

112 FERC ¶ 61,171
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Eastern Shore Natural Gas Company

Docket No. CP03-80-001

ORDER DENYING REQUEST FOR STAY

(Issued August 5, 2005)

1. On July 22, 2005, Springside LLC filed a request for a stay¹ of the construction of facilities authorized in the Commission's June 27, 2005 Order in this docket.² The June 27 Order amended Eastern Shore Natural Gas Company's (Eastern Shore) certificate of public convenience and necessity issued by the Commission on October 8, 2003.³ The October 8, 2003 Order authorized Eastern Shore to construct and operate certain pipeline and measurement facilities in Pennsylvania and Delaware in order to expand system capacity and enhance system reliability. The June 27 Order authorized Eastern Shore to construct and operate four new pipeline segments totaling 20.98 miles of pipeline of varying diameter pipeline in Chester County, Pennsylvania, and New Castle County, Delaware; and vacated the authorization to construct and operate a Metering and Regulating station.⁴

¹ The document filed by Springside LLC was titled "Response to Eastern Shore Natural Gas Company's Responses to Environmental Conditional and Request for Authority to Begin Construction," but is, in effect, a request for stay.

² *Eastern Shore Natural Gas Co.*, 111 FERC ¶ 61,479 (2005) (June 27 order).

³ *Eastern Shore Natural Gas Co.*, 105 FERC ¶ 61,049 (2003).

⁴ Specifically, the June 27 order authorized Eastern Shore to construct and operate 1.4 miles of 16-inch mainline looping on Eastern Shore's right-of-way in Chester County, Pennsylvania, paralleling the existing 8-inch mainline; 3.25 miles of 16-inch new mainline and a regulator station in New Castle County, Delaware; 10.33 miles of 6-inch mainline extension from a point near Milford, Delaware, to a point near Milton, Delaware; and 6.0 miles of 6-inch mainline looping, paralleling the existing 6-inch mainline from Laurel, Delaware to Delmar, Delaware.

2. The Commission concludes that Springside LLC has failed to demonstrate that absent the stay it will suffer irreparable harm and, therefore, denies the request for a stay.

Request for Stay

3. Springside LLC does not object to the certificated construction. Rather, Springside LLC states that it recognizes the need for construction of the pipeline extension and the need for an additional permanent easement in which to place the pipeline. However, Springside LLC complains that it has been unable to get answers to many of its questions regarding the extent of temporary workspace needed for construction of the pipeline extension and the condition of the temporary workspace after Eastern Shore's work has been performed. Springside LLC notes that a large portion of the temporary workspace is located in a wooded area with mature trees.

4. Springside LLC avers that Eastern Shore will be unable to provide, at this time, documentation of landowner approval as required in condition 5 of the Appendix of the June 27 Order. Further, Springside LLC complains that Eastern Shore has not complied with the federal Uniform Real Property Acquisition Policy (42 U.S.C. § 4651 *et seq.*) in that the real property to be taken was not appraised prior to the initiation of negotiations. Springside LLC contends that, although Eastern Shore made an original offer on the property dated May 3, 2005, the offer did not meet the threshold for a standard appraisal evidencing any basis for valuation. Springside LLC states that it requested an offer based on an appraisal. Springside LLC states that it received the appraisal (dated July 11, 2005) on July 15, 2005 – four days prior to filing of the Complaint in Delaware Superior Court demanding that judgment be entered condemning the permanent easement and temporary easements. Springside LLC avers that this action on the part of Eastern Shore violates U.S.C. § 4651(7).

5. Springside LLC concludes that Eastern Shore's action in providing the appraisal, the offer and filing the Complaint in a four-day period is coercive in nature. Springside LLC would like a reasonable opportunity to review the appraisal provided by Eastern Shore. Springside LLC would like an answer from Eastern Shore as to the size and final disposition of the temporary workspace area.

6. Finally, Springside LLC states that it has been in contact with the Delaware Department of Natural Resources and Environmental Control, Division of Parks and Recreation (Department), regarding the deforestation which will be necessitated by the size of Eastern Shore's temporary workspace and the Department has expressed a willingness to contact Eastern Shore to discuss mitigation/preservation measures.

7. In sum, Springside LLC would like an opportunity to have the above concerns addressed with Eastern Shore prior to the Commission authorizing Eastern Shore to begin construction. In that light, Springside LLC requests a stay on the issuance of the authority to begin construction for ninety days.

Discussion

8. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.⁵ We are not persuaded to stay our order here.

9. The Commission may stay its action when "justice so requires."⁶ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.⁷ The key element in the inquiry is irreparable injury to the moving party.⁸ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁹ The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.' It is well established that economic loss does not necessarily constitute irreparable harm . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.¹⁰

⁵ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,630 (1991), *aff'd sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

⁶ 5 U.S.C. § 705 (2000).

⁷ See, e.g., *CMS Midland, Inc.*, 56 FERC at 61,631.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Wisconsin Gas Co. v. FERC*, 785 F.2d 699, 674 (D.C. Cir. 1985).

10. The Commission finds that Springside LLC has not demonstrated that it will suffer irreparable harm absent a stay. Springside LLC has only demonstrated concern over the compensation for property taken for easements and deforestation. Under section 7(h) of the NGA, when the certificate holder cannot acquire rights-of-way by contract or is unable to agree with the property owner on the amount of compensation, the certificate holder may acquire the property rights by exercising the right of eminent domain in a court action. Thus, the power of eminent domain rests with the certificate holder, not the Commission.¹¹

11. Typically, the landowners themselves are in the best position to determine the level of compensation and method of payment that would best suit their situation. It is also incumbent upon the applicant to make good faith efforts to negotiate with landowners for any needed rights. However, if the parties cannot reach agreement, the Commission does not intervene. Issues of compensation for land taken by a pipeline under the eminent domain provisions of the NGA are matters for state or federal court.

12. Furthermore, the possibility that adequate compensatory relief will later be available through the ordinary course of litigation "weights heavily against a claim of irreparable harm."¹² Springside LLC has access to adequate compensatory relief through the normal course of the ongoing process.

13. Likewise, Springside LLC's mere recitation that it has an issue regarding deforestation fails to show how irreparable harm will occur absent a stay. To eliminate any confusion over the extent and restoration of the temporary workspaces, we reiterate the conditions recommended in the Environmental Assessment for Eastern Shore's proposal and adopted in the June 27 Order. Eastern Shore plans to use two extra workspaces during construction outside the 70-foot-wide construction right-of-way that it plans to use through Springside LLC's property. The first extra workspace would accommodate the boring of State Route 40 and does not have mature trees. The second extra workspace on the east side of the construction right-of-way is also in an area that does not have mature trees. Eastern Shore would follow our *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan) and *Wetland and Waterbody Construction and Mitigation Procedures* during construction and restoration. Eastern Shore would install

¹¹ In this regard we note that Springside LLC's argument that Eastern Shore violated 42 U.S.C. § 4651(7) of the Uniform Real Property Acquisition Policy is without merit since that policy applies only to the acquisition of real property by federal agencies, not private parties such as Eastern Shore.

¹² *Wisconsin Gas Co. v. FERC*, 785 F.2d 699, 674 (D.C. Cir. 1985).

and maintain silt fence along the edge of wetlands and along the one stream crossing on Springside LLC's property until vegetation is established. During restoration, the temporary and permanent right-of-way would be graded, seeded, and mulched with wood chips or straw. The temporary right-of-way would be allowed to naturally revegetate with trees in areas where forest exists prior to construction, as only the permanent right-of-way would be maintained in accordance with the Plan. To further address Springside LLC's concern, we will ensure that forest clearing is minimized prior to granting construction approval for Loop 2.

14. Finally, Springside LLC asserts that it will not give its approval for Eastern Shore's route through Springside LLC's land as required in Environmental Condition 5 in the Appendix to the June 27 Order. However, Environmental Condition 5 applies only to route realignments that have not been previously identified. Since the Commission has approved the route through Springside LLC's land, Eastern Shore does not need approval from Springside LLC.

15. Accordingly, the request for stay is denied.

The Commission orders:

Springside LLC's request for stay is denied.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary