provision"?

As the Supreme Court recognized as early as *Cherokee Nation*, "[w]hether a particular provision be sufficient to secure the compensation to which, under the constitution, [the owner] is entitled, is sometimes a question of difficulty." 135 U.S. at 659. In that case, a statute required a deposit of double the amount of the estimated property value, determined by referees initially, if the railroad company and landowner disagreed about the property's value. The Court deemed that procedure sufficient. In response to the landowner's concerns about the possibility of insolvency, the Court stated that the "possibility of such insolvency is not . . . a sufficient ground for holding that the provision made in the act of congress for securing just compensation is inadequate. Absolute certainty in such matters is impracticable, and therefore cannot reasonably be required." 135 U.S. at 660–61.

Here, as in *Sage*, a governmental entity is not the condemnor. As noted above though, the court in *Sage* found that "the procedural safeguards in the preliminary injunction process," while "not a perfect match," nonetheless offer comparable protections to the DTA. 361 F.3d at 825. In concluding that sufficient provision

was made in the case before it, the *Sage* court explained:

> Rule 71A provides the procedure for determining just compensation, and ETNG has deposited cash with the court in an amount equal to the appraised value of the interests condemned. If the deposit is somehow short, ETNG will be able to make up the difference. In 2002 ETNG's parent company reported earnings of $1.17 billion from its natural gas transmission division that includes ETNG. There is thus adequate assurance that the landowners will receive their just compensation. *See Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1321 (4th Cir.1983) (fact that agency could be sued and had substantial assets was sufficient to assure just compensation).

Id. at 824. The *Sage* court therefore relied on two things in determining that adequate provision was made to ensure just compensation could be paid at the conclusion of the proceedings: a deposit of cash in an amount equal to the appraised value of the condemned interests, and some level of financial viability on the part of ETNG.

The *Sage* court also explained that landowners are protected by the procedural safeguards in the preliminary injunction process because a bond is required and because title does not pass until the final compensation is awarded. *Id.* at 825–26. Further, a gas company that fails to pay any shortfall in the deposit is liable in trespass, *id.*, and "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.'" *Id.* at 826 (citation omitted). Based on *Sage*, then, those types of protections are what satisfy the mandates of *Cherokee Nation.*

The court notes that when the landowners requested discovery in this case, they sought discovery about MVP's finances. MVP opposed discovery on that topic, arguing that the court "can ensure the payment of just compensation through an appropriate bond." (Dkt. No. 106 at 3.) The court agreed with that reasoning in general terms and said that it would not allow broad discovery as to MVP's financial strength, but it allowed limited discovery as to two related topics identified by defendants which dealt, at least in part, with the "issue of the appropriate amount of a bond." (Dkt. No. 205 at 6.) Nonetheless, the court warned MVP that it would not be permitted to present evidence of its financial strength after objecting to discovery on that issue as not relevant. (Dkt. No. 255 at 3 n.1.)

As indicated in its previous ruling regarding discovery, the court does not believe that evidence of MVP's financial strength is the only method by which it, or the court, can assure payment of just compensation. Rather, requiring a bond and/or deposit in excess of reasonable estimates of land value can accomplish the same goal and protect against possible insolvency. Here, however, for the reasons discussed next, the

court does not have sufficiently certain estimates of value on which to base its security decision.

c. Evidence presented as to value

While *Sage* makes clear that protections must be provided prior to granting immediate possession, it leaves many issues unaddressed about how to do so. Surprisingly, moreover, and despite a large number of district court cases that grant immediate possession and require the posting of security, the parties have not pointed the court to any case addressing the issue of what constitutes sufficient evidence of land value such that a bond and/or deposit, or multiple thereof, is adequate. In the vast majority of cases granting immediate possession, as far as is evident from those opinions, either: (1) appraisals were done on the property and the bond or security was set based on the appraised amount, which was the case in *Sage*; or (2) security was set based on some other estimates which the landowners did not argue were improper or inaccurate.

In this case, however, the court does not have adequate assurances that it can provide just compensation through security. At the hearing, MVP offered three types of evidence that it now asks the court to rely upon to set an amount of security: (1) testimony and exhibits entered through Mr. Long, a real estate appraiser, who was permitted to testify as an expert on real estate valuation and appraising; (2) an aggregate amount of the last offer by MVP on each of the

outstanding properties;[23] and (3) some of defendants' interrogatory answers as to their own estimated values of the easements sought to be condemned, although these were stated as minimums and done without the benefit of appraisals. Defendants objected to all of this information, and they did not present any of their own evidence as to value. Left unresolved from the hearing is whether some of the testimony of Mr. Long and Mr. Wagner was admissible. Mr. Long's estimates, that were not appraisals, raise the preliminary issue of whether *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies in the context of a hearing on a preliminary injunction.

Mr. Long is a real estate appraiser and was called by MVP to provide expert testimony to assist the court in valuing the properties for purposes of setting a bond. Based on his experience and education, and without objection by defendants, the court qualified Mr. Long as an expert. (Day 1 Hr'g Tr. 287.) Mr. Long had

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[23] MVP also sought to introduce the offer letters as to individual properties themselves, but the court disallowed that evidence. As the transcript reflects, MVP did not disclose or refer to those documents in discovery and provided copies of them only at the time it intended to introduce them. Moreover, the copies were not in an immediately usable form; instead, MVP provided flash drives with hundreds of pages of documents and had only four copies immediately available, despite many more defense counsel and pro se defendants than that in attendance. Defendants simply did not have sufficient time to review or consider the documents. They were properly excluded under Federal Rule of Civil Procedure 37.

appraised only nine of the properties at issue.[24] (*See* Pl.'s Hr'g Exs. 14–22.) As to the remaining properties, he explained that he did not have sufficient time to conduct appraisals consistent with the normal standards for real estate appraisals, and MVP had not asked him to do so. (Day 1 Hr'g Tr. 318–19). Instead, he arrived at valuation figures that he referred to as "estimates" for each of the remaining properties, based on a methodology he created for purposes of this litigation.

The methodology used tax assessed values of the properties (with adjustments based on assessment ratios in 2013, 2014, and 2015), to obtain an "adjusted assessed price" per acre, which considered land only. Based on research Mr. Long had performed, he concluded that 90 percent of the adjusted assessed price would provide adequate compensation for the permanent

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[24] The court admitted those appraisals over objections. Mr. Long was questioned specifically about several of the appraisals that were higher than his estimates of value for the same property. As to one of them, the Legges' property, Mr. Long admitted, upon questioning by defense counsel, that if an additional parcel (not subject to the easements) had been considered as part of the same property, based on the unity of use theory, then his appraisal would have been significantly higher. (Pl.'s Hr'g Ex. 18; Day 2 Hr'g Tr. 38–49.) He testified, though, that he did not speak to the landowners for this appraisal. That is the only appraised property where there is evidence that the appraisal may be substantially lower based on such inaccuracies. But disparities between an appraisal and a final award of just compensation are to be expected, especially when the appraisal is preliminary and done without the benefit of being able to speak with a landowner. The court is confident that, overall and on balance, the security it is requiring will suffice to assure just compensation.

easements. (*Id.* at 292–93.) In assessing the value of the temporary easements, he relied on another study to conclude that 8 percent per year based on the value of the land is a reasonable rental rate. Thus, given the three-year period FERC allowed for construction, he calculated the rental rate at 24% of the adjusted assessed price. (*Id.* at 293–94.) Then, for each property, he opined that 20% of the value should be included in the estimate as a "reserve," to account for any "inconveniences or damages that might take place to a property." (*Id.* at 294–95.) And for purposes of the value used in calculating any reserve, he included improvements to the land, as well as the land itself. (*Id.* at 295.) Using this method, he arrived at a "good faith estimate" of value for each of the properties identified in the complaint.

Defendants objected on a number of grounds to Mr. Long's testimony and to some of the exhibits offered through him. The court took under advisement the admissibility of plaintiff's Exhibits 11 and 12. Exhibit 11 reflects Mr. Long's individual "estimates" of value for each of the properties, and Exhibit 12 is a summary of the values in Exhibit 11.

First of all, defendants contend that Mr. Long's specific methodology—which is the only evidence offered as to the value of nearly all of the properties—is not admissible under *Daubert* and Federal Rule of Evidence 702. Defendants also argue that valuations based on tax assessed values are inherently unreliable and inadmissible, and so the two exhibits and his testimony about his estimates should be excluded.

As to each of these contentions, MVP has a ready response. As to the first, it argues that the Federal Rules of Evidence and *Daubert* are not strictly applicable in the preliminary injunction setting. Even if those rules were applicable, moreover, MVP insists that Mr. Long's testimony and the exhibits are reliable and admissible. Further, MVP cites to several cases where estimates based on tax assessed value, as opposed to full-blown appraisals, were admitted to determine property value, albeit not in any condemnation cases.[25]

There is no general consensus on the applicability of *Daubert* in this setting. (*See* Dkt. No. 314 at 28–29 (MVP's post-hearing brief citing some cases applying *Daubert* and others refusing to apply it at preliminary injunction hearing).) For its argument that *Daubert* and Rule 702 are inapplicable in this setting, though, MVP relies on the Fourth Circuit's decision in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016), *vacated on other grounds by Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (mem.). In *Grimm*, the court joined seven other circuits in allowing district courts to "look to, and indeed in appropriate circumstances rely on, hearsay

[25] The court also has reviewed the other cases cited by MVP for the proposition that real estate valuation is not a precise science and cases that allowed "unorthodox" expert testimony concerning valuation in a condemnation case, and they do not alter its conclusions. Those cases generally dealt with experts who had conducted some individual market analysis or appraisal based on something other than tax assessments. Thus, they do not lead to the conclusion that ***any*** unorthodox method is sufficiently reliable to be admitted.

or other inadmissible evidence when deciding whether a preliminary injunction is warranted." *Id.* at 725–26.

Defendants contend that *Grimm* does not apply to this case because it does not address *Daubert* or Rule 702 expressly and because its reasoning was based on the purpose of a *prohibitory* injunction, not a *mandatory* one. That is, *Grimm* allowed the relaxed standard in part because "preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards." *Id.* at 725–26; *see also Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 956 (W.D. Tex. 2011), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012) (refusing to strike affidavits as failing to satisfy *Daubert* and noting that the reason for the relaxed evidentiary standard is because "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held") (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). Defendants argue that, because the injunction sought here is a mandatory one, the loosening of the evidentiary restrictions that *Grimm* permitted is not proper.

The court need not resolve this issue conclusively because, even if *Grimm* applied as broadly as MVP suggests, and thus *Daubert* and Rule 702 do not apply to bar the evidence, the evidence can only be given such

weight as it deserves.[26] In this case, the court is simply not satisfied that Long's estimates are sufficiently reliable to support a finding of estimated value on each property so that the court can use it to set a bond sufficient to ensure just compensation will be paid. In addition to a general prohibition against admitting tax assessments in condemnation cases, which the court addresses next, Long himself admitted the fact that many issues into which an appraiser would inquire are not accounted for in his analysis.

For instance, Long admitted that "appraisal would be a better way to" evaluate property in a condemnation case than his estimate and that his methodology failed to account for "highest and best use" of a property, like an appraisal would. (Day 1 Hr'g Tr. 307–08.) His methodology, unlike an appraisal, also failed to account for potential damage to related properties that were not being condemned but were part of the same farm, for example. He further agreed that the actual fair market value after an appraisal process "may be many, many times higher" than his estimated value. (Day 1 Hr'g Tr. 306–08).

He also admitted that his estimates did not include any "cost-to-cure" type items, such as the expenses associated with repairing or replacing fences for animals, or any damages that may result from animals being unable to graze on the property during construction, although he thought those damages "might"

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[26] If the court applied *Daubert*, it would not admit Exhibit 11 or 12 or Long's testimony about his estimates.

be accounted for in his reserve number. (*Id.* at 313–14.) His estimates also did not include timber value, nor did they account for whether or not water sources for people or livestock might be affected.

He admitted that his method is not a standard method used by anybody else and that it had "never been put out to [his] peers." (*Id.* at 319.) With regard to the land owned by the Town of Chatham, moreover, Long admitted that he was unable to use tax assessed values, since it was tax-exempt from the state. Instead, he had to use comparable sales from other parcels that surrounded it. He also did not factor into his consideration the fact that the land contained a landfill. (*Id.* at 323–36.)

Mr. Long also acknowledged the difficulties generally with using tax assessed values, which is another reason why the court cannot credit the estimates as sufficiently accurate or reliable to assure just compensation. Additionally, the parties agree that the Fourth Circuit expressly ruled, in *United States v. Certain Parcels of Land in the County of Arlington*, 261 F.2d 287 (4th Cir. 1958) (*Certain Parcels of Land*), that testimony regarding tax assessed values in condemnation proceedings, regardless of who seeks to introduce those values, is not permitted. In that case, a witness from the appraiser's office testified about what the assessed value of a property was, and he further testified that in general appraisals are about forty percent of market value. 261 F.2d at 289. The court concluded that the district court erred in admitting both the assessment and the related testimony. It noted that some courts

have excluded assessments as "notoriously unreliable as a criterion of true value." *Id.* at 290. And although it excluded them on the grounds that they were inadmissible hearsay, the court also commented that they were "general[ly] unreliab[le] . . . as an indication of market value, which ought to make them suspect in any case. . . ." *Id.* at 291.

In an effort to overcome the clear statement of law in that case, MVP argues first that the case was decided before the effective date of the Federal Rules of Evidence (FRE). It also notes that in a post-FRE case from the Fourth Circuit, *Christopher Phelps & Associates* v. *Galloway*, 492 F.3d 532 (4th Cir. 2007), the court affirmed the district court's admission of a county tax assessment offered to prove the value of a property. *Christopher Phelps & Associates* was not a condemnation case; it dealt with an alleged copyright violation based on an individual's use of an architectural firm's custom-built home design without the firm's permission and without payment. There, the opponent of the valuation evidence argued both that the assessment contained inadmissible hearsay and also because they contained undisclosed expert testimony, which was subject to Rule 702 and *Daubert*. 492 F.3d at 541–42. The court stated, though, that the assessment "could appropriately have been admitted under the agency records exception to the hearsay rule, Fed. R. Evid. 803(8), which holds such documents sufficiently reliable because they represent the outcome of a governmental process and were relied upon for non-judicial

purposes." *Id.* at 542. It did not discuss the issue further, nor did it cite to *Certain Parcels of Land.*

The court does not find persuasive the argument that *Christopher Phelps & Associates* implicitly overruled *Certain Parcels of Land* or determined that the FRE would change the outcome in the earlier case.[27] Instead, it appears more likely that the prior case was not addressed or considered.[28]

So, although it is true that some cases allow tax assessment evidence to establish the value of property, they are not binding on this court and some even question or acknowledge that assessments are not dispositive of the valuation issue.[29] Furthermore, a number of

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[27] In any event, a subsequent panel of the Fourth Circuit "cannot overrule a decision issued by another panel," and where there is a conflict between two panels, courts should "follow the earlier of the conflicting opinions." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc).

[28] Even if the assessment records themselves were permitted under Rule 803(8), however, the court concludes that the defendants have shown that they are not trustworthy for the purposes for which they have been offered. Accordingly, they are inadmissible pursuant to Rule 803(8)(B).

[29] In one of the non-condemnation cases cited by MVP for the proposition that courts allow evidence of assessed values, for example, the court relied on *Christopher Phelps & Assoc.*, without any reference to *Certain Parcels. See, e.g.*, *In re Chen*, No. 08-17862, 2009 WL 3754672, at *5 nn.1–2 (Bankr. E.D. Va. Nov. 3, 2009) (admitting tax assessments, but refusing to rely on them as objective evidence of value because "even professional real estate appraisers frequently arrive at widely-varying opinions of value for commercial real estate" and any valuation should be understood as "the center-point of a range of values" and there was no evidence as to what variation from the center-point would be

cases decided after the FRE went into effect have continued to cite *Certain Parcels of Land* as good law on this issue. *See, e.g.*, *Sun Tr. Mortg., Inc. v. Busby*, No. 2:09-cv-03(L), 2010 WL 3945103, at *8 (W.D.N.C. Oct. 6, 2010) (holding that a tax assessment was not admissible to prove value, despite the fact that the tax assessor testified and was available for cross-examination); *Heavener v. Quicken Loans, Inc.*, No. 3:12-cv-68, 2013 WL 5966423, at *6 (N.D.W. Va. Nov. 8, 2013) (relying on *Certain Parcels of Land*); *Hardy Storage Co. v. Prop. Interests Necessary to Conduct Gas Storage Operations*, No. 2:07-cv-5, 2009 WL 689054, at *6 (N.D.W. Va. Mar. 9, 2009) (same).

For all of these reasons, even if the court were to conclude that *Daubert* and Rule 702 did not preclude the evidence, the court would either exclude Mr. Long's opinions based on his estimate methodology, as well as Exhibits 11 and 12, or simply assign them no weight. In sum, in this particular case, with the sheer number of properties, those properties' varying uses, and the problems that Mr. Long acknowledged with his methodology, the court concludes that Long's estimates are

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normal). In another, looking to Wyoming law, the court noted that a certified tax assessment record was admissible as to value because it was relevant, even if it was not dispositive. *Simek v. J.P. King Auction Co.*, 160 F. App'x 675, 685–86 (10th Cir. 2005). Additionally, the court there noted that the witnesses were not purporting to offer their own opinions of fair market value. *Id.* at 687 & n.8.

not sufficiently reliable to set an appropriate bond or deposit.[30]

Wagner's testimony about an aggregate amount of the offers does not assuage the court's concerns about its inability to set a proper bond. He testified that the total amount of the highest and best offers from MVP for the remaining properties was approximately $9.5 million. (Day 2 Hr'g Tr. 362). These offers, too, represent simply a rough estimate based on others' opinions and, in any event, that aggregate number is insufficient to allow for meaningful cross-examination regarding individual properties, to assure just compensation for the individual properties, or to allow individual owners to draw down the deposited monies.

Accordingly, based on the information before it, the court is unable to provide the assurance of just compensation through the setting of a bond or deposit, without additional information as to individual properties. Under *Sage* and *Cherokee Nation*, something

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[30] In *Sage*, the court had before it appraisals. Likewise, in most of the reported and unreported cases the court has located that granted immediate possession, the bond or deposit was set based on appraisals. The court acknowledges, though, that some district courts have used other measures, even where there was an argument that an appraisal should be required. *See, e.g.*, *Columbia Gas Transmission LLC v. 0.85 Acres*, No. 14-cv-2288, 2014 WL 4471541, at *6–7 (D. Md. Sept. 8, 2014). Moreover, there may be methods of estimating value (other than appraisals) that would suffice for the court to use in setting security. So, the court is not holding that *only* appraisals will suffice, but something more reliable and certain than the estimates based on tax assessments is required to satisfy the mandates of *Cherokee Nation* and *Sage*.

more is required before the landowners' occupancy can be disturbed.

III. CONCLUSION

The court acknowledges the large number of cases in which courts have granted partial summary judgment and the same type of injunctive relief sought here—immediate possession by a pipeline construction company, many of them pointing to *Sage* for authority to do so. And it is clear to this court that *Sage* confers that authority on this court. The court also believes that MVP has established its right to exercise eminent domain over the properties and an entitlement to injunctive relief.

But until MVP can provide a more fulsome basis on which the court can assure that just compensation will be paid, the court cannot allow immediate possession at this time as to nearly all of the properties. As to those properties, the court will direct MVP to provide a statement to the court within seven days providing a time-frame by which it believes it could provide sufficient information to set reliable security, consistent with this memorandum opinion. As to the nine properties for which the court has appraisals, the court will direct MVP to deposit with the court an amount of three times the appraised value of each property and a certified surety bond in an amount two times the total appraised value, conditioned on the payment of just compensation. The court will also require MVP to submit an order for each of those nine properties granting

immediate possession and setting forth the terms of that possession. A separate detailed order will be entered.

Entered: January 31, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff,

v.

SHARON SIMMONS, Administratrix of the Charles D. Simmons Estate (Parcel ID NO. 7-13D-11), et al.,

Defendants.

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CIVIL ACTION NO. 1:17CV211 (Judge Keeley)

MEMORANDUM OPINION AND ORDER DENYING MOTION TO STAY [DKT. NO. 31], GRANTING MOTION TO STRIKE [DKT. NO. 28], DENYING AS MOOT MOTION TO DISMISS [DKT. NO. 23-1], AND GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT AND IMMEDIATE ACCESS [DKT. NO. 5]

(Filed Feb. 2, 2018)

The plaintiff, Mountain Valley Pipeline, LLC ("MVP"),[1] seeks to condemn certain temporary and

[1] MVP is a Delaware LLC owned by MVP Holdco, LLC, a subsidiary of EQT Corporation; US Marcellus Gas Infrastructure, LLC, a subsidiary of NextEra Energy Capital Holdings, Inc.; WGL Midstream, Inc., a subsidiary of WGL Holdings, Inc.; RGC Midstream, LLC, a subsidiary of RGC Resources, Inc.; and Con Edison Gas Midstream, LLC, a subsidiary of Consolidated Edison (Dkt. No. 1-2 at 2 n.4).

permanent easements necessary for the construction and operation of an interstate natural-gas pipeline. To facilitate the expeditious completion of its project, MVP moves the Court to grant partial summary judgment regarding its right to condemn the easements, and to enter a preliminary injunction allowing it to access and possess the property prior to paying just compensation (Dkt. No. 5).

Having carefully considered the record and the parties' arguments regarding the pending motions, for the following reasons, the Court **DENIES** the Motion for Stay of Proceedings (Dkt. No. 31), **GRANTS** MVP's Motion to Strike (Dkt. No. 28), **DENIES AS MOOT** Defendants' Motion to Dismiss (Dkt. No. 23-1), and **GRANTS** MVP's Motion for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned for Construction of the MVP Project (Dkt. No. 5).

I. LEGAL FRAMEWORK

This proceeding is governed by the Natural Gas Act ("NGA" or "the Act"), which provides private natural-gas companies the power to acquire property by eminent domain. 15 U.S.C. § 717 et seq. Under the Act, a "natural-gas company" is "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Id. § 717a(6). Such companies may build and operate new pipelines only after obtaining a certificate of public convenience and necessity ("Certificate") from

the Federal Energy Regulatory Commission ("FERC" or "the Commission"). As the Fourth Circuit has summarized:

> The procedure for obtaining a certificate from FERC is set forth in the NGA, and its implementing regulations. The process begins with an application from the gas company that includes, among other information, (1) a description of the proposed pipeline project, (2) a statement of the facts showing why the project is required, and (3) the estimated beginning and completion date for the project. Notice of the application is filed in the Federal Register, public comment and protest is allowed, and FERC conducts a public hearing on the application. As part of its evaluation, FERC must also investigate the environmental consequences of the proposed project and issue an environmental impact statement. At the end of the process FERC issues a certificate if it finds that the proposed project "is or will be required by the present or future public convenience and necessity." In its order issuing a certificate, FERC specifies a date for the completion of construction and the start of service. The certificate may include any terms and conditions that FERC deems "required by the public convenience and necessity."

E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 818 (4th Cir. 2004) (internal citation omitted).

"Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise 'the right of eminent domain' over any lands needed for the

project." Id. (citing 15 U.S.C. § 717f(h)). The authority by which natural-gas companies may exercise the right is set forth fully in the Act:

> When 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, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, 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. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h). Notably, the "state procedure requirement has been superseded" by the implementation of Fed. R. Civ. P. 71.1, which provides the

applicable procedure in most condemnation cases. See Sage, 361 F.3d at 822.

There are, therefore, three essential prerequisites that must be met prior to exercising the power of eminent domain under the NGA. The natural-gas company must only establish that "(a) It is a holder of a certificate of public convenience and necessity; (b) It needs to acquire an easement, right-of-way, land or other property necessary to the operation of its pipeline system; and (c) It has been unable to acquire the necessary property interest from the owner." Rover Pipeline LLC v. Rover Tract No(s) WV-DO-SHB-011.510-ROW-T & WV-DO-SHB-013.000-ROW-T, No. 1:17cv18, 2017 WL 5589163, at *2 (N.D.W.Va. Mar. 7, 2017).

The law in the Fourth Circuit is clear that, "once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction." Sage, 361 F.3d at 828. A preliminary injunction is proper when the plaintiff can "[1] establish that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).[2]

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[2] Because the Court makes reference to the facts and analysis in Sage throughout this Opinion and Order, it must note that

II. BACKGROUND

On October 13, 2017, FERC granted a Certificate to MVP authorizing construction of a 303.5-mile-long, 42-inch-diameter natural-gas pipeline from Wetzel County, West Virginia, to Pittsylvania County, Virginia ("MVP Project" or "the Project") (Dkt. No. 1-2 at 3).[3] The Project also includes three compressor stations in West Virginia and four interconnections along the pipeline's route. Id. at 3-4. The Certificate is subject to various environmental conditions, including those that must be fulfilled before and during construction of MVP's pipeline. Id. at app. C.

MVP must obtain easements along the Project in order to construct its pipeline, and under the appropriate circumstances the NGA grants it the authority to do so by eminent domain. On December 8, 2017, MVP sought to exercise that authority over certain property located in the Northern District of West Virginia, which it could not acquire by agreement, by filing a complaint pursuant to the NGA and Fed. R. Civ. P. 71.1 (Dkt. No. 1). As required by Rule 71.1(c)(2), it included

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the decision applied the preliminary injunction test from Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 193-96 (4th Cir. 1977), which was abrogated by the Supreme Court's holding in Winter. Real Truth About Obama, Inc. v. Fed. Election Com'n, 575 F.3d 342, 346-47 (4th Cir. 2009), vacated on other grounds and remanded, 559 U.S. 1089 (2010), standard reaffirmed in 607 F.3d 355 (4th Cir. 2010). Nonetheless, Sage is binding on this Court to the extent that its analysis of each preliminary injunction factor comports with the requirements of Winter.

[3] Citations to the FERC Certificate reference pagination of the FERC Certificate itself rather than CM/ECF pagination.

descriptions of the property, as well as the interests to be taken (Dkt. Nos. 1 at 5-7; 1-1; 1-3). On December 13, 2017, MVP filed the following motions: Motion for Partial Summary Judgement and Immediate Access to Survey Parcel ID Nos. 02-4L-19, 02-4L-12 Owned by Arthur C. And Judy Roberts ("Survey Motion") (Dkt. No. 3); Motion for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned for Construction of MVP Project ("Possession Motion") (Dkt. No. 5); and Motion for Expedited Hearing on Motions for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned (Dkt. No. 7).

Following a status conference on December 21, 2017, the Court set a schedule for discovery and briefing on the Survey Motion and Possession Motion (Dkt. No. 33). The next day, several defendants filed a motion to stay proceedings on MVP's motion for immediate possession, which remains pending (Dkt. No. 31). On December 29, 2017, the Court denied the Survey Motion as moot after being advised by the parties that the motion was no longer in controversy (Dkt. No. 42). The Court subsequently granted MVP's motion for an expedited hearing, and amended the schedule to include a hearing on the Possession Motion (Dkt. No. 43).

Pursuant to Fed. R. Civ. P. 71.1(e)(2), the following defendants asserted objections and defenses by way of an answer: Hilry Gordon, Gerald Wayne Corder, Randall N. Corder, Bryan and Helen Montague Van Nostrand, Charles F. Chong and Rebecca Ann Eneix-Chong, Nancy Shewmake Bates, and William G.

Lloyd (Dkt. No. 23-1);[4] Western Pocahontas Properties LP ("Western Pocahontas") (Dkt. No. 45); ICG Eastern, LLC ("ICG Eastern") (Dkt. No. 48);[5] George Ernest Bright and William Townsend Bright (Dkt. No. 50); Dale Eastham, Travis Eastham, Brent Fairbanks, David Fairbanks, Michael Fairbanks, Edward Charles Smith, Sr., Edward Charles Smith, II, Todd Edward Smith, and Jeremy Collins (Dkt. No. 51); Adam L. Matheny and Glenn D. Matheny (Dkt. No. 52); and Arthur C. Roberts and Judy D. Roberts (Dkt. No. 53). On January 23, 2018, the Court conducted an evidentiary hearing on MVP's Possession Motion (Dkt. No. 103). Thereafter, the parties filed post-hearing briefs regarding MVP's Possession Motion (Dkt. Nos. 112; 113; 114). The pending motions are now ripe for disposition.

III. MOTION TO STAY

On December 22, 2017, defendants Charles F. Chong and Rebecca Ann Eneix-Chong ("the Chongs") moved to stay proceedings on MVP's motion for immediate possession (Dkt. No. 31), contending that, because there is a pending application for rehearing before FERC, this Court should delay consideration of equitable relief for MVP. According to the Chongs, the regulatory process before FERC has subjected them to

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[4] This answer also included a motion to dismiss the complaint, which MVP moved to strike as procedurally improper (Dkt. No. 31).

[5] Although ICG Eastern and MVP disagree concerning just compensation, ICG Eastern no longer objects to MVP's request for immediate access to its property (Dkt. No. 112).

"administrative purgatory." Id. at 2. At the evidentiary hearing on January 23, 2018, however, MVP and the Chongs advised that they had reached an agreement in principle regarding just compensation that would render moot the Chongs' motion to stay. Because that agreement is not final, however, the Court has considered the motion and **DENIES** it for the following reasons.

When FERC issues a Certificate, aggrieved parties may petition for rehearing within 30 days. Unless FERC "acts upon the application for rehearing within thirty days," the application is deemed denied. Following further review by FERC, parties may seek judicial review, which is exclusively "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." 15 U.S.C. § 717r(a). Aggrieved parties are given "60 days after the order of [FERC] upon the application of rehearing" to seek judicial review. Id. § 717r(b).

FERC Certificates are effective on the date that they are issued. 18 C.F.R. § 285.2007(c)(1) (2017). Filing an application for rehearing or seeking judicial review does not "operate as a stay of [FERC's] order" unless otherwise ordered by FERC or the applicable court of appeals. 15 U.S.C. § 717r(c). Only FERC and the courts of appeals have jurisdiction to stay the effect of a Certificate, and pending applications for rehearing – or even granted applications for rehearing – do not nullify the Certificate's effect in an eminent domain

proceeding before the district court. See Sabal Trail Transmission, LLC v. 7.72 Acres in Lee Cty., Ala., No. 3:16-cv-173, 2016 WL 8900100, at *4 (M.D. Ala. June 3, 2016) (collecting cases); Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres, More or Less, No. 08-168, 2008 WL 4346405, at *3-*6 (W.D. Pa. Sept. 19, 2008).

In this case, FERC issued MVP's Certificate on October 13, 2017. On November 13, 2017, the Chongs and a number of other interested parties timely moved for rehearing before FERC. They argue that MVP's Project is not necessary under the NGA, and that the FERC Certificate rests on a deficient final environmental impact statement, in violation of the National Environmental Policy Act (Dkt. No. 31-2 at 2, 6-7). FERC responded with a "tolling order" on December 13, 2017, which states:

> In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law.

(Dkt. No. 31-1). According to FERC, such tolling orders do not constitute an "act[] upon" motions for rehearing, and associated Certificates are not final agency actions subject to judicial review (Dkt. No. 31-3 at 5). Neither FERC nor a court of appeals has enjoined enforcement of MVP's Certificate.

While acknowledging that this Court does not have jurisdiction to stay the Certificate itself, the Chongs argue that this Court should exercise its equitable power to stay consideration of MVP's request for a preliminary injunction. They contend that FERC's tolling order "gores [them] on the horns of a dilemma": MVP will contend that the Chongs may only challenge the FERC Certificate before FERC and the court of appeals, while the tolling order indefinitely delays such administrative and judicial review (Dkt. No. 31 at 4). According to the Chongs, they may be deprived of their property in this proceeding before the validity of the FERC Certificate is fully resolved, resulting in a [sic] "a clear case of hardship" and a "scandal to the administration of justice" that warrants the imposition of a stay (Dkt. No. 59 at 2, 5).

In support of their request, the Chongs rely solely on Landis v. North American Co., 299 U.S. 248 (1936), which discusses the Court's inherent equitable authority. In Landis, the Supreme Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Id. at 254. "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." Foreclosing the district courts' power to issue such stays might result in "scandal[s] to the administration of justice." Id. at 255.

The Court acknowledges that it possesses inherent authority to stay consideration of MVP's request for a preliminary injunction, but concludes that several factors weigh against such an exercise of discretion in this case. First, the Chongs seek unusual relief. They do not ask the Court to stay this condemnation action in its entirety, but instead request equitable relief from the possibility that MVP will receive equitable relief. Yet the Court's analysis of whether MVP is entitled to a preliminary injunction necessarily will take into account whether "the balance of equities tips in [MVP's] favor." Winter, 555 U.S. at 20. The Chongs' motion therefore is a mere redundancy.

Second, the Chongs' argument would warrant similar stays in a broad category of eminent domain cases under the NGA. A review of the cases cited within this Memorandum Opinion and Order establishes that a significant number of eminent domain proceedings commence before administrative and judicial review are complete. See, e.g., Sabal Trail, No. 3:16-cv-173, 2016 WL 8900100, at *4 (collecting cases). In essence, the Chongs disagree with the structure of the NGA, which allows natural-gas companies to exercise the power of eminent domain upon receipt of a Certificate rather than after the Certificate has been subject to judicial review. The NGA also provides a remedy, however, by providing that FERC or the court of appeals may stay a Certificate.

Indeed, the Chongs' attorneys have unsuccessfully requested such a stay from both FERC and the United States Court of Appeals for the District of Columbia,

both of which are fully aware that district courts hold the authority to grant preliminary injunctions in eminent domain cases (Dkt. Nos. 31-2; 47 at 6-7). That the Chongs have been unable to obtain the relief they seek in two other forums does not warrant an exercise of this Court's equitable power. Therefore, the Court **DENIES** the Chongs' Motion for Stay of Equitable Proceedings on Plaintiff's Motion for Immediate Possession (Dkt. No. 31).

IV. MOTION TO DISMISS AND MOTION TO STRIKE

On December 21, 2017, several defendants moved to dismiss MVP's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted (Dkt. No. 23-1). MVP moved to strike the motion to dismiss, arguing that it is procedurally improper (Dkt. No. 28).

Fed. R. Civ. P. 71.1 governs "proceedings to condemn real . . . property by eminent domain." The rule provides for only one responsive pleading: "A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice." Among other things, such an answer is required to "state all the defendant's objections and defenses to the taking." Fed. R. Civ. P. 71.1(e)(2). Moreover, the rule expressly states that "[a] defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed." Fed. R. Civ. P.

71.1(e)(3). As the advisory notes regarding Rule 71.1 explain, "[d]eparting from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in a condemnation proceeding."

The plain language of Rule 71.1 makes clear that motions to dismiss are not permitted in condemnation proceedings, rendering the defendants' motion to dismiss procedurally improper. See Atl. Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455, 458 (4th Cir. 1963) ("We need not consider the dubious merits of the . . . motion to dismiss, for [it was] not [an] allowable pleading[ ]."). Therefore, the Court **GRANTS** MVP's motion to strike (Dkt. No. 28) and **DENIES AS MOOT** the defendants' motion to dismiss (Dkt. No. 23-1). Nonetheless, to the extent the defendants raise similar arguments in their answers and responses to MVP's motion for summary judgment, they are addressed below. Accord Sabal Trail, 3:16-cv-173, 2016 WL 8900100, at *3.

V. MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court may only exercise its equitable power to grant a preliminary injunction after determining "that a gas company has the substantive right to condemn property under the NGA." Mid-Atlantic Express, LLC v. Baltimore Cty., Md., 410 F. App'x 653, 657 (4th Cir. 2011) (unpublished decision) (quoting Sage, 361

F.3d at 828). As discussed, to establish that it has the right to condemn, MVP must demonstrate only that 1) it holds a FERC Certificate, 2) it needs to acquire the easements, and 3) it has been unable to acquire them by agreement. 15 U.S.C. § 717f(h). MVP has satisfied each of these elements, and is thus entitled to partial summary judgment regarding its right to condemn.

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence "in the light most favorable" to the nonmoving party. Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000). The Court must avoid weighing the evidence or determining its truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has made the necessary showing, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256 (internal quotation marks and citation

omitted). The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment; the evidence must be such that a rational trier of fact could reasonably find for the nonmoving party. Id. at 248-52.

A. MVP holds a FERC certificate.

The parties cannot dispute that FERC issued MVP a Certificate on October 13, 2017 (Dkt. No. 1-2). Various defendants argue, however, that the FERC Certificate's conditions render it ineffective to grant the power of eminent domain under the NGA, thus divesting the Court of jurisdiction (Dkt. Nos. 69 at 3-4; 70 at 2-5). That argument is without merit.

Pursuant to 15 U.S.C. § 717f(e), FERC "shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." FERC is capable of imposing conditions precedent to the exercise of eminent domain power, but it did not do so in this case. See Mid-Atlantic, 410 F. App'x 653 (dismissing case in which the FERC Certificate contained conditions that must be fulfilled prior to exercising the power of eminent domain). In addition, FERC can condition actual approval of a project on the fulfillment of certain conditions. See, e.g., Del. Dep't of Nat. Resources & Envtl. Control v. FERC, 558 F.3d 575, 577-79 (D.C. Cir. 2009) (noting that a "conditional approval"

could not approve a project without fulfillment of a condition).

Here, the FERC Certificate includes numerous environmental conditions, which require MVP to obtain a variety of permits and approvals from state and federal agencies at various stages of the Project (Dkt. No. 1-2 at app. C). There is nothing in the FERC Certificate, however, that conditions either approval of the Project or MVP's exercise of eminent domain under the NGA. Instead, FERC intended to confer the power of eminent domain. Id. at 27.

In this case, therefore, "the FERC Order cannot reasonably be read to prohibit [MVP] from exercising eminent domain authority until it has complied with all conditions set forth in the Appendix." Constitution Pipeline Co., LLC v. A Permanent Easement for 0.42 Acres & Temporary Easements for 0.46 Acres, No. 1:14-CV-2057, 2015 WL 12556145, at *2 (N.D.N.Y. Apr. 17, 2015). When FERC's conditions are not precedent to approval of a project or the exercise of eminent domain, whether an applicant has complied with those conditions is an issue for FERC and cannot delay the exercise of eminent domain. See, e.g., Sabal Trail Transmission, LLC v. 7.72 Acres in Lew Cty., Ala., No. 3:16-CV-173-WKW, 2016 WL 3248666, at *4 (M.D. Ala. June 8, 2016) ("There is no basis to delay the condemnation proceedings because any failure to comply with the FERC certificate is an issue for FERC – not this court at this stage in the proceedings."); Columbia Gas Transmission, LLC v. 370 Acres, More or Less, No.

1:14-0469-RDB, 2014 WL 2092880, at *4 (D. Md. Oct. 9, 2014).

Nonetheless, the defendants argue that the environmental conditions contained within the Certificate undermine its validity in this Court. They argue that § 717f(e) allows FERC to impose only limitations on MVP's operation of the pipeline, not prerequisites to MVP's Project. They argue that FERC exceeded its authority by imposing conditions that must be satisfied prior to construction, such as acquiring necessary permits. They ask the Court to find that MVP does not truly hold a FERC Certificate (Dkt. No. 70 at 3-5). The Court rejects these arguments for two reasons.

First, analyzing the propriety and validity of a FERC Certificate is not the Court's role in the statutory scheme. As summarized by the District of Maryland:

> A district court's role in proceedings involving FERC certificates is circumscribed by statute. The district court's role is simply to evaluate the scope of the certificate and to order condemnation of property as authorized in the certificate. Disputes over the reasons and procedures for issuing certificates of public convenience and necessity must be brought to the FERC.

Columbia Gas, No. 1:14-0469-RDB, 2014 WL 2092880, at *3 (quoting Columbia Gas Transmission, LLC v. 76 Acres More or Less, Civ. A. No. Elh-14-0110, 2014 WL 2960836 (D. Md. June 27, 2014)). "The NGA does not

allow landowners to collaterally attack the FERC certificate in the district court, it only allows enforcement of its provisions." Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cty., 550 F.3d 770, 778 n.9 (9th Cir. 2008) (citing Williams Nat'l Gas Co. v. City of Oklahoma City, 890 F.2d 255, 264 (10th Cir. 1989)); see also Gas Transmission Northwest, LLC v. 15.83 Acres of Permanent Easement, 126 F. Supp. 3d 1192, 1198 (D. Or. 2015). Therefore, the defendants' suggestion that this Court declare the FERC Certificate invalid is completely improper.

Second, even if the Court had jurisdiction to consider the validity of MVP's Certificate, the substance of the defendants' argument is of dubious merit. The NGA simply does not contain a provision limiting the exercise of eminent domain when conditions have not been met, and "[c]ourts have repeatedly rejected similar arguments that a pipeline company cannot exercise eminent domain because a FERC Order is conditioned." Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres, No. 17-715, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017) (collecting cases). The plain language of § 717f(e) permits FERC to attach conditions to the FERC Certificate, not any particular kind of condition.[6]

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[6] The defendants argue that the Court should employ the canon of constitutional avoidance and construe the NGA narrowly (Dkt. No. 70 at 4-5). This is a misuse of the canon. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon

Moreover, the cases cited by the defendants do not support their argument. For instance, they [sic] citing Northern Natural Gas Co., Division of InterNorth, Inc. v. FERC, 827 F.2d 779, 782 (D.C. Cir. 1987), they argue that FERC may only impose "conditions on the terms of the proposed service itself," rather than preconstruction conditions (Dkt. No. 70 at 3). Northern Natural simply does not stand for this limited proposition. There, the question presented was "whether the Commission lawfully imposed upon the certificate the condition that [the natural-gas company] credit fixed-cost related revenues from its proposed discount resale service to the customers of its existing non-discount resale service." N. Nat., 827 F.2d at 781. In Northern Natural, the circuit court reaffirmed that § 717f(e) allows FERC to "impos[e] conditions on the terms of the proposed service itself," not "on the terms of services not directly before the Commission." Id. at 782. That ruling on the scope of § 717f(e) is thus wholly distinguishable from the facts of this case, where FERC imposed conditions on the construction of MVP's Project itself, rather than a separate "service[] not before it in the certificate proceeding." Id. at 783 (quoting Panhandle E. Pipe Line Co. v. FERC, 613 F.2d 1120, 1133 (D.C. Cir. 1979)).

In summary, MVP's FERC Certificate is effective in this Court and does not include a condition limiting the exercise of eminent domain. The Court lacks

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functions as a means of choosing between them." United States v. Mills, 850 F.3d 693, 699 (4th Cir. 2017) (quoting Clark v. Martinez, 543 U.S. 371, 385 (2005) (Scalia, J.) (emphasis in original)).

jurisdiction to consider the defendants' challenge regarding the validity of the Certificate, and thus concludes that MVP has satisfied the threshold requirement under § 717f(h).

B. The property interests are necessary.

MVP next must establish that the easements sought are necessary to the construction, operation, and maintenance of its pipeline. 15 U.S.C. § 717f(h). MVP has established that the easements are "necessary and consistent with the easement rights that FERC authorized [MVP] to obtain." Rover Pipeline LLC, No. 1:17cv18, 2017 WL 5589163, at *2; see also Sabal Trail, No. 3:16-CV-173-WKW, 2016 WL 3248666, at *6 ("FERC has determined that the property is necessary for the project. . . .").[7] Moreover, the conditions outlined in the FERC Certificate do not render the easements unnecessary to the construction of the MVP Project. Therefore, MVP has satisfied the second requirement under § 717f(h).

[7] Several defendants object that MVP's complaint does not contain sufficient maps, and deny that the easements are located along the route approved by FERC (Dkt. No. 23-1 at 19). Not only does Rule 71.1 not require any "particular type of map, drawing, or measurements" as long as the description "identifies the size and placement of the easements" such that the landowner can identify them, In re Transcon. Gas Pipeline Co., LLC, 1:16cv02991, 2016 WL 8861714, at *4 (N.D. Ga. Nov. 10, 2016), but the defendants have not presented any evidence in support of their claim.

C. MVP has been unable to acquire the interests by agreement.

Finally, MVP must establish that it "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the easements. 15 U.S.C. § 717f(h). According to MVP, it "made offers . . . to acquire the required easements . . . but was unable to acquire them by agreement" (Dkt. No. 5-1 at 3). Nonetheless, several defendants argue that MVP has not met this requirement because it has not offered proof of good-faith negotiations (Dkt. Nos. 69 at 5; 71 at 7-10).[8]

As this Court has previously reasoned, MVP "is not required by the Natural Gas Act or Rule 71.1 to engage in 'good faith' negotiations with the landowner."

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[8] Several answers assert that "easement negotiations between MVP's land agents and private property owners were intended to intimidate and instill fear in owners to motivate them to sign MVP's form easement agreements conveying rights well beyond what MVP needs or was granted in its Certificate." They assert that "MVP's land agents made offers to acquire easement rights in the private property of Landowners based upon insufficient or incorrect facts as to the specific property proposed to be encumbered, in many cases without any maps, drawings or plats provided to Landowners to allow a meeting of the minds as to the subject of the offer." (Dkt. Nos. 23-1 at 18; 50 at 8; 51 at 8; 52 at 8; 53 at 8). Despite the opportunity to do so at the evidentiary hearing, the defendants have not presented any evidence in support of these broad allegations of MVP's bad-faith negotiations. In any event, the Court notes that disagreement concerning the value of an easement does not amount to bad faith. 15 U.S.C. § 717f(h) (granting right of eminent domain if Certificate holder "is unable to agree with the owner of property to the compensation").

Hardy Storage Co., LLC v. Prop. Interests Necessary to Conduct Gas Storage Operations, No. 2:07CV5, 2009 WL 689054, at *5 (N.D.W.Va. Mar. 9, 2009) (citing E. Tenn. Nat. Gas LLC v. 3.62 Acres in Taxewell Cty., Va., 2006 WL 1453937, at *10 (W.D. Va. May 18, 2006)); see also Columbia Gas Transmission Corp. v. An Easement to Construct, Operate, and Maintain a 24-Inch Pipeline, No. 5:07cv04009, at *4 n.4 (W.D. Va. June 9, 2008). But see Transcon. Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990). Consequently, the defendants' related objections are without merit, and the Court concludes that MVP has been unable to acquire the easements by contract or agreement.

D. The defendants' other objections are without merit.

The defendants raise several additional objections to MVP's eminent-domain authority. None of them persuades the Court that MVP's requests for relief are untimely or improper.

1. Ability to Pay

Several of the defendants argue that MVP cannot exercise the power of eminent domain because it has not made "adequate provision" (Dkt. Nos. 70 at 5; 71 at 5-7). They contend that whether MVP is able to pay just compensation for their property was not determined by the FERC Certificate, that MVP is a private company at constant risk of insolvency, and that MVP

is a new project without existing customers (Dkt. No. 70 at 6). Despite these challenges, the Court concludes that MVP has established an ability to pay such that it may seek immediate possession of the easements. See Sage, 361 F.3d at 824 (discussing "adequate provision" in the context of injunctive relief rather than the pipeline company's eminent-domain authority).

A similar challenge was considered and rejected by the Fourth Circuit in Sage, where the court acknowledged that, although "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid . . . the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." Id. at 824 (citing Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890)). The court was satisfied that the condemnor had provided adequate assurance by "depositing cash with the court in an amount equal to the appraised value," and that its parent company's reported earnings – $1.17 billion – were sufficient to cover any difference between the deposit and just compensation. Id. (citing Wash. Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1321 (4th Cir. 1983) (finding sufficient the fact that agency could be sued and had substantial assets)).

Here, MVP has satisfied the requirement of adequate provision by indicating its willingness to post a bond equal to the appraised value of the easements to be taken. Accord Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 0.03 Acres, No. 4:17CV565, 2017 WL 3485752, at *5 (M.D. Pa. Aug. 15, 2017). At

the evidentiary hearing on its motion for a preliminary injunction, MVP presented the testimony of Stephen A. Holmes ("Holmes"), a certified general appraiser, to establish the estimated diminution in property value that will result from MVP's takings (Dkt. No. 106 at 79-81). Following the Uniform Standards of Professional Appraisal Practice ("USPAP"), Holmes used a comparable sales approach that took into account the properties' highest and best use to arrive at a "total cumulative value for the diminution in property value" of $81,300. Id. at 82, 85, 95, 97.[9]

In response to Holmes's testimony, the defendants offered the testimony of Russel Rice ("Rice"), a real estate appraiser (Dkt. No. 107 at 4-5). Although Rice had reviewed Holmes's appraisal report, he "did not complete a thorough and entire review of it," nor did he prepare a written review of the report. Id. at 8-9. Nonetheless, he opined that Holmes's report is insufficient under the USPAP because restricted appraisal reports may only be used by the appraiser's client, and Rice would not testify about a restricted appraisal in a bond hearing. Id. at 11-13, 15. Rice did not provide an opinion on whether Holmes's estimation of value was correct, but rather opined only that the report does not provide sufficient information to assess the reliability of its approach. As he stated, "I'm saying I disagree

[9] Holmes acknowledged that he used the USPAP to arrive at an estimated value for the simple purpose of setting a bond. He acknowledged knowing that the Uniform Appraisal Standards for Federal Land Acquisitions ("Yellow Book") must be used to determine just compensation in federal condemnation proceedings (Dkt. No. 106 at 90).

with the means with which the values were communicated. We don't have enough information in that report to be able to rely upon it." Id. at 16, 20, 22.

The defendants argue both that Holmes's USPAP appraisal is unreliable and that he should have used the Yellow Book (Dkt. No. 113 at 17 n.13). These criticisms may be well-taken, but they are insufficient to undermine Holmes's opinion for the purpose of fixing a discretionary bond in the event that a preliminary injunction issues. The bond is meant to "cover[ ] the potential incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer . . . or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained." Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 n.3 (4th Cir. 1999) (quoting 11A Charles Alan Wright et al., Federal Practice & Procedure § 2954, at 292 (2d ed. 1995)). In this condemnation proceeding, the bond should be fixed as close as practicable to the just compensation amount for which MVP will ultimately be liable. See id.

Without the benefit of a trial on just compensation, it is impossible for the Court to fix the bond at precisely the correct amount. It is satisfied, however, that Holmes's appraisal, as well as the defendants' criticisms, provide a sufficient foundation for fixing the bond in this case.[10] Further, if the bond is insufficient,

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[10] Despite the fact that the defendants bear the ultimate burden to establish the amount of just compensation, United States v. 69.1 Acres of Land, 942 F.2d 290, 292 (4th Cir. 1991), they did not present an independent valuation of their property, which

MVP "will be able to make up the difference" at the time of judgment or face further legal action by the landowners. Sage, 361 F.3d at 824. The MVP Project has a total budget of $3.7 billion, which includes a contingency of $180 million, and FERC has concluded that MVP is "prepared to financially support the project" (Dkt. Nos. 1-2 at 12; 105 at 118; 106 at 51). Cf. Sage, 361 F.3d at 824 (taking into account that natural-gas company's "parent company reported earnings of $1.17 billion from its natural gas transmission division").

Finally, Western Pocahontas argues that MVP is not entitled to condemn the easements at issue in this case because it has not deposited money with the Court pursuant to Fed. R. Civ. P. 71.1(j)(2) (Dkt. No. 115 at 8-9). That rule states that "[t]he plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain." Fed. R. Civ. P. 65(c), on the other hand, requires as follows: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Unlike the exercise

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would have been of great assistance in the Court's bond-fixing analysis. This decision likely resulted from their position that setting an appropriate bond is a component of MVP's burden regarding adequate provision. See Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline, No. 7:17cv492, 2018 WL 648376, at *20 (W.D. Va. Jan. 31, 2018). Assuming that the burden is on the movant in these circumstances, the Court concludes that MVP has satisfied its burden.

of the United States's "quick-take" powers, which requires a deposit under Rule 71.1, those with eminent domain authority under the NGA must simply post a bond when granted relief under Rule 65. See UGI Sunbury LLC v. A Permanent Easement for 71.7575 Acres, No. 3:16-CV-00788, 2016 WL 7239945, at *2 (M.D. Pa. Dec. 15, 2016). Western Pocahontas's request for a cash deposit thus is without merit.

2. Separation of Powers

Some defendants argue that granting a preliminary injunction violates the separation-of-powers doctrine. More specifically, because Congress could have granted "quick-take" authority under the NGA but chose not to, the defendants contend that the Court should not consider granting equivalent relief in the form of an injunction (Dkt. Nos. 69 at 10-13; 70 at 7). Although the defendants' argument finds support in other jurisdictions, see N. Border Pipeline Co. v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998), the law of the Fourth Circuit is to the contrary.

In Sage, the Fourth Circuit expressly distinguished Northern Border, reasoning that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid," and "Congress has not acted to restrict the availability of Rule 65(a)'s equitable . . . remedy in an NGA condemnation." 361 F.3d at 824. Furthermore, in a recent unpublished opinion, our circuit court reaffirmed that Sage squarely precludes any

argument that preliminary injunctions in NGA condemnation cases are an "unconstitutional violation of separation of powers":

> The Landowners argue that Sage is distinguishable because it did not mention the words "separation of powers." However, we stated that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." In addition, we rejected the Sage landowners' argument "that only Congress can grant the right of immediate possession." Because we are bound to follow this Court's published opinions, Sage would require us to reject the Landowners' claim even if it was not moot.

Columbia Gas Transmission, LLC v. 76 Acres, More or Less, 701 F. App'x 221, at 231 & n.7 (4th Cir. 2017) (unpublished decision) (internal citation omitted). Thus, bound by Sage, the Court rejects the defendants' contention that considering MVP's request for a preliminary injunction violates the Constitution. Accord Columbia Gas Transmission, LLC v. 252.071 Acres More or Less, No. ELH-15-3462, 2016 WL 1248670, at *11-*12 (D. Md. Mar. 25, 2016).

3. Western Pocahontas Properties LP

Western Pocahontas raises several arguments that merit separate attention, and to which the provision of Fed. R. Civ. P. 71.1(c)(3) is particularly relevant:

> When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired.

As Western Pocahontas concedes (Dkt. No. 107 at 67), MVP seeks to condemn only surface easements, and has repeatedly represented that it is not condemning the mineral estate (Dkt. No. 1 at 4-6). To that end, the complaint names Western Pocahontas with regard to only one surface parcel in the Northern District of West Virginia, identified as Tax Assessor Number 6-5F-1 (Dkt. No. 104-11). Western Pocahontas objects to MVP's proposed taking of its interest in this surface estate – the temporary use of an existing access road – and demands just compensation (Dkt. No. 107 at 64, 76-77).

Notably, although Western Pocahontas does not own an interest in any other surface estate that is the subject of this condemnation action, it argues that it owns an interest in the coal beneath the Project, including those surface parcels identified in this case and owned by defendant Kincheloe Mitigation Holdings LLC ("Kincheloe"). According to Western Pocahontas, "construction of the MVP pipeline will require trenching through near-surface coal owned by [Western

Pocahontas], rendering mineable and merchantable coal unmineable" (Dkt. No. 71 at 10). As Western Pocahontas has outlined, it provided detailed information to MVP regarding the "location, ownership, and evaluations of coal affected by the pipeline." Representatives from Western Pocahontas and MVP conducted meetings at which they discussed the Project's effect on Western Pocahontas's coal. Western Pocahontas contends that, although MVP made offers regarding easements over its property, it never made an offer that "include[d] any compensation for the coal or other mineral interests" (Dkt. No. 71-4 at 4-5). It estimates that the MVP Project will dig, damage, or render unmineable $8,630,847 in coal royalty in the Northern District (Dkt. No. 71-4 at 3-6). Although the Court is troubled by Western Pocahontas's representations, two considerations convince it that these matters do not preclude the entry of summary judgment.

First, the entirety of Western Pocahontas's mineral interests are not at issue in this action. It is clear that Western Pocahontas's claimed damages include coal it believes will be affected by the entire Project in the Northern District of West Virginia. To the extent that Western Pocahontas argues MVP will affect its interests related to properties not at issue in this case, its arguments are irrelevant. Neither this Court nor Western Pocahontas may dictate the property over which MVP exercises the power of eminent domain. See Fed. R. Civ. P. 71.1 (providing procedures for property that the plaintiff wishes to procure). If work on the Project results in a compensable trespass on or taking

of property not joined in this case, Western Pocahontas may avail itself of legal remedies as it sees fit.

Second, Western Pocahontas will have the opportunity to assert its claims regarding the Kincheloe tracts during the just compensation phase of this proceeding. Pursuant to 15 U.S.C. § 717f(h), MVP may only exercise the power of eminent domain if it "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the easements. It is evident that the parties have significant disagreements concerning not only the amount of compensation due to Western Pocahontas, but also whether it is due any compensation at all with regard to the Kincheloe tracts. Cf. Columbia Gas Transmission, LLC v. Crawford, 746 F. Supp. 2d 905, 913 (N.D. Ohio 2010) (denying summary judgment where it was unclear that the parties had negotiated regarding leaseholds sought to be condemned).

Given that Western Pocahontas claims an interest in the easement sought over the Kincheloe property, it should be named as a defendant with regard to those tracts in advance of the hearing on compensation. Fed. R. Civ. P. 71.1(c)(3). Accord Sabal Trail, No. 3:16-cv-173, 2016 WL 8900100, at *9 (reasoning that claimant of electrical easement line "can be added for the compensation proceeding"). At that time, Western Pocahontas will have the opportunity to assert its interest and establish just compensation, and the Court will take its contentions into account with regard to setting an appropriate bond in this case.

In a related argument, Western Pocahontas contends that MVP "may not have joined" all necessary property and owners because other mineral interests along the Project may also be affected (Dkt. No. 71 at 12-16).[11] Western Pocahontas, however, has failed to identify a single party that should be joined in this action. The Court finds no support for the assertion that it can deny summary judgment based solely on speculation regarding parties that should be joined under Rule 71.1(c)(2)(E) and (c)(3). See Sabal Trail, No. 3:16-cv-173, 2016 WL 8900100, at *9. Should it be determined that other parties have or claim an interest prior to the trial on just compensation, they too should be added pursuant to Rule 71.1(c)(3), but their possible existence does not preclude summary judgment on MVP's right to condemn.

I. MOTION FOR IMMEDIATE ACCESS AND POSSESSION

Given that it has the authority to condemn the subject easements, MVP seeks a preliminary injunction permitting it to access and possess the easements prior to paying just compensation (Dkt. No. 5). A preliminary injunction is proper when the plaintiff can "[1] establish that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of

[11] Given that Fed. R. Civ. P. 71.1 governs who must be joined in condemnation proceedings, Western Pocahontas's argument based on Fed. R. Civ. P. 19 is misplaced (Dkt. No. 115 at 24-26).

equities tips in his favor, and [4] that an injunction is in the public interest." Winter, 555 U.S. at 20. "[A]ll four requirements must be satisfied," Real Truth About Obama, Inc., 575 F.3d at 346, and "[a] preliminary injunction shall be granted only if the moving party clearly establishes entitlement." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

The Court is mindful of the fact that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Winter, 555 U.S. at 24. Moreover, "[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." Sage, 361 F.3d at 828 (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980)). Having given heightened scrutiny to MVP's request for a mandatory preliminary injunction in light of the factors outlined in Winter, the Court concludes that the exigencies warrant such equitable relief.

A. MVP is likely to succeed on the merits.

For the reasons discussed, MVP has satisfied the requirements of 15 U.S.C. § 717f(h) and is authorized to condemn the easements at issue. It has succeeded on the merits, and thus has satisfied the first factor. See Sage, 361 F.3d at 829-30.

B. MVP is likely to suffer irreparable harm.

MVP must next establish that it will be irreparably harmed in the absence of an injunction. Winter, 555 U.S. at 20. Its harm must be likely rather than merely possible. Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 700 F. App'x 251, 263 (4th Cir. 2017) (unpublished decision) (citing Winter, 555 U.S. at 22)). After carefully reviewing the record and the parties' arguments, the Court concludes that MVP will suffer irreparable economic and noneconomic harm that cannot be wholly discounted as "self-inflicted" or capable of mitigation.

The threshold question regarding irreparable harm is whether MVP's anticipated economic losses are sufficient to warrant a preliminary injunction. As the defendants contend, typically, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction] are not enough." Di Biase, 872 F.3d at 230 (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)). However, this maxim is tied to "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date." Id.

In other words, "[w]hile it is beyond dispute that economic losses generally do not constitute irreparable harm, this general rule rests on the assumption that economic losses are recoverable." N.C. Growers' Ass'n, Inc. v. Solis, 644 F. Supp. 2d 664, 671 (M.D.N.C. 2009). A plaintiff may "overcome the presumption" against a preliminary injunction regarding wholly economic

harm, Di Biase, 872 F.3d at 230 (citing Hughes Network Syss., Inc. v. InterDigital Commc'ns Corp., 17 F.3d 691, 694 (4th Cir. 1994)), in the "extraordinary circumstances . . . when monetary damages are unavailable or unquantifiable." Handsome Brook, 700 F. App'x at 263 (citing Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551-52 (4th Cir. 1994)). No party contests that, if MVP suffers financial losses as the result of its inability to access the condemned easements, it will not be able to recover those losses in this or any other litigation. This weighs in favor of finding irreparable harm. See In re Transcon., 1:16cv02991, 2016 WL 8861714, at *8.

Treating economic harm as irreparable under the facts of this case is also consistent with the Fourth Circuit's holding in Sage, where our circuit court considered several species of irreparable harm, including economic repercussions:

> The district court found that without a preliminary injunction the Patriot Project would suffer "undue delay" and that this delay would cause "significant financial harm both to ETNG and some of its putative customers." This finding has ample support in the record. . . . Constructing a ninety-four-mile pipeline is a complex project that can only progress in phases. Certain portions of the project have to be completed before construction can begin on other portions. Therefore, as the district court recognized, "any single parcel has the potential of holding up the entire project." . . . Furthermore, ETNG is under an order from

> FERC to complete construction and have the pipeline in operation by January 1, 2005. It would not be possible to meet FERC's deadline without a preliminary injunction.
>
> ETNG is also under contractual obligation to provide natural gas to several electric generation plants and local gas utilities by certain dates. Without a preliminary injunction, ETNG would be forced to breach these contracts. ETNG's inability to satisfy these commitments would have negative impacts on its customers and the consumers they serve. . . . ETNG estimates that it would lose in excess of $5 million if construction delay caused it to breach its contractual obligations to supply gas. Finally, delay in the construction of the pipeline would hinder economic development efforts in several Virginia counties.

Sage, 361 F.3d at 828-29 (internal citation omitted); see also Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less, 768 F.3d 300, 316 (3d Cir. 2014) (holding that financial harm, along with "safety and potential liability concerns," constituted irreparable harm).

The defendants have pointed to differing standards regarding economic harm, and the Court acknowledges that some are more exacting than others. See, e.g., A Helping Hand, LLC v. Baltimore Cty., Md., 355 F. App'x 773, 776 (4th Cir. 2009) (unpublished decision) (citing cases in which economic loss "threatened the very existence of [a] business" or was "incalculable"); Air Transp. Ass'n of Am., Inc. v. Export-Import Bank of the U.S., 840 F. Supp. 2d 327, 336 (D.D.C. 2012); Nat'l

Mining Ass'n v. Jackson, 768 F. Supp. 2d 34, 52 (D.D.C. 2011) (requiring that economic harm be "certain, imminent, and unrecoverable"). Indeed, this Court has previously held that economic harm caused by a government agency cannot be irreparable. Mylan Pharm., Inc. v. U.S.F.D.A., 23 F. Supp. 3d 631, 645-46 (N.D.W.Va. 2014) (reasoning that Food and Drug Administration did not cause irreparable harm when it granted exclusivity to another generic drug manufacturer). But the binding guidance in Sage is clear. The Fourth Circuit there dealt not only with missing the relevant FERC deadline (Dkt. No. 113 at 6), but also with "increased construction costs and losses from . . . breach of gas supply contracts." Sage, 361 F.3d at 830.

Here, the FERC Certificate requires MVP to complete the Project by October 13, 2020 (Dkt. No. 1-2 at 108), but MVP plans to begin construction in February 2018 and place the pipeline in service by December 2018 (Dkt. No. 70-4 at 11). At the evidentiary hearing, MVP presented the testimony of Robert Joseph Cooper ("Cooper"), its Senior Vice President of Engineering and Construction, to establish irreparable harm.

Cooper testified that, during the course of MVP's multi-year effort to obtain FERC's permission to construct its pipeline, MVP entered into precedent agreements with shippers "to show evidence of the demand for the service the pipeline would provide" (Dkt. No. 105 at 87). FERC issued the final environmental impact statement ("EIS") regarding the Project on June 23, 2017 (Dkt. No. 1-2 at 52), after which MVP entered into its first master construction services agreement

("MSA") on July 6, 2017 (Dkt. No. 104-6 at 1). On October 10, 2017, prior to FERC's issuance of the Certificate, MVP made purchase orders under the MSA that encompassed several hundred miles of the Project. Id. at 67-132. FERC issued the Certificate on October 13, 2017, and on November 13 and November 22, 2017, MVP entered two additional MSAs and quickly made purchase orders covering the remaining 70 miles of the Project (Dkt. Nos. 1-2; 104-7; 104-8).

When MVP commences construction, the Project will proceed in 11 distinct segments along the pipeline's length; three of those segments are located in the Northern District. After felling trees on properties used for service facilities and access roads, as well as those with endangered species, MVP's contractors will work in a "linear" fashion to excavate and install pipeline along each of the 11 segments (Dkt. Nos. 5-1 at 4-5; 105 at 100-01). If MVP is forced to break from this method of construction, it will face financial penalties from its contractors (Dkt. No. 105 at 101). MVP's construction schedule hinges on the fact that certain tree clearing must be complete by March 31, 2018, to comply with regulations of the United States Fish and Wildlife Service that protect the habitat of bats and migratory birds (Dkt. No. 5-1 at 6).

If MVP does not complete the necessary tree clearing by that time, it will be unable to do so until November 15, 2018. MVP claims that delaying the entire Project until November 2018 will result in the loss of $40 to $50 million in revenue each month that the Project is not in service, up to $200 million in delay and

cancellation fees, and $40 to $45 million in otherwise unnecessary administrative and carrying costs (Dtk. Nos. 70 at 11; 105 at 117-18). In addition, being forced to construct the pipeline during the winter months would increase costs and require additional environmental measures (Dkt. No. 105 at 115).

Even assuming that these economic harms can be characterized as irreparable, the defendants contend that they are not likely to occur (Dkt. No. 70 at 14). They argue, among other things, that 1) MVP's claim for lost revenue is actually only delayed revenue because its 20-year transportation agreement does not commence until service begins; 2) most revenue will come from affiliate companies, so there is no actual loss; 3) MVP can mitigate contractor penalties by directing work on other portions of the pipeline or invoking force majeure clauses; and 4) administrative carrying costs result from MVP's schedule or would be incurred to remain in business (Dkt. No. 70 at 14-24).

These arguments relate only to the degree of irreparable economic harm; that MVP might be capable of mitigating its unrecoverable losses does not render them irrelevant. For instance, in Sage, the pipeline company estimated that it would lose only "$5 million if construction delay caused it to breach its contractual obligations to supply gas." 361 F.3d at 829. The Fourth Circuit found this harm to be irreparable when coupled with the reality that delayed construction would mean the pipeline's "inability to satisfy [its] commitments" and lead to "negative impacts on . . . customers and the consumers they serve." Id. Therefore, even a drastically

lower amount of loss than estimated by MVP is irreparable in light of the effect that delayed construction would have on end users. Accord Sabal Trail, No. 3:16-cv-173, 2016 WL 8900100, at *11 (finding $1,048,000 loss to be significant despite being "such a small percentage of the overall project cost").

Finally, the defendants argue that the Court should discount the urgency of MVP's request because it could still meet FERC's deadline if it commenced construction in November 2018 (Dkt. No. 117 at 2). In other words, the Court should narrowly analyze whether MVP needs access to their properties now or whether it still can meet FERC's deadline if granted access later. This argument fails to account for the fact that MVP will breach its contractual obligations if it does not commence construction in February 2018, and that MVP's decision to set such a schedule was entirely reasonable under the circumstances.

Of course, an injunction is usually inappropriate where the movant fails to show "that [it] availed [itself] of opportunities to avoid the injuries of which [it] now complain[s]," Di Biase, 872 F.3d at 235, and courts have declined to consider harms that are self-inflicted by the moving party. See, e.g., Salt Lake Tribune Publ'g Co., LLC v. AT&T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003); Davis v. Mineta, 302 F.3d 1104, 1116 (10th Cir. 2002) ("As we have previously concluded, the state entities involved in this case have 'jumped the gun' on the environmental issues by entering into contractual obligations that anticipated a pro forma result."); Livonia Props. Holdings, LLC v. 12840-12976 Farmington Road

Holdings, 399 F. App'x 97, 104 (6th Cir. 2010) ("[S]elf-inflicted harm is not the type that injunctions are meant to prevent.").

As have other courts, this Court recognizes that a FERC-governed, natural-gas company's "self-inflicted" contracts and deadlines are not driven solely by its desire to place the pipeline into service as quickly as possible. See Transcon., 1:16cv02991, 2016 WL 8861714, at *9. That the FERC deadline is not yet looming, however, does not negate the reality that the MVP Project is and always has been time sensitive. See, e.g., Sage, 361 F.3d at 830 ("ETNG could not meet FERC's deadline without immediate possession."); Columbia Gas Transmission, LLC v. 171.54 Acres of Land, More or Less, No. 2:17cv70, 2017 WL 838214, at *7 (S.D. Ohio Mar. 3, 2017) (acknowledging that the prospect of missing FERC's deadline is irreparable harm). The process by which natural-gas companies obtain approval and construct under the NGA necessitates forethought and a degree of speculation.

For instance, MVP entered shipping contracts to demonstrate to FERC that there was a market demand for its Project (Dkt. No. 105 at 87), and it made the business decision to secure its primary contractor for the Project in advance of receiving FERC approval (Dkt. No. 104-6). It did so to ensure that necessary skilled workers and general contractors would be available to work on the Project, considering "it likely that it would be difficult or perhaps impossible to get the workers" if it delayed (Dkt. No. 105 at 110-11). In fact, throughout the bidding process, MVP faced a

smaller and more expensive pool of contractors. Id. at 111-12. Undoubtedly, MVP decided to accept the risk that FERC would not approve its Project, but FERC did approve the Project, and MVP is appropriately prepared for construction.

In addition, other practical considerations underscore the wisdom of MVP's decision to issue purchase orders and prepare for construction. Especially given the likelihood of trials on just compensation, this litigation may not be complete well enough in advance of the FERC deadline. Testimony at the evidentiary hearing established that MVP can construct the Project in approximately 12 months. Given that the FERC Certificate requires MVP to complete the Project by October 2020 (Dkt. No. 1-2 at 108), and assuming there are no other delays, MVP must commence construction no later than the time the tree-clearing window opens in November 2019. The prospect that this litigation could be complete in that time, rendering equitable relief entirely unnecessary, is "unfounded" and "fanciful." Columbia Gas, No. ELH-15-3462, 2016 WL 1248670, at *15.

Currently, there are 30 defendants and 13 parcels of land at issue in the case. Some defendants and parcels may be joined for trial on just compensation, but requiring MVP to forego equitable relief would necessitate several trials before construction could begin. "It is not at all likely that this Court could accommodate, in the requisite time, the need for multiple trials, given the Court's busy docket." Id. Even if the Court's other obligations were less pressing, it is possible that "some

or all of the Landowners may appeal the outcome of the trials, which could add to the delay." Id. (providing example of case that remained pending on appeal more than two years after its original filing).[12]

C. The balance of equities tips in MVP's favor, and an injunction is in the public interest.

The third and fourth elements of the preliminary injunction test require MVP to establish clearly that the balance of equities tips in its favor and an injunction is also in the public interest. Winter, 555 U.S. at 20. In cases involving significant public interest, courts may "consider the balance of the equities and the public interest factors together." As the Fourth Circuit has explained:

> Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, "pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). This is because "courts of equity may go to greater lengths to give 'relief

[12] Moreover, contrary to the defendants' argument, "lack of FERC approval" is not the reason that MVP might be delayed (Dkt. No. 113 at 17). Cooper testified that MVP cannot request approval to proceed along the entire length of the Project until it has the legal authority to access the necessary property (Dkt. No. 106 at 32) ("[I]t's my understanding in that case they're not going to let me go to work on the properties I don't have access to.").

> in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 826 (4th Cir. 2004) (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937)).

Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 602 (4th Cir. 2017). Especially in light of the significant public interest at issue, the irreparable harm that MVP will likely suffer outweighs the effect of an injunction on the defendants.

Some defendants argue that MVP will significantly and irreparably burden their property if permitted early access (Dkt. Nos. 70 at 28-32; 71 at 11-12).[13] They acknowledge, however, that completion of the Project will have the same impact on their property whether MVP is granted immediate access or commences construction only after landowners have received just compensation. The fact that an injunction will deprive the defendants of their land now rather than later is not "a type of an inherent harm that is irreparable," but rather is an ordinary burden of citizenship. Sage, 361 F.3d at 829. At bottom, it is the NGA and the FERC Certificate that are responsible for the defendants' injuries, and delaying access until just compensation is paid will do nothing to alleviate those

[13] At the evidentiary hearing, the defendants presented testimony from a hydrogeologist and representatives of two affected landowners regarding the effects of the Project on various properties to be condemned (Dkt. No. 107).

burdens. See id. ("This is simply a timing argument. . . ."); Columbia Gas, 768 F.3d at 316 ("The Landowners have not stated any concrete injury other than the loss of the easements over their land, which will definitely occur, whether or not we grant Columbia immediate possession of the easements.").

Nonetheless, in light of pending challenges to the Project, the defendants argue that the Court should not accelerate the harm that MVP will cause to their property. They point to the fact that the FERC Certificate was a 2-1 decision, which issued over the dissenting commissioner's opinion that the Project may not be in the public interest (Dkt. No. 1-2 at 137). Moreover, they represent that requests for rehearing and a stay are pending before FERC, which will remain subject to appeal by the adversely affected party (Dkt. No. 69 at 7-8). The defendants contend that, depending on the outcome of these proceedings, the Project may yet be delayed, modified, or nullified in its entirety. Given the remaining permits and approvals that MVP must obtain (Dkt. No. 1-2 at app. C), they speculate that the Project possibly may never commence or be completed (Dkt. No. 70 at 31-32).

The defendants advance these arguments, hoping to distinguish the instant case from the circumstances of Sage, where there was no indication that the Certificate at issue remained subject to challenge before FERC or a court of appeals. 361 F.3d 808. Even taking notice of this distinction, the Court is not persuaded by the defendants' arguments. As discussed, FERC did not condition MVP's exercise of eminent domain under

the Certificate on its fulfillment of any environmental requirement, and it has not stayed the Certificate in light of pending requests for rehearing. Although the defendants contend that FERC's tolling orders are improper (Dkt. No. 70 at 38-40), they may not challenge those procedures in this Court, but must appeal to the circuit court. Both FERC and the court of appeals are fully aware that, so long as the Certificate remains in effect, MVP may seek equitable relief in this Court.

With regard to the public interest, the defendants raise various concerns about the importance of their Fifth Amendment rights, environmental permits that have yet to be obtained, and the Project's effect on cultural interests (Dkt. No. 70 at 35-38). For the most part, these are matters upon which FERC has already passed judgement or that should be raised before FERC, and the Court affords them little weight.

Western Pocahontas also argues that it and other parties, including the public at large, will be harmed by an injunction because MVP intends to trespass on mineral interests that it has not condemned (Dkt. No. 115 at 17-18, 23-24). Indeed, the Court is troubled by the suggestion that MVP's Project will affect such mineral interests. It would be impractical, however, to litigate mineral ownership issues along the entire Project to determine whether immediate access is in the public interest. Moreover, even if Western Pocahontas had presented evidence of other mineral owners, the balance of equities tips in MVP's favor here too: unlike the irreparable harm caused by delay, parties injured by trespass may pursue legal action against MVP. Cf. Di

Biase, 872 F.3d at 230 (reasoning that economic harms are not irreparable if they can be recovered).

There simply is no reason to depart from the Fourth Circuit's reasoning in Sage:

> Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. As the district court observed, FERC conducted a careful analysis of the . . . [p]roject and determined that the project will promote these congressional goals and serve the public interest. The project serves the public interest because, among other things, it will bring natural gas to portions of southwest Virginia for the first time. This will make gas available to consumers, and it will help in the efforts of local communities to attract much-needed new business. On a larger scale, the pipeline will make gas available for electric power generation plants. A delay in construction would postpone these benefits.

Sage, 361 F.3d at 830 (internal citation omitted).[14]

Here, FERC concluded that "the public at large will benefit from increased reliability of natural gas

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[14] Of course, the Court is cautious in applying the reasoning in Sage regarding public interest. The Fourth Circuit's former reasoning Blackwelder did not require courts to consider public interest "at length," while Winter requires that courts "pay particular regard for the public consequences." Real Truth About Obama, Inc., 575 F.3d at 347. In this case, however, the "public consequences" all weigh in favor of an injunction.

supplies. Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product" (Dkt. No. 1-2 at 28). The Court will not second-guess FERC's determination that MVP's project will benefit the public need for natural gas as the defendants request (Dkt. No. 70 at 34-35); FERC possesses the expertise necessary to make that determination. There can be no dispute that delaying MVP's completion of the project will delay the introduction of the benefits identified by FERC. Moreover, expediting construction will also hasten the creation of approximately 6,000 temporary jobs and millions of dollars in yearly property taxes (Dkt. Nos. 105 at 110; 106 at 6).

In summary, the Court has carefully considered each of the four factors articulated in Winter, and has given them heightened scrutiny in light of MVP's request for a mandatory preliminary injunction. MVP has carried its burden to clearly establish that it will be irreparably harmed in the absence of a preliminary injunction, that this harm is not outweighed by those concerns identified by the defendants, and that granting immediate access is in the public interest. Therefore, the Court **GRANTS** MVP's motion for immediate access and possession of the easements at issue.

VII. CASH DEPOSIT AND BOND

Having determined that granting immediate access is appropriate in this case, the Court must determine the conditions under which such access should be

granted, bearing in mind the necessity of giving adequate provision to the defendants.

A. The Kincheloe Properties

With regard to the Kincheloe properties, the Court will require MVP and Western Pocahontas to submit further information prior to permitting physical possession. As discussed, although not named as a defendant with regard to the Kincheloe properties, Western Pocahontas claims an interest in the easements and will be entitled to present evidence regarding just compensation. Western Pocahontas claims that the Project generally will deprive it of $8,630,847 in coal royalty in the Northern District, which apparently encompasses far more property than is at issue in this case, while MVP claims only that it is not condemning the rights to the coal estate. Neither of these arguments is sufficient to allow the Court to determine an appropriate security.

Therefore, MVP and Western Pocahontas are each **ORDERED** to file supplemental briefs no later than 14 days following entry of this Memorandum Opinion and Order. These briefs shall be limited to ten pages in length, and shall set forth the party's position regarding the value of the interest that Western Pocahontas claims in the easements over the Kincheloe properties at issue. The parties are expected to support their assignment of value with appropriate exhibits.

B. The Remaining Properties

As to the remaining properties, MVP may immediately access and possess the relevant easements after the following conditions have been satisfied:

1) Not later than seven (7) days after entry of this Memorandum Opinion and Order, MVP shall submit a separate proposed order for each of the properties, granting MVP the immediate right of entry as to the easements in the complaint and the FERC Certificate and also containing any requirements set forth in the FERC Certificate that are unique to that parcel of land. The proposed orders need not contain general requirements applicable to all parcels. MVP shall serve a copy of each proposed order on counsel for the affected landowner(s) or on any affected pro se defendant.[15] If the landowner objects to the order's form or content, the objection must be filed in writing with the Court not later than seven (7) days after service of the proposed order. If no objection is filed within that time, and the order is sufficient and proper, the Court may enter the order granting immediate possession without further notice.

2) Pursuant to the Federal Rules of Civil Procedure 65(c), 67, and 71.1(j)(l), the right to immediate possession of the easements on these properties is contingent upon MVP satisfying two requirements as to security. First, although the Court has concluded that a cash deposit is not required, abiding by the provisions of Fed. R. Civ. P. 71.1(j) will assist

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[15] Although several defendants remain unrepresented, none has made an appearance pro se.

in rendering adequate provision to the defendants in this case. Therefore, MVP must deposit with the Clerk of Court ("Clerk") a certified check in an amount of three times the appraised amount for each of the easements sought.[16]

3) Second, MVP shall obtain and post a surety bond in the total amount of two times the appraised amount for the easements sought. The bond shall be conditioned on MVP's payment of any and all final compensation damages awarded in excess of the deposited amount, and if such payments are made, then the bond shall be null and void upon full payment having been made as to all of the properties.

4) Both the multiplier for the deposit and the bond take into account Rice's criticism of Holmes's appraisal report, particularly the fact that he found it unreliable and that the ultimate Yellow Book appraisal in this case will be more thorough. The total value is designed to serve as sufficient security to protect the interests of the landowners in the event any just compensation awarded for one or more of the easements exceeds the appraised amount for such property or properties. The multiplied value, the bond amount, or the two combined, shall not be construed as any indication of the floor or ceiling of the ultimate amount of just compensation, if any, to which any interest-holder is entitled. Instead, the eventual compensation

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[16] For easements that MVP has appraised as worth $3,000 or less, MVP shall nonetheless base the deposit and bond on a presumed value of $3,001. 15 U.S.C. § 717f(h) (granting jurisdiction over actions where the "amount claimed by the owner of the property to be condemned exceeds $3,000").

award by this Court, a jury, or a compensation commission may be lower, higher, or the same as the amount MVP is required to provide as security.

5) MVP shall remit the deposit amounts to the Clerk for deposit into the registry of this Court. The Clerk shall deposit the amounts received into the registry of this Court and then, as soon as the business of the Clerk's office allows, the Clerk shall deposit these funds into the interest-bearing Court Registry Investment System administered by the Administrative Office of the United States Courts as Custodian, pursuant to Fed. R. Civ. P. 67.

6) MVP shall also file, at the time it remits any deposit or deposit(s), a chart broken down by easement that identifies: (i) each appraised property for which funds are being deposited; (ii) the corresponding MVP parcel numbers; (iii) the corresponding paragraph numbers in the amended complaint; (iv) the amount of the deposit for that specific property (which will be three times the appraised amount); (vi) the amount of the bond that relates to that specific property (which will be two times the appraised amount); and (vii) all persons or entities who own an interest in the property and the percentage of each person's interest. The information shall also be emailed to the Court in an Excel spreadsheet format. If any party disputes the accuracy of any information in the chart, he shall file an objection not later than seven days after service of the chart. Additionally, all parties – including MVP and any defendants who have an interest in any of the deposited funds – have a continuing duty, until the conclusion of all proceedings, to advise the Court if the information in any

filed chart changes. This includes, in particular, a duty to advise the Court if there is any change for any parcel in the number of owners or the percentages of their ownership interests.

7) Pursuant to Fed. R. Civ. P. 71.1(j)(2), the deposit of any funds for an identified defendant's property shall constitute MVP's agreement that the interest-holder can access up to the base amount of the appraisal or one-third of the deposited amount, whichever is greater. Such withdrawal is at the landowner's peril, and all defendants are advised that, if the ultimate compensation award is less than the amount withdrawn, the interest-holder will be liable for the return of the excess with appropriate interest. If multiple defendants claim an interest in any of the easements, each defendant claiming an interest can withdraw only its proportionate share of the funds identified for that easement and attributable to its claimed interest.

8) Each of the defendants shall be entitled to draw from one-third of the funds deposited by MVP with the Clerk its ownership share of the amount of estimated just compensation deposited by MVP for the easement which burdens lands in which such defendant owns or claims an interest, subject to the warnings above, and provided that each such defendant satisfies all conditions of this Memorandum Opinion and Order and any other direction of the Court. Furthermore, such defendants shall be entitled to interest calculated pursuant to 28 U.S.C. § 1961 from and after the date of entry of this Memorandum Opinion and Order on the difference between the principal amount deposited with the Court by MVP and the amount of just

compensation determined by the Court, if any, if such determination of just compensation to be paid exceeds the amount deposited by MVP.

9) A defendant who wishes to draw on the deposited funds shall file a motion for disbursement of funds with the Court and shall include a certificate of service evidencing service of the motion on all other persons with a property interest in the same parcel or easement, if any. Any person objecting to the disbursement shall have fourteen days to file a written objection with the court. The Court will then resolve any objections and issue an order on the withdrawal request. If there are no other persons with an interest in the property, disbursement will be permitted only by a separate order of the Court, but the period for objections will not apply.

VII. CONCLUSION

For the reasons discussed, the Court:

1) **DENIES** the Motion for Stay of Proceedings (Dkt. No. 31);

2) **GRANTS** MVP's Motion to Strike (Dkt. No. 28);

3) **DENIES AS MOOT** Defendants' Motion to Dismiss (Dkt. No. 23-1);

4) **GRANTS** MVP's Motion for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned for Construction of the MVP Project (Dkt. No. 5);

5) **DIRECTS** MVP and Western Pocahontas to file further information regarding the Kincheloe properties as set forth above; and

6) **DIRECTS** MVP to deposit funds and a surety bond prior to accessing and taking possession of the remaining properties as set forth above.

It is so **ORDERED**.

The Court **DIRECTS** the Clerk to transmit copies of this Order to counsel of record.

DATED: February 2, 2018.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MOUNTAIN VALLEY PIPELINE, LLC,

Plaintiff,

v.

AN EASEMENT TO CONSTRUCT, OPERATE AND MAINTAIN A 42-INCH GAS TRANSMISSION LINE ACROSS PROPERTIES IN THE COUNTIES OF NICHOLAS, GREENBRIER, MONROE, and SUMMERS, WEST VIRGINIA, et al.,

Defendants.

Civil Action No. 2:17-cv-04214

MEMORANDUM OPINION AND ORDER

(Filed Feb. 21, 2018)

Pending is plaintiff Mountain Valley Pipeline, LLC's ("Mountain Valley") motion for partial summary judgment and immediate access to and possession of the easements condemned, (ECF #6), filed October 27, 2017. Also pending are three motions to dismiss, three motions to strike, and one motion to stay, each of which also will be discussed herein.

I. Background

A. Legal Framework

The Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq., outlines the power to regulate and approve new pipeline construction projects. At the outset, construction of a new pipeline cannot commence until a gas company obtains from the Federal Energy and Regulatory Commission ("FERC") a certificate of public convenience and necessity (a "certificate"). 15 U.S.C. § 717f(c)(1)(A). FERC may issue a certificate

> authorizing the whole or any part of the operation . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the NGA] and the requirements, rules, and regulations of [FERC] thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.

Id. § 717f(e). FERC also "[has] the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Id.

Once FERC issues a certificate, the certificate holder has the power of eminent domain over properties that are necessary to complete an approved project and that the holder has been unable to acquire by

agreement. See id. § 717f(h). The NGA mandates that condemnation proceedings "shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." Id. The United States Court of Appeals for the Fourth Circuit holds "that this state procedure requirement has been superseded by [Federal Rule of Civil Procedure 71.1]." E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 822 (4th Cir. 2004).

The Fourth Circuit's opinion in East Tennessee Natural Gas Co. v. Sage dictates the progression of condemnation and immediate possession actions under the NGA. In Sage, the Fourth Circuit approached the following question: "[W]hether a court may use its equitable powers to grant a preliminary injunction allowing immediate possession" in an NGA condemnation action even though the NGA "is silent on the issue of immediate possession." Id. at 823. The court answered in the affirmative and explained that

> once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.

Id. at 828.

B. Factual and Procedural Background

FERC issued Mountain Valley's certificate on October 13, 2017, authorizing construction of a 303.5-mile

long natural gas pipeline of 42-inches in diameter. (See Compl. Ex. B, ¶¶ 7, 310(A).) The pipeline originates in Wetzel County, West Virginia, and terminates in Pittsylvania County, Virginia. (Id. ¶ 7.) In the Southern District of West Virginia, the pipeline traverses properties in Nicholas, Greenbrier, Summers, and Monroe Counties and specifies a compressor station in Fayette County. The certificate requires Mountain Valley to satisfy a variety of conditions, including a three-year construction and in-service deadline and a number of environmental prerequisites to be met before and during construction. (See id. ¶ 310(C)(1), App. C.)

The easements sought by Mountain Valley are a necessary predicate to building the pipeline. (Declaration of Robert J. Cooper on Access for Construction ("Cooper Construction Decl.") ¶ 10.) Although Mountain Valley obtained some of the necessary easements by agreement prior to filing this action, it failed to acquire many in the four-county region noted above despite offering at least $3,000 for each one. (Id. ¶¶ 7-8.) Thus, Mountain Valley initiated this action in this court on October 24, 2017, pursuant to the NGA and Federal Rule of Civil Procedure 71.1.

Soon thereafter, on October 27, 2017, Mountain Valley filed three motions: Motion for Partial Summary Judgment and Immediate Access to Survey the Easements Condemned (ECF #4); Motion for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned for Construction of MVP Project (ECF #6); and Motion for

Expedited Hearing on Motions for Partial Summary Judgment and Immediate Access to and Possession of the Easements Condemned (ECF #8). The court permitted limited discovery until January 12, 2018, and set a briefing schedule for the surveying and construction motions. (ECF #143.) On January 12, 2018, the court granted Mountain Valley's request for immediate access to survey "to the extent that it [sought] access to the properties . . . that ha[d] not already been surveyed by agreement of the parties, and for the limited purposes" of staking environmental and cultural resources. (ECF #186, at 2.) On January 24, 2018, briefing concluded on the pending motion, wherein Mountain Valley requests partial summary judgment of its power of eminent domain and a preliminary injunction granting it immediate possession of the condemned properties for construction activities. The court held a preliminary injunction hearing on February 7, 2018. The issues are now ripe for disposition.

II. Motions to Dismiss, Strike, and Stay

Before addressing the motion for partial summary judgment and preliminary injunction, the court must first address the various parties' motions to dismiss,

strike, and stay.[1] The landowners[2] have filed three motions to dismiss, (ECF #78, 120, 203), and Mountain Valley has moved to strike each one, (ECF #116, 157, 212). Mountain Valley aptly points out that the motions to dismiss should be denied because Rule 71.1 does not permit such motions in condemnation actions. (See, e.g., ECF #117, at 1-2.)

Rule 71.1 expressly states that, other than an answer, "[n]o other pleading or motion asserting an additional objection or defense is allowed." Fed. R. Civ. P. 71.1(e)(3). The Advisory Committee Notes explain that subdivision (e) "[d]epart[s] from the scheme of Rule 12, . . . requir[ing] all defenses and objections to be presented in an answer." Fed. R. Civ. P. 71.1(e) advisory committee notes. The notes continue that subdivision (e) "does not authorize a preliminary motion," of which "[t]here is little need . . . in condemnation proceedings." Id. Correspondingly, the Fourth Circuit unequivocally holds that, under Rule 71.1, "no other pleading besides

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[1] Additionally, Warrior Energy Resources, LLC, ("Warrior") moved to intervene on December 22, 2017. At the February 7 hearing, counsel for Warrior represented to the court that it was close to a settlement agreement with Mountain Valley and requested that its motion be held in abeyance for the time being. Additionally, at that time, Warrior withdrew its objections to Mountain Valley's motion for partial summary judgment and preliminary injunction.

[2] As it is used here and throughout this memorandum opinion and order, "landowners" refers to one or more of the defendant-landowners in this action. Because the landowners often make overlapping arguments, and because there are a great number of landowners, specific reference to each landowner would needlessly confound the analysis.

the answer is contemplated." Wash. Metro. Area Transit Auth. v. Precision Small Engines, 227 F.3d 224, 228 n.2 (4th Cir. 2000); accord Atlantic Seaboard Corp. v. Van Sterkenburg, 318 F.2d 455, 458 (4th Cir. 1963) ("[Rule 71.1's] prohibition of any pleading other than an answer is clear and unequivocal. The preliminary motions tendered here were unallowable."). Accordingly, Mountain Valley's motions to strike are granted, and the motions to dismiss are denied as stricken.

Next, the landowners filed a motion for stay of proceedings. Again, Mountain Valley correctly notes that the NGA delineates when and how a certificate may be stayed. (See ECF #160, at 2-7.) The NGA directs that

> [t]he filing of an application for rehearing . . . shall not, unless specifically ordered by [FERC], operate as a stay of [FERC's] order. The commencement of [appellate] proceedings [in the courts of appeal] shall not, unless specifically ordered by the court, operate as a stay of [FERC's] order.

15 U.S.C. § 717r(c). Thus, the court lacks discretion to order a stay of Mountain Valley's certificate. Accord, e.g., Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth., 2 F. Supp. 2d 106, 109 (D. Mass. 1998) ("The NGA itself directs that an order by FERC not be stayed unless either FERC itself – in the context of a rehearing – or the reviewing Court of Appeals specifically orders a stay.").

Even so, the landowners argue that the court retains the equitable power to stay "proceedings on

[Mountain Valley's] equitable motion for preliminary injunction until FERC concludes its 'further consideration' of Landowners' request for rehearing." (ECF #169, at 4.) Fundamentally, the landowners ask the court to deny Mountain Valley's motion for preliminary injunction – time-sensitive by its very nature – under the guise of a stay based on the alleged irreparable harms that they may face if Mountain Valley is granted immediate possession of the easements. Assuming that the court has such authority, which it does not pursuant to the NGA, the court cannot grant the relief requested. The Supreme Court instructs that four factors are to be considered in a preliminary injunction analysis, while the landowners implore the court for an effective denial of Mountain Valley's motion based upon only one – balance of the equities. See Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7, 20, 25-26 (2008). The motion for stay of proceedings is denied.

III. Motion for Partial Summary Judgment of Power of Eminent Domain Under the NGA

A. Governing Standard

Pursuant to Federal Rule of Civil Procedure 56(b), "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"As to materiality, . . . [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citing 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2725 (2nd ed. 1983)).

Regarding genuineness, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The moving party has the initial burden of "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); see also Dash v. Mayweather, 731 F.3d 303, 311 (4th Cir. 2013). If the movant carries its burden, the non-movant must demonstrate that "there is sufficient evidence favoring [it] for a jury to return a verdict" in its favor. Anderson, 477 U.S. at 249 (citation omitted); see also Dash, 731 F.3d at 311. "Although the court must draw all justifiable inferences in favor of the nonmoving party, the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." Dash, 731 F.3d at 311 (citing Anderson, 477 U.S. at 252, and Stone v. Liberty Mut. Ins. Co., 105 F.3d 188, 191 (4th Cir. 1997)).

B. Discussion

Mountain Valley moves the court for entry of partial summary judgment that it has the power of eminent domain under the NGA. The NGA confers the power of eminent domain when (1) the condemnor has a certificate authorizing construction of a project; (2) the property interests to be condemned are necessary to complete the project; and (3) the condemnor has been unable to acquire the necessary property interests by agreement. See id. § 717f(h). Mountain Valley argues that the undisputed facts demonstrate its satisfaction of all three elements.[3] (See generally ECF #7.) The court agrees.

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[3] There is an additional prong to whether the court can entertain Mountain Valley's condemnation action. The NGA states "[t]hat the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000." Id. Mr. Cooper swears that each landowner was offered at least $3,000 for the associated easement, (Cooper Construction Decl. ¶ 8), which the court presumes to be a sum in excess of $3,000 for each property. The courts appear to agree that an offer exceeding $3,000 satisfies the NGA's jurisdictional test. See ANR Pipeline Co. v. 62.026 Acres of Land, 389 F.3d 716, 717-19 (7th Cir. 2004) (finding that the landowners "claimed" in excess of $3,000 when they turned down an offer of $4,872 in an effort to proceed in state court); Dominion Energy Carolina Gas Transmission, LLC v. 1.169 Acres, 3:16-cv-01974-JMC, 2018 WL 330012, at *2 (D.S.C. Jan. 8, 2018) (finding the jurisdiction amount satisfied where the condemnor stipulated that the property values exceeded $3,000); In re Algonquin Nat. Gas Pipeline Eminent Domain Cases, No. 15-cv-5988, 2015 WL 10793423, at *5, 10 (S.D.N.Y. Sept. 18, 2015) (finding the jurisdictional amount satisfied when the offer exceeded $3,000 even though the condemnor's appraiser valued the land at less than $3,000).

The defendants mount a variety of attacks against Mountain Valley's condemnation authority. First, however, the court must determine whether it has the power to hear these challenges. The NGA defines the power of review over FERC orders. It sets forth a procedure that begins with FERC, then the courts of appeals, and lastly the Supreme Court. See 15 U.S.C. § 717r(a), (b). Accordingly, the Fourth Circuit holds that

> 15 U.S.C. § 717r(b)[ ] vests exclusive jurisdiction to review all decisions of [FERC] in the circuit court of appeals; there is no area of review, whether relating to final or preliminary orders, available in the district court. And this has been the uniform construction given the statute.

Consolidated Gas Supply Corp. v. FERC, 611 F.2d 951, 957 (4th Cir. 1979) (citations omitted). In other words, the NGA's review provision extends to "all issues inhering in the controversy, and all other modes of judicial review;" "all objections to the [certificate] . . . must be made in the Court of Appeals or not at all." City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-36 (1958) (parsing a judicial review section that is virtually identical to the NGA's); see also Williams Nat. Gas Co. v. City of Oklahoma City, 890 F.2d 255, 262 (10th Cir. 1989) ("We would be hard pressed to formulate a doctrine with a more expansive scope.").

It follows, then, that this court does not have jurisdiction to hear any of the landowners' challenges that would require the court to undertake review of the

certificate or that which FERC is authorized to consider thereunder.[4] See Williams Nat. Gas Co., 890 F.2d at 262 ("Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding."). One district court has described its limited review authority as "determining whether (1) the certificate of public convenience and necessity is 'facially valid'; and (2) the property sought to be condemned is within the scope of the certificate" – in other words, ensuring that the certificate holder is not committing a fraud on the court and the condemnees. Alliance Pipeline v. 4.500 Acres of Land, 911 F. Supp. 2d 805, 813 (D.N.D. 2012) (citations omitted).

Many of the landowners' challenges to Mountain Valley's condemnation authority are improper in this court. Those challenges can be summarized as follows: FERC has erroneously interpreted its congressional authority to condition certificates, (ECF #202, at 3 n.4); there is not yet a "public necessity" for the taking as required by the Fifth Amendment because Mountain

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[4] Furthermore, even if one of the challenges brought by the defendants falls outside the NGA's review provision, the Western District of Virginia recently held that a district court "would still lack jurisdiction over [challenges to a certificate] based on an application of the so-called Thunder Basin framework." Berkley v. Mountain Valley Pipeline, LLC, No. 7:17-cv-00357, 2017 WL 6327829, at *5 (W.D. Va. Dec. 11, 2017) (Dillon, J.). Thunder Basin recognizes that "Congress can also impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court" – in this case, the courts of appeals. Bennett v. SEC, 844 F.3d 174, 178 (4th Cir. 2016) (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994)).

Valley has not satisfied all of the conditions precedent to construction, and Mountain Valley thus lacks the substantive power of eminent domain, (ECF #155, at 4-5; ECF #196, at 5; ECF #202, at 1-5; ECF #206, at 2-4); if Mountain Valley lacks the power of eminent domain, it cannot show that the landowners' property interests are necessary, (ECF #155, at 5); and Mountain Valley has not proven that it can pay just compensation as required by the Fifth Amendment, (ECF #202, at 5-7).

Congress has forbidden the district courts from considering any of these arguments because each would require review of FERC's order. See Consolidated Gas Supply Corp., 611 F.2d at 957. Indeed, Mountain Valley cites a series of district court opinions reinforcing that point, (see ECF #208, at 4-7, 13-16, 19-20 (citing cases)), and the court has not found any opinions holding otherwise. Although the landowners bring some debate as to the scope of matters under FERC's purview, the range of FERC's authority is exceptionally broad: it is comprehensive of "all factors bearing on the public interest" as they pertain to the regulation of natural gas projects. Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959); accord 15 U.S.C. § 717(a) ("[I]t is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the

public interest."). Accordingly, the aforementioned arguments are improper here.

The remainder of the landowners' assertions are also readily discarded. The landowners insist that the various challenges that Mountain Valley faces before FERC and the courts of appeals counsel against the granting of partial summary judgment. (ECF #206, at 3-4.) As explained earlier, a FERC order remains in effect unless FERC or a court of appeals issues a stay, see 15 U.S.C. § 717r(c), and no such stay has been issued here.

The landowners contend that Mountain Valley did not negotiate the purchase of their property interests in good faith, and that there should be a good-faith negotiation requirement under the NGA before the grant of condemnation authority. (ECF #155, at 6; ECF #205, at 10-12, 14-16.) The landowners cite two out-of-circuit district court opinions for the proposition that the NGA requires condemnors to negotiate in good faith. See Humphries v. Williams Nat. Gas Co., 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999) ("The court does not believe that [the condemnor's] post-entry offer to compensate [the condemnee] complies with either the letter or spirit of § 717f(h). . . ."); Transcon. Gas Pipe Line Corp. v. 118 Acres of Land, 745 F. Supp. 366, 369 (E.D. La. 1990) (stating that Louisiana law requires a condemnor to negotiate in good faith). Mountain Valley, on the other hand, references overwhelming authority – including many opinions from district courts in the Fourth Circuit – that the NGA does not contain a good-faith negotiation requirement. (See ECF #208, at 9-11

(citing inter alia, Hardy Storage Co. v. Property Interests Necessary to Conduct Gas Storage Operations, No. 2:07CV5, 2009 WL 689054, at *5 (N.D. W. Va. Mar. 9, 2009); Columbia Gas Transmission Corp. v. An Easement to Construct, Operate and Maintain a 24-Inch Pipeline, No. 5:07cv04009, 2008 WL 2439889, at *2 n.4 (W.D. Va. June 9, 2008)).) These opinions comport with the language of the NGA and Rule 71.1, which make no reference to good faith. See 15 U.S.C. § 717f(h); Fed. R. Civ. P. 71.1. Mountain Valley made offers to purchase the necessary easements from the defendants, and whether those offers were in good faith is of little moment inasmuch as a fair and reasonable award can be adjudicated. But see Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cty., 550 F.3d 770, 776 (9th Cir. 2008) (requiring the condemnor under the NGA to "establish that it engaged in good faith negotiations with the landowner" (citation omitted)).

Last, the landowners assert that partial summary judgment should be denied because Mountain Valley has not yet posted a sufficient cash deposit to ensure just compensation. (ECF #205, at 12.) This assertion is premature inasmuch as the posting of assurance is a prerequisite to possession, not recognition of the power of eminent domain under the NGA. See Sage, 361 F.3d at 824 (citing Cherokee Nation v. S. Kan. Ry. Co., 135

U.S. 641, 659 (1890)). Accordingly, the landowners' remaining arguments are without merit.[5]

It is undisputed (1) that Mountain Valley holds a certificate, (2) that the property interests Mountain Valley seeks to condemn are necessary for its FERC-approved project, and (3) that Mountain Valley has unsuccessfully negotiated the purchase of those property interests with the landowners. Partial summary judgment of Mountain Valley's power of eminent domain as conferred by the NGA is granted.

IV. Preliminary Injunction Granting Immediate Possession

A. Separation of Powers and the Court's Inherent Equitable Power

The landowners argue that an award of immediate possession violates separation of powers principles. (ECF #155, at 10-14; ECF #202, at 8; ECF #206, at 5-15.) In short, the landowners' argument proceeds that immediate possession in a condemnation action is essentially a quick take, 40 U.S.C. § 3114; the NGA does not authorize gas companies to condemn property via

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[5] One additional argument bears mentioning here. Landowner Mountain Lair, LLC, ("Mountain Lair") claimed that Mountain Valley represented to it that the pipeline could not be built along the approved easement route across its property. (ECF #206, at 4-5.) Mountain Valley replied that it intends to build the pipeline on the approved route. (ECF #208, at 8.) At the February 7 hearing, both parties confirmed Mountain Valley's position, and Mountain Lair withdrew its argument on this point.

quick take, see generally 15 U.S.C. § 717 et seq.; thus, judicial authorization of a quick take under the NGA violates separation of powers principles because doing so assumes the powers of the legislature. The defendants heavily rely upon the Seventh Circuit's opinion in Northern Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998), insisting that the Seventh Circuit denied immediate possession because Congress did not make quick take power available under the NGA.

Alternatively, the defendants argue that this court should not needlessly exercise its inherent equitable powers to authorize immediate possession where an adequate remedy at law already exists under the NGA – normal condemnation proceedings. (ECF #206, at 18-19.) The defendants look for support in Transwestern Pipeline Co. v. 9.32 Acres, More or Less, of Permanent Easement Located in Maricopa County, 550 F.3d 770 (D. Ariz. 2008), aff'd sub nom., Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770.

Furthermore, the defendants insist that while Sage authorizes immediate possession where condemnation authority has been entered by a court, Sage did not consider a separation of powers argument. (ECF #206, at 9-10.) As a result, the defendants ask the court to discard Sage in the separations of powers analysis.

As an initial matter, the landowners' reading of Northern Border and the district court opinion in Transwestern Pipeline is dubious. First, the corresponding appellate opinion for Transwestern Pipeline

casts a stark shadow over the landowners' separation-of-powers and inherent-equitable-power arguments. There, the Ninth Circuit concluded

> that the substantive right to condemn under § 717f(h) of the NGA ripens only upon the issuance of an order of condemnation. At that point, the district court may use its equitable powers to grant possession to the holder of a . . . certificate if the gas company is able to meet the standard for issuing a preliminary injunction.

550 F.3d at 778. In other words, if a certificate holder obtains summary judgment of its power of eminent domain – Mountain Valley has received such relief herein – then the holder is entitled to a preliminary injunction granting it immediate possession, provided it could satisfy the preliminary injunction factors and ensure just compensation. Additionally, the Ninth Circuit recognized that district courts in the Seventh Circuit have read Northern Border to allow a "grant[of] possession to gas companies only following judgments of condemnation." Id. at 777. Accordingly, the cases upon which the landowners rely hardly provide them any support.

Moreover, the Fourth Circuit has already spoken on separation of powers in the context of immediate possession and the NGA. In Columbia Gas Transmission, LLC v. 76 Acres, More or Less, in Baltimore and Harford Counties, the Fourth Circuit stated the following:

> The Landowners argue that Sage is distinguishable because it did not mention the words "separation of powers." However, we stated that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." Sage, 361 F.3d at 824. In addition, we rejected the Sage landowners' argument "that only Congress can grant the right of immediate possession." Id. Because we are bound to follow this Court's published opinions, Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016), Sage would require us to reject the Landowners' claim. . . .

701 F. App'x 221, 231 n.7 (4th Cir. 2017). Columbia Gas Transmission v. 76 Acres, while unpublished, is highly persuasive since it directly addresses the argument made by the defendants here: Sage is binding, and it does not violate separation of powers. Accord Columbia Gas Transmission, LLC v. 252.071 Acres, More or Less, in Baltimore Cty., No. ELH-15-3462, 2016 WL 1248670, at *10-12 (D. Md. Mar. 25, 2016). Thus, consideration of Mountain Valley's request for immediate possession by way of a preliminary injunction does not violate separation of powers principles, nor does it run awry of the court's inherent equitable powers.

B. Governing Standard

"A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants[,] . . . on a temporary basis, the relief that can be granted permanently after

trial[.]" The Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 345 (4th Cir. 2009), vacated on other grounds, Citizens United v. FEC, 558 U.S. 310 (2010), aff'd, 607 F.3d 355 (4th Cir. 2010) (per curiam). The party seeking the preliminary injunction must

> demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest.

Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (citing Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7, 20 (2008)). All four elements must be established by "a clear showing" before the injunction will issue. Real Truth About Obama, 575 F.3d at 347. Further, "[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." Sage, 361 F.3d at 828 (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980), and citing In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003), abrogated on other grounds, eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006)) (alteration in original).

C. Discussion

The court finds it pertinent to note, at the outset of this discussion, that the two other district courts presiding over Mountain Valley's companion condemnation actions have already granted Mountain Valley's

request for a preliminary injunction under virtually identical circumstances. See Mountain Valley Pipeline, LLC v. Simmons, No. 1:17CV211, 2018 WL 701297, at *12-19 (N.D. W. Va. Feb. 2, 2018) (Keeley, J.); Mountain Valley Pipeline, LLC v. Easements to Construct, Operate and Maintain a Nat. Gas Pipeline Over Tracts of Land in Giles Cty., No. 7:17-cv-00492, 2018 WL 648376, at *12-19 (W.D. Va. Jan. 31, 2018) (Dillon, J.). The court's search of the NGA case law suggests that the district courts accord with that result. See, e.g., Dominion Carolina Gas Transmission, LLC v. 1.169 Acres, in Richland Cty., 218 F. Supp. 3d 476 (D.S.C. 2016); Rover Pipeline, LLC v. Rover Tract No(s) WV-DO-SHB-011.510-ROW-T, No. 1:17CV18, 2017 WL 5589163 (N.D. W. Va. Mar. 7, 2017) (Keeley, J.); Columbia Gas Transmission, LLC v. 252.071 Acres, More or Less, in Baltimore Cty., No. ELH-15-3462, 2016 WL 1248670 (D. Md. Mar. 25, 2016); Columbia Gas Transmission, LLC v. 0.85 Acres, More or Less, in Harford Cty., No. WDQ-14-2288, 2014 WL 4471541 (D. Md. Sept. 8, 2014); Transcon. Gas Pipe Line Co. v. Permanent Easement Totaling 2.322 Acres, No. 3:14-cv-00400-HEH, 2014 WL 4365476 (E.D. Va. Sept. 2, 2014); Columbia Gas Transmission, LLC v. 76 Acres More or Less, in Baltimore and Harford Counties, No. ELH-14-0110, 2014 WL 2960836 (D. Md. June 27, 2014), aff'd, vacated in part on other grounds, remanded, 701 F. App'x 221 (4th Cir. 2017).

The court recognizes the paradox that the NGA presents, that relief as extraordinary as a preliminary injunction is granted so ordinarily. Indeed, the court

questions the providence of a statutory and regulatory system that scrutinizes litigants with such rigor and precision over the course of years, before passing them to the district courts in a race against the clock – Mountain Valley's certificate expires in three years, and the FERC approval process evidently encourages, if not requires, applicants to prove a market by entering into shipping agreements prior to certificate issuance – to obtain relief that is supposed to be rarely granted.

As far as the court can tell, however, the circumstances presented by an NGA condemnation and immediate possession action appear to be nearly uniform. Such uniformity is doubtlessly the designed product of the practicalities of constructing a natural gas pipeline combined with the finely-wrought procedures before FERC. Perhaps, then, it makes sense that the results would also be the same. And based on the record here, there are no unique circumstances that would place Mountain Valley outside the ambit of those cases. Thus, for reasons stated below, the court finds that Mountain Valley has successfully demonstrated the four preliminary injunction elements, and Mountain Valley's motion for a preliminary injunction granting it immediate possession of the landowners' property interests is granted.

First, the court has already determined on the merits that Mountain Valley has the right to condemn the landowners' property interests. "Success on the

merits for [Mountain Valley] is therefore apparent." Sage, 361 F.3d at 830.[6]

Second, Mountain Valley must clearly demonstrate that it is likely to suffer irreparable harm absent relief. Robert J. Cooper, Mountain Valley's Senior Vice President of Engineering and Construction and "company-wide leader for the [pipeline] project," described Mountain Valley's irreparable harm as follows:

> 12. [Mountain Valley] needs access to the permanent and exclusive rights-of-way, access road rights-of-way, temporary construction rights-of-way, and temporary workspace rights-of-way across the Landowners' properties by February 1, 2018 to begin construction activities in order to safely and effectively accomplish the [project] on schedule.

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[6] The landowners argue that Sage is of lesser import here because it was decided under the Blackwelder standard for preliminary injunctive relief, which was abrogated by Winter. (ECF #202, at 12-14; ECF #206, at 15-16.) Under the Blackwelder standard, preliminary injunction requests were evaluated according to the "balance-of-the-hardship test," whereby a movant faced a generally more lenient standard for obtaining relief. See Real Truth About Obama, 575 F.3d at 346-47. As written, however, Sage suggests that it would pass muster under the Winter standard, although that cannot be said with certainty. Nevertheless, the post-Winter district courts in the Fourth Circuit, cited supra, continue to treat Sage as at least highly persuasive, if not dispositive, and the outcomes in those cases mirror Sage as well. In any event, the court has read and applied Sage here in light of the proper standard for preliminary injunctive relief.

13. [Mountain Valley] plans to construct the pipeline and place it into service by December 2018.

. . .

24. If [Mountain Valley] is unable to begin the tree clearing and construction activities of the [project] on the Landowners' properties by February 1, 2018, it will be unable to complete the work according to its construction schedule, and it will incur additional delay fees and contractor costs.

25. [Mountain Valley] has contractual requirements to begin clearing activities in February 2018. [Mountain Valley] also must comply with administrative agency regulations of the United States Fish and Wildlife Service requiring that certain clearing be complete by March 31, 2018, and that construction of roads be complete by March 31, 2018. If construction is delayed, [Mountain Valley] will be unable to comply with those contractual requirements, and agency approvals and permits, and may be subject to fines and will incur damages.

26. [Mountain Valley] also has agreements in place to begin shipping gas in 2018.

. . .

28. Delaying the [project] will unnecessarily postpone the public benefits that the pipeline will provide and unnecessarily increase the costs of completing the work and result in the

> loss of substantial revenue to [Mountain Valley].

(Cooper Construction Decl. ¶¶ 3, 12-13, 24-26, 28.) Mr. Cooper reiterated the effect of these statements at the February 7 hearing. Additionally, Mr. Cooper added that Mountain Valley will suffer non-economic harms absent relief, such as harm to its business reputation and goodwill.

Mr. Cooper claimed that Mountain Valley required possession of the landowners' property interests by February 1, 2018. (Id. ¶¶ 12, 24.) Obviously, that date has passed. At the February 7 hearing, Mr. Cooper explained that the passage of February 1 does not negate Mountain Valley's need for relief. Rather, it results in the accrual of extra costs that vary depending on when access is granted.

Generally, the landowners contend that possession is not a limiting factor to Mountain Valley's progress since it faces legal challenges in other forums and still must satisfy all of the conditions precedent to construction in its certificate, (ECF #155, at 6-7; ECF #196, at 8; ECF #200, at 2-3; ECF #202, at 24-25; ECF #205, at 9-10; ECF #206, at 3-4); that Mountain Valley can build the pipeline in under a year but has three years from the date of certificate issuance to complete the pipeline, and Mountain Valley has considered alternative construction schedules with a later possession date that nonetheless meets its certificate deadline, (ECF #155, at 6-7; ECF #196, at 9; ECF #202, at 26-28; ECF #205, at 6-10; ECF #206, at 17); that mere economic

harm is insufficient to show irreparable harm, (ECF #155, at 6-7; ECF #202, at 11-14; ECF #205, at 9-10); and that Mountain Valley's measurement of loss is unrealistic, speculative, and self-inflicted, (ECF #196, at 9; ECF #202, at 15-24; ECF #205, at 6-10; ECF #206, at 17).

At the hearing, the landowners reiterated these themes and also elicited testimony from Mr. Cooper that Mountain Valley's alleged irreparable harms may not be as severe, may be partially mitigated, and represent only a fraction of Mountain Valley's overall $3.7-billion budget. The landowners could not, however, establish that the harms would not occur absent relief.

As earlier noted, the case law recognizes that Mountain Valley's alleged harms, including economic and non-economic, are irreparable. See Sage, 361 F.3d at 829; see also, e.g., Dominion Carolina, 218 F. Supp. 3d at 479-80; Rover Pipeline, 2017 WL 5589163, at *4. The courts agree that Mountain Valley's economic losses are irreparable because they cannot be recovered at the end of litigation. See, e.g., Sage, 361 F.3d at 828-29 (treating the gas company's economic harms as irreparable); Columbia Gas Transmission LLC v. 0.85 Acres, 2014 WL 4471541, at *6; cf. Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017) ("A plaintiff must overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by money damages at the time of judgment.").

Regarding scheduling modifications, the District of Maryland succinctly stated the following:

> It is clear that the lack of a preliminary injunction would require [the certificate holder] to modify its construction schedule, deviate from its usual course, expend additional resources, and jeopardize its ability to satisfy its obligations under both its private contracts and its FERC Certificate. It is of no moment that [the holder] could, in theory, construct [the pipeline] in a disjointed manner, temporarily skipping Defendants' parcels of land and then returning to them after a trial is held in this case. Such a course of action would be wasteful and inefficient, and it would serve no purpose other than to delay the inevitable.

Columbia Gas Transmission, LLC v. 76 Acres, 2014 WL 2960836, at *15; cf. Sage, 361 F.3d at 828-29. Next, the court cannot entertain argument about other pending legal challenges for reasons earlier stated, namely, that the NGA shows a clear congressional intent that certificates are not stayed absent specific instruction by FERC or a court of appeals. See 15 U.S.C. § 717r(c). And last, the landowners' concerns about conditions precedent to construction are unfounded because any preliminary injunction issued here is merely coextensive to that which is approved by FERC, nothing more. Mountain Valley has thus shown that it will suffer irreparable harm absent relief.

Third, the balance of hardships must tip in Mountain Valley's favor for a preliminary injunction to issue.

In Sage, the Fourth Circuit conclusively spoke on this issue in the context of NGA condemnation actions. See also, e.g., Dominion Carolina, 218 F. Supp. 3d at 480-81. The Fourth Circuit explained that threat of condemnation of private property "is properly treated as part of the burden of common citizenship," Sage, 361 F.3d at 829 (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949)), and that just compensation is guaranteed by the Fifth Amendment whether property condemned under the NGA is taken immediately or after a trial, id. "In any event, . . . [any] early loss of use . . . is blunted by [the landowners'] right to draw down the money" that Mountain Valley has indicated it is willing to deposit as assurance for the taking. Id. (internal quotations omitted and last alteration in original).

Fourth, granting Mountain Valley's request for a preliminary injunction must be in the public interest. Again, Sage's conclusion on the public interest is dispositive here. In Sage, the Fourth Circuit determined that a certificate is imbued with the public interest pursuant to the authority granted under the NGA. Id. at 830 ("Congress passed the [NGA] and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. . . . FERC conducted a careful analysis of the [project] and determined that the project will promote these congressional goals and serve the public interest." (citations omitted)); see also, e.g., Columbia Gas Transmission, LLC v. 252.071 Acres, 2016 WL 1248670, at *17.

Accordingly, Mountain Valley's motion for a preliminary injunction granting it possession of the condemned property interests is granted.

V. Posting of Deposit and Security

Although Mountain Valley has made the requisite showing for a preliminary injunction, it must fulfill an additional requirement before taking immediate possession of the landowners' property interests. The Fourth circuit holds that

> the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid. As the Supreme Court said a long time ago, the Constitution "does not provide or require that compensation be paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed."

Sage, 361 F.3d at 824 (quoting Cherokee Nation, 135 U.S. at 659). The Fourth Circuit in Sage found that "adequate assurance" of just compensation had been provided because the condemnor "deposited cash with the court in an amount equal to the appraised value of the interests condemned[, and, i]f the deposit [was] somehow short, [the condemnor would] be able to make up the difference" based upon its substantial assets and its ability to be sued by any aggrieved parties. Id.

At the February 7 hearing, Mountain Valley proffered the expert testimony of Todd Goldman, a licensed appraiser hired by Mountain Valley to perform preliminary appraisal work on the landowners' property interests. His preliminary appraisal report and valuations were admitted into evidence as Plaintiff's Exhibits 7 and 8.

The landowners did not provide valuations though it is their ultimate burden to do so at trial. See United States v. 69.1 Acres of Land, More or Less, Situated in Platt Springs Twp., 942 F.2d 290, 292 (4th Cir. 1991) (citing United States ex rel. TVA v. Powelson, 319 U.S. 266, 274 (1943)). Instead, the landowners focused on discrediting Mr. Goldman's appraisals. On cross examination, the landowners elicited testimony from Mr. Goldman in an effort to cast doubt on his methodology and on the compliance of his report with professional standards. (See ECF #221, at 24-78.) The landowners' rebuttal expert, Russel D. Rice, also a licensed appraiser, echoed that sentiment in his own declaration and report, filed February 13, 2018, pursuant to the court's directive. (See ECF #224.) Specifically, Mr. Rice believes that omissions in Mr. Goldman's report "fatally erode [its] credibility" and that just compensation cannot be known without "adequate time for a field inspection and evaluation of all elements of the subject appraisal." (ECF #224 Ex. A, at 13.)

Assuming that the landowners' and Mr. Rice's criticisms are well-founded, the criticisms do not squarely address the immediate issue. Determination of the fixed and definite amount of just compensation is the

guaranteed outcome of a condemnation action, see Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005), whereas, at this point, the court need only set a deposit amount that ensures just compensation ultimately will be paid once the issue has been thoroughly investigated, see Sage, 361 F.3d at 824 (stating, as noted, that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid" so long as the condemnees receive "adequate assurance" that just compensation will be paid). The landowners would have just compensation fully litigated prior to the issuance of the preliminary injunction. Of course, doing so would defeat the purpose of immediate relief.

In Sage, the Fourth Circuit was apparently satisfied that it could set appropriate assurance based upon the condemnor's deposit of cash in the amount equaling its appraised values of the interests condemned. 361 F.3d at 824. Thus, to the extent that Sage indicates that there is a burden on Mountain Valley to provide an estimate of value at this juncture, Mountain Valley has carried that burden such that the court has a baseline against which to properly fix the amount of the deposit that Mountain Valley must provide prior to taking possession of the landowners' property interests.

The court is not, however, satisfied with Mountain Valley's estimation. The landowners and Mr. Rice have raised legitimate concerns over Mr. Goldman's appraisals. Mr. Goldman's testimony on cross examination revealed as much, as does Mr. Rice's rebuttal.

Additionally, although Mr. Goldman valued a number of property interests at less than $3,000, Mr. Cooper states, as earlier noted, that Mountain Valley offered at least $3,000 for every property interest in this action. (Cooper Construction Decl. ¶ 8.) The court notes similar divergences in value in two other instances. First, Mr. Goldman appraised landowner Paco Land, Inc.'s ("Paco Land") property interests at $20,600 (Pl's Ex. 8), while the offer that Mountain Valley evidently made for the same according to Paco Land's answer was $150,000 (ECF #118, at 6). Second, although Mr. Goldman appraised landowner Western Pocahontas Properties Limited Partnership's ("WPPLP") property interests at $20,200 (Pl's Ex. 8), WPPLP's general partner, Gregory F. Wooten, swears that the value of its property interests "with respect to the pipeline right of way only" are valued at $457,002 including "near-surface coal" that will be "d[ug] and damage[d]" by the pipeline. (Affidavit of Gregory F. Wooten ¶¶ 11, 18.)

The court cannot speculate as to Mountain Valley's rationale underlying these offers, nor does the court know the extent of the interests that Mountain Valley attempted to purchase. Particularly, in the case of Paco Land, it is unknown whether Mountain Valley's offer included any consideration for Paco Land's insistence that it would lose the use of an entire 151.02-acre tract as a result of the approximately 7.56-acre easement. (See id. at 3-6.) The court has recited these examples because it finds them probative of the accuracy of Mountain Valley's appraisal.

Moreover, the court is concerned about the remarkably few landowners from whom Mountain Valley has purchased the necessary easements. It was revealed at the February 7 hearing that Mountain Valley had purchased around only 60% of the necessary easements in the Southern District of West Virginia. Meanwhile, Mountain Valley had purchased around 85% of the easements overall in all three districts, sometimes in excess of 90% in certain counties.

Accordingly, while the court accepts Mountain Valley's proffer of valuation as a basis for estimating the deposit, the court does not find the valuation sufficient to ensure that just compensation will be paid. The court directs the following:

1. Before taking possession, Mountain Valley must deposit with the Clerk a certified or cashier's check in the amount of four times the appraised value according to Mr. Goldman. Provided, however, that for any property interests appraised at $3,000 or less, Mountain Valley must assume that the appraised value is actually $3,001 and adjust its deposit accordingly.

2. Before taking possession, Mountain Valley must post a surety bond in the amount of two times the appraised value according to Mr. Goldman. Again, for any property interests appraised at $3,000 or less, Mountain Valley must assume that the appraised value is actually $3,001 and adjust its surety bond accordingly. The surety bond requirement is in keeping with Federal Rule of Civil Procedure 65(c), which requires that the moving party must "give[] 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" before a preliminary injunction may issue.

3. The Clerk is directed to deposit the funds from Mountain Valley's certified or cashier's check pursuant to Federal Rule of Civil Procedure 67 and 28 U.S.C. § 2041.

4. Each landowner is entitled to draw upon Mountain Valley's deposit pursuant to Federal Rule of Civil Procedure 67 and 28 U.S.C. § 2042. To withdraw on the deposit, a landowner must file with the court a Motion to Withdraw Funds. The Motion must identify the parcel identification tag as labeled by Mountain Valley in Exhibit C of the Complaint, list any other individuals or entities sharing ownership in the property interest condemned, and be accompanied by proof of service of the Motion on each such co-owner. Each landowner is entitled to draw upon the greater of Mountain Valley's appraised value or $3,001, and each landowner is entitled only to the landowner's proportionate share of the property interest. The landowners are forewarned that, should the value of just compensation owed to them ultimately be less than what they withdrew, they will be liable to Mountain Valley for the balance, with interest.

5. Each landowner is entitled to draw upon Mountain Valley's deposit in an additional amount if an appraised value is provided that is greater than Mountain Valley's appraised value and the court grants the

motion next noted. To do so, a landowner must file with the court a Motion to Withdraw Appraised Funds, which must include a statement from an appraiser as to value and must also comply with the same requirements as a Motion to Withdraw Funds. Again, the landowners are forewarned that, should the value of just compensation owed to them ultimately be less than what they withdrew, they will be liable to Mountain Valley for the balance, with interest.

6. Any objections to a Motion to Withdraw Funds or a Motion to Withdraw Appraised Funds – whether by Mountain Valley, a landowner, or a non-party to this action – must be made within seven days of receipt of service of the Motion or twenty-one days of the Motion's filing with the court, whichever is earlier.

VI. Conclusion

For the foregoing reasons, it is ORDERED that:

1. Mountain Valley's motions to strike be, and hereby are, granted;

2. The landowners' motions to dismiss be, and hereby are, denied as stricken;

3. The landowners' motion for stay of proceedings be, and hereby is, denied; and

4. Mountain Valley's motion for partial summary judgment and immediate access to and possession of the easements condemned in Nicholas, Greenbrier,

Summers, and Monroe Counties, West Virginia, be, and hereby is, granted.

Further, the court directs Mountain Valley to post the deposit and security as directed, which is a predicate to Mountain Valley's right to possess the condemned property.

The Clerk is directed to forward copies of this memorandum opinion and order to all counsel of record and to any unrepresented parties.

ENTER: February 21, 2018

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
United States District Judge

FILED: March 5, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1159 (L)
(7:17-cv-00492-EKD)

MOUNTAIN VALLEY PIPELINE, LLC

Plaintiff-Appellee

v.

[Case Caption Not Repeated Here]

Defendants-Appellants

OWNER'S COUNSEL OF AMERICA

Amicus Supporting Rehearing Petition

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Wynn, and Judge Harris.

For the Court

s/ Patricia S. Connor, Clerk