

**COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT**

BERKSHIRE, ss.  
C.A. No. 1676CV00083

APPEALS COURT  
NO. 2016-J-0231

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Tennessee Gas Pipeline Company, L.L.C., Plaintiff

v.

Commonwealth of Massachusetts, et al., Defendants

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**COMMONWEALTH'S OPPOSITION TO PLAINTIFF TENNESSEE GAS  
PIPELINE COMPANY'S PETITION TO LIFT STAY**

This Court should deny Plaintiff Tennessee Gas Pipeline Company, L.L.C.'s ("Tennessee") petition to lift the Berkshire Superior Court's (Agostini, J.) eleven week stay ("Stay") of its May 9, 2016, Decision and Order granting Tennessee's motions to condemn certain easements for pipeline construction in Otis State Forest in Sandisfield pursuant to the Natural Gas Act ("NGA"). In short, there is no legal basis or reason to disturb the Superior Court's fact finding and lift the short-duration Stay, because the Superior Court did not abuse its discretion or commit any error of law.<sup>1</sup>

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<sup>1</sup> For the reasons set forth in this Opposition, Tennessee's petition to lift the Stay has no legal or equitable merit and the Commonwealth respectfully urges

In its sound discretion, the Superior Court based the Stay – in place for only six more weeks – on factual findings that Tennessee would not be harmed by a short delay in taking possession of the easement, facts which Tennessee does not specifically refute. Tennessee failed to move the Superior Court to reconsider the Stay and waited more than four weeks to pursue this interlocutory appeal, seriously undermining its claim of harm from a short delay.

The Superior Court entered the Stay to permit the Legislature until the end of its formal session to act on a pending bill, H.3690, introduced on Tennessee's behalf to authorize the pipeline easement in the Otis State Forest, land protected by Article 97 of the Massachusetts Constitution.<sup>2</sup> Less than a week after receiving approval for the pipeline project, Tennessee brought its condemnation action to take the easement by eminent domain because the Legislature had not yet

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this Court to deny the petition and not refer it to a full panel.

<sup>2</sup> Massachusetts amendment Article 97, ratified in 1972, requires that the Legislature approve, by a two-thirds roll call vote of both houses, any easement, change in use, or other disposition of land taken or acquired for conservation purposes. The Commonwealth acquired the land in Otis State Forest, including the easement area, as conservation land protected by Article 97 in 2007. See Record Appendix ("RA") p. 8, Decision p. 3.

acted on H.3690.<sup>3</sup> The Superior Court did not abuse its discretion by properly balancing a short delay that would not harm Tennessee with allowing the Legislature time to act on H.3690. Moreover, the Stay does not violate the NGA, which encourages parties to reach pipeline easement agreements, precisely what the bill would accomplish.

### **ARGUMENT**

#### **I. The Superior Court Did Not Abuse Its Discretion by Issuing the Stay.**

A petition for interlocutory review should be denied if the trial court did not abuse its discretion. *Caffyn v. Caffyn*, 441 Mass. 487, 490 (2004). On interlocutory review, the appellate court will not disturb the fact findings below where "the record discloses reasonable support for [the trial court's] evaluation of factual questions." *Id.* at 490, quoting *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20, 25-26 (1981).

##### **A. This Court Should Not Disturb the Superior Court's Factual Finding That The Stay Would Not Harm Tennessee**

The Superior Court found that the Stay would not harm Tennessee or unreasonably delay the project. That finding is fully supported by the record. It is

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<sup>3</sup> See RA pp. 8-9, Decision pp. 3-4.

undisputed that the Federal Energy Regulatory Commission ("FERC") has not yet authorized any tree cutting or other pipeline construction work in the easement area, and will not do so until Tennessee has received all required federal environmental permits and demonstrated compliance with federal conservation laws enforced by the United States Fish and Wildlife Service ("USFWS"). See RA pp. 10-11, Decision pp. 5-6.<sup>4</sup> It is also undisputed that Tennessee has not yet received all required federal environmental permits for the project. *Id.*

The Superior Court did *not* find that any delay in possession of the easement would irreparably harm Tennessee. Indeed, the Superior Court expressly found that an eleven week stay would not do so. See RA p. 21, Decision p. 16 ("This additional period to permit the Legislature to consider the project [and act on the pending easement authorization bill H.3690] will not unfairly or unreasonably delay the project. In fact, it seems unlikely that Tennessee will be able to

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<sup>4</sup> See also RA p. 21, Decision note 14, p. 16 ("FERC will not issue notices to proceed with tree felling or construction until it is satisfied that the remaining environmental impact concerns, including compliance with the [federal] Water Quality Act and the [federal] Migratory Bird Treaty Act, are resolved.")

secure all the necessary permits to allow it to begin construction in the near future.”).<sup>5</sup>

Rather, the Superior Court found only that if there were a many-month delay in possession pending *conclusion* of condemnation proceedings, it would irreparably harm Tennessee. See RA p. 24, Decision p. 19 (“[D]elaying the work authorized by FERC *until after the [Superior Court eminent domain compensation] litigation is resolved* would cause injury and irreparable harm to both the plaintiff and its [pipeline gas] customers.”(emphasis added)). Because it has yet to establish a litigation schedule - including expert depositions and a compensation hearing - for the eminent domain compensation proceedings, the Superior Court likely will not determine compensation and enter final judgment before fall. See RA p. 5, docket entries 40 - 42.

For all these reasons, the Superior Court’s factual finding that FERC will not allow Tennessee to begin pipeline construction “in the near future” and that the Stay will not harm Tennessee is fully supported by the record. In all likelihood, Tennessee

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<sup>5</sup> See also RA p. 8, Decision p. 3 (The Superior Court noted that the pipeline still faces “major hurdles” before it may proceed, including “a myriad of approvals, including environmental permitting and certification.”)

will not be able to begin tree cutting and pipeline construction until fall.<sup>6</sup>

Thus, the Superior Court did not abuse its discretion by finding that eleven weeks of delay will not harm Tennessee. *See Clair v. Clair*, 464 Mass. 205, 214 (2013) (the focus of interlocutory appellate review is whether the trial court abused its discretion and whether the record contains reasonable support for the court's fact-based determinations).

**B. Tennessee Provides No Explanation or Support For Its Claim That It Will Suffer Harm If the Stay Remains In Place For Six Weeks.**

Tennessee has not articulated *any* specific factual reason why maintaining the Stay for six more weeks will delay permitting and construction. Instead, Tennessee argues that the Superior Court "overlooked that unrestricted possession is needed to perform preconstruction activities and finalize permits needed to obtain a Notice to Proceed [from FERC allowing construction] - so the stay is delaying and will delay construction well beyond July 29, 2016." *See* Tennessee's brief in support of its petition ("Petition Br."), p. 13.

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<sup>6</sup> *See* note 7 and accompanying discussion in Section IB, *infra*.

The Superior Court did *not* overlook Tennessee's general and unsupported claim that *any* delay in possession would hinder permitting and construction. Rather, the Superior Court found that FERC will in all likelihood not allow Tennessee to begin tree cutting before fall - regardless of when Tennessee obtains possession or receives all its required federal permits - because the USFWS informed Tennessee and FERC that doing so would harm nesting and fledgling birds in violation of federal wildlife law.<sup>7</sup> Because Tennessee will not be in a position for several months to cut trees and clear the easement area for pipeline construction, six more weeks of delay will not significantly impede permitting or pre-construction work, as the Superior Court properly found.

Tennessee's failure to move for reconsideration in the Superior Court and the fact that it waited more than four weeks to pursue this interlocutory appeal to vacate an eleven-week stay demonstrates that Tennessee

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<sup>7</sup> See RA pp. 10-11, Decision pp. 5-6. Discussing Tennessee's correspondence with the USFWS regarding tree cutting necessary before pipeline construction may begin, the Superior Court noted the USFWS position that "tree felling during migratory birds' nesting season, *usually from early spring to early fall*, would injure or kill migratory birds likely to be present within the Project area, and thus [ ] tree felling [during nesting season] would contravene the [federal] Migratory Bird Act" (emphasis added).

does not need immediate possession to avoid harm. Failure to promptly challenge the Stay seriously undermines Tennessee's claim that the Stay "is *delaying*" and will continue to delay the project. See Petition Br., p. 13 (emphasis added). As recognized by the Appeals Court, a party's unexplained delay in seeking "emergency" relief indicates an absence of immediate and irreparable harm, *Alexander & Alexander, Inc. v. Danahy*, 21 Mass. App. Ct. 488, 494-95 (1986), and therefore may constitute grounds for denial of such relief. *Cf. Tough Traveler, Ltd. V. Outbound Products*, 60 F.3d 964, 968 (2d Cr. 1995) (delay in seeking preliminary injunctive relief, without strong justification, negates any presumption of irreparable harm).

**II. The Superior Court Did Not Commit an Error of Law and the Stay Does Not Violate the NGA.**

Tennessee does not challenge the Superior Court's Decision and Order finding that FERC's Certificate approving the pipeline project gave the company the substantive right to condemn the easement. Tennessee only challenges the Stay, arguing that it is the "functional equivalent" of a stay of the FERC Certificate.<sup>8</sup> But FERC's

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<sup>8</sup> Although not addressed in its brief, Tennessee's petition also asks this Court to "enter an order granting Plaintiff's motion to confirm authority to condemn



Certificate does not confer automatic or instant possession, only the right to bring a condemnation action in federal or state court. Tennessee chose to bring this action in state court and is now subject to Massachusetts procedural rules and the Superior Court's exercise of its sound discretion in determining how the condemnation action will proceed, including by issuing a short stay if warranted, as it is here, by the facts.<sup>9</sup>

By staying its Decision and Order until July 29 to give the Legislature an opportunity to act on H.3690 authorizing the easement under Article 97, the Superior Court did not violate the NGA. The NGA lists respect for

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easements and motion for injunctive relief authorizing immediate entry with the stay." See Petition, p. 4, prayer 2. There are no "motions" pending before this Court, and the Commonwealth questions the Court's jurisdiction to enter its own condemnation order where Tennessee does not challenge and is not aggrieved by the Superior Court's own confirmation of Tennessee's condemnation authority. See Tennessee's Petition Br., p. 2 ("Tennessee does not appeal the portion of the Decision and Order that confirms Tennessee's condemnation authority and right of possession as a matter of law. Tennessee appeals *only* the Stay . . . ." (emphasis added)). Further, by failing to argue for or even mention it in its brief, Tennessee has waived any request that this Court enter its own order regarding condemnation. Cf. Mass. R. App. P. 16(a)(4) ("The appellate court need not pass upon questions or issues not argued in the brief."); *Bennett v. Eagle Brook Country Store, Inc.* 28 Mass. App. Ct. 35, 40 (1989)(issue on appeal waived because party "failed to raise that issue in [its] brief."); *Allen v. Cosmopolitan Trust Co.*, 247 Mass. 334, 346 (1924) ("The Court does not ordinarily consider questions in support of which the parties do not present any argument. Such conduct is the equivalent of waiver.").

<sup>9</sup> See discussion in Section I, *supra*.

conservation and environmental limitations among its objectives. See *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015). FERC's Certificate approving the pipeline project encourages proponents to take reasonable measures to comply with state and local requirements, even if that may cause delay and additional costs, because "[n]ot all additional costs or delays . . . are unreasonable in light of the Commission's [FERC] goal to include state and local authorities to the extent possible in [pipeline] planning and construction activities." See RA pp. 8, 19, Decision pp. 3, 14.<sup>10</sup> In short, the Stay does not violate the NGA, which encourages parties to reach easement agreements, precisely what the bill would accomplish.<sup>11</sup> The Superior Court properly

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<sup>10</sup> As the Superior Court noted, FERC "encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures. That a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission's and state or local agency's requirements." See R.A. p. 8, Decision p. 3, quoting the FERC Certificate authorizing Tennessee's pipeline project.

<sup>11</sup> Tennessee's petition should also be denied because the relief Tennessee seeks – lifting the Stay – will be moot if the Legislature votes in the next six weeks to authorize the easement. Tennessee has reserved its right to argue any such action by the Legislature would be preempted and of no effect, but the Superior Court issued the Stay precisely to allow the Legislature to authorize the easement. See RA pp. 19-20, Decision pp. 14-15. The Commonwealth reserves its right to argue that any bill passed by the Legislature by the

balanced a short delay in possession that would not harm Tennessee with allowing the Legislature an opportunity to act on H.3690. There is no legal basis or equitable reason for this Court to disturb the Superior Court's sound exercise of its discretion.

For all the above reasons, Tennessee's Petition should be denied.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS  
MAURA HEALEY, ATTORNEY GENERAL

By:



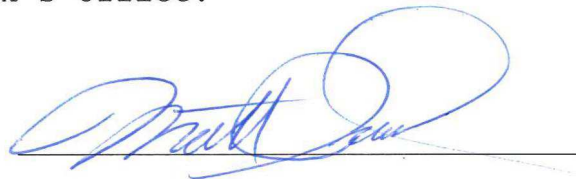
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end of the current session in late July is not preempted by federal law.

**MASS. R. APP. P. 13(D) CERTIFICATE OF SERVICE**

I, Matthew Ireland, Assistant Attorney General, certify that on this day of 15<sup>th</sup> day of, 2016, I served the foregoing *Commonwealth's Opposition To Plaintiff Tennessee Gas Pipeline Company's Petition To Lift Stay* by causing copy to be served by electronic mail transmission and first class mail on all counsel of record in this action, with a copy to the Berkshire Superior Court Clerk's Office.



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