UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PORTLAND NATURAL GAS TRANSMISSION SYSTEM,	)	
Plaintiff	)	
v.	)	***Civil Docket No. 96-336-P-C***
PORTLAND PIPE LINE CORPORATION,	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR TO STAY

At the heart of this declaratory judgment action is the plaintiff's proposal to develop a new interstate natural gas pipeline, a portion of which would be adjacent to or within a right-of-way of the defendant, which owns three existing pipelines. The complaint invokes the diversity jurisdiction of the court and seeks a judicial determination of the scope of that right-of-way, in the form of an easement, across a parcel of land in Harrison, Maine purchased by the plaintiff approximately five months before instituting the present proceedings.

The defendant has moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the action, or in the alternative to stay it, on the ground that it presents a controversy that is not yet ripe for review. In essence, the defendant's position is that a determination of the scope of the easement in question, which is likely to have implications along other parts of the proposed pipeline route that are burdened by similar easements, should await the project's licensure by the Federal Energy Regulatory Commission ("FERC"). For the reasons that follow, I recommend that the defendant's

motion be denied and that this action be permitted to proceed now.[1]

A review of the complaint, as supplemented by affidavits filed by both sides, reveals the following material assertions: The defendant is a Maine corporation with its principal place of business in Portland. Complaint ¶ 3. The plaintiff, a partnership, has its principal place of business in Westborough, Massachusetts and is comprised of six corporate entities, all of which are incorporated in jurisdictions other than Maine and likewise do not maintain their principal places of business in the jurisdiction. *Id*. at ¶ 2. Pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), the plaintiff has submitted an amended application to FERC for authority to construct, to own and to maintain a natural gas pipeline from Pittsburg, New Hampshire to a point near Haverhill, Massachusetts. *Id*. at ¶ 5. The defendant and its parent corporation, Montreal Pipe Line Ltd., own and maintain three existing pipelines that run between South Portland, Maine and Montreal, Canada. *Id*. at ¶ 7.

In order to maintain and install its pipelines, the defendant obtained easements from various landowners permitting it to construct, maintain and operate the lines. *Id*. at ¶ 8. On June 15, 1996, the plaintiff acquired title in fee simple to a certain parcel of real property in Harrison, Maine that is subject to such an easement. *Id*. at ¶ 9; Attachment A to Motion to Dismiss or, in the Alternative, to Stay the Present Action and Incorporated Memorandum of Law ("Defendant's Memorandum") (Docket No. 2). The width of the easement right granted to the defendant in connection with this property is unspecified in the instrument that created the easement. Complaint at ¶ 11.

As the owner of the burdened property in Harrison, the plaintiff has an interest in determining

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[1] The defendant has requested oral argument on its motion. Satisfied that I am able to address the substantive issues presented on the basis of the parties' written submissions and my own research, I deny the request. *See* Local Rule 7(f).

the scope of the easement so that it can ascertain the extent of its rights in the property. *Id*. That, however, only begins to describe the significance of such a determination for the plaintiff. If FERC approves its new pipeline as presently proposed, approximately 42 miles of it will be constructed alongside the defendant's existing pipelines in Maine. *Id*. at ¶ 1; Affidavit of Michael Minkos ("Minkos Aff."), appended to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Motion for Stay ("Plaintiff's Memorandum") (Docket No. 6), at ¶ 1. The easement held by the defendant across the Harrison property is the "Standard Easement" used by the defendant in connection with acquiring the rights to build and operate its pipelines.[2] Complaint at ¶ 12; Affidavit of Theodore Metzing ("Metzing Aff.") (Docket No. 3) at ¶ 4.

The proximity of the plaintiff's proposed pipeline to the defendant's existing pipelines has been the subject of significant and ongoing disagreement between the parties. They have been negotiating about it since 1991. Complaint at ¶ 13. The defendant formally petitioned to intervene in the FERC proceeding, at least in part to bring its concerns about this question to the attention of the agency. Metzing Aff. at ¶ 13. Citing safety issues, logistical problems related to construction and corrosion, environmental issues and its own possible future plans to build an additional pipeline along its right-of-way, the defendant has taken the position that the plaintiff's new pipeline should be constructed at least 50 feet from each of the defendant's existing lines. *Id*. at ¶¶ 8-10, 13. According to the defendant, the plaintiff wishes to build its new pipeline as close as 25 feet from the existing lines of the defendant. *Id*. at ¶ 8.

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[2] At the time of the construction of the defendant's first pipeline in 1941, the defendant enjoyed the right to acquire its easements by eminent domain. Affidavit of Theodore Metzing ("Metzing Aff.") (Docket No. 3) at ¶ 3. However, only three easements, involving approximately 3,300 feet of the pipeline, were acquired in this manner. *Id*. The vast majority of the defendant's easements were acquired via negotiation with individual landowners. *Id*. at ¶ 4.

The plaintiff contends that a "reasonable interpretation" of the easement across its Harrison property is that the defendant's rights extend 25 feet on either side of the middle line of the easement. Plaintiff's Memorandum at 4. Determination of the scope of this easement, or any other, is not a condition precedent to the actual construction of the project because, should FERC grant the plaintiff's application, the Natural Gas Act authorizes the plaintiff to take by eminent domain any necessary property rights. 15 U.S.C. § 717f(h). However, this provision obligates the plaintiff to negotiate with the owners of those rights first, *id*., and the plaintiff therefore desires to move forward with these discussions expeditiously, Minkos Aff. at ¶ 6; Plaintiff's Memorandum at 3 (suggesting that these negotiations are already under way). The plaintiff's stated objective is to bring the new pipeline into service by November 1998. Minkos Aff. at ¶ 3. To that end, the plaintiff received preliminary approval of its project from FERC in March 1996 and is asking the agency to give final approval by August. Complaint at ¶ 15. It is the plaintiff's position that in order for the new pipeline to go into service by the projected date, construction must begin no later than April 1988. Minkos Aff. at ¶ 5.

The defendant requests dismissal of the complaint on the ground that the controversy is not ripe for review. According to the defendant, the plaintiff's claim involves uncertain and contingent events, the parties are not sufficiently adverse, and any potential hardship to the plaintiff is insufficient to warrant the court's exercising its discretion to grant declaratory relief. I disagree.

When issues of ripeness arise in connection with a complaint for declaratory judgment, such questions "are analyzed under a familiar framework that considers the fitness of the issue for immediate review and the hardship to the litigant should review be postponed." *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003, 1009 (1st Cir. 1995) (citing *Abbott Labs. v.*

Gardner, 387 U.S. 136, 148-49 (1967)). Fitness in this context "typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends on facts that may not yet be sufficiently developed." *Riva*, 61 F.3d at 1009 (citation and internal quotation marks omitted). "One critical component is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id*. (citation and internal quotation marks omitted).

According to the defendant, the relief sought here involves such uncertain and contingent events because a judgment would only be useful to the plaintiff in the event FERC grants the pending application and in so doing approves the pipeline route as proposed. The defendant refers to other hurdles the project must clear before its construction, involving cooperation with an entity that has sought approval for a similar international gas transmission system,[3] and the completion of an environmental impact statement. Defendant's Memorandum at 13. In so arguing, the defendant confuses the utility of the relief sought, which is obviously uncertain for the reasons stated (and which I discuss, *infra*), with the possibility that future events might have an impact on the plaintiff's entitlement to relief itself. As the plaintiff points out, this is essentially a quiet title action. The

[3] This other entity is Maritimes & Northeast Pipeline, L.L.C. ("Maritimes"). Metzing Aff. at ¶ 15. The defendant has moved to supplement its motion with certain materials concerning Maritimes and the relationship of its plans to those of the plaintiff. Defendant's Motion for Leave to Supplement its Motion to Dismiss or Stay the Action, etc. (Docket No. 10). At FERC's urging, Maritimes and the plaintiff have proposed a joint pipeline in lieu of plans for separate pipelines along the part of the route that lies between South Portland and Haverhill. *Id*. at 2; Metzing Aff. at ¶¶ 11, 16. The materials on this subject presented by the defendant in its motion to supplement are, in my opinion, cumulative in the sense that they simply underscore the reality that the FERC proceeding is a complicated one and approval of the project as requested by the plaintiff, and within the time frame sought by the plaintiff, is not preordained. Thus, these materials do not alter my recommendation against the granting of the defendant's motion to dismiss or to stay, and I therefore grant the defendant's request to supplement the record even though the court has not yet ascertained the plaintiff's position as to these materials.

scope of the easement to which the plaintiff's property in Harrison is subject in no way turns on anything FERC might decide. Although the FERC decision may well have the effect of obviating the plaintiff's interest in receiving a favorable decision here, "a litigant seeking shelter behind a ripeness defense must demonstrate more than a theoretical possibility that harm may be averted." *Riva*, 61 F.3d at 1011.

In arguing to the contrary, the defendant relies on the First Circuit's decision in *Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530 (1st Cir. 1995). In that proceeding, the plaintiff sought a declaratory judgment that a Rhode Island statute was unconstitutional, contending the state legislature had drafted the measure specifically to deprive the plaintiff of certain of its preexisting rights. *Id*. at 531, 533. The First Circuit affirmed the trial court's dismissal on ripeness grounds, listing fully eight contingent events that would have to occur in the future in order for the plaintiff to have suffered any injury by virtue of the operation of the challenged statute. *Id*. at 538, 541. The court rejected as "too simplistic" the argument that the constitutional challenge itself was amenable to immediate adjudication because that determination did not turn on future events. *Id*. at 537.

> Put bluntly, the question of fitness does not pivot solely on whether a court is capable of resolving a claim intelligently, but also involves an assessment of whether it is appropriate for the court to undertake the task. Federal courts cannot -- and should not -- spend their scarce resources on what amounts to shadow boxing. Thus, if a plaintiff's claim, though predominantly legal in character, depends upon future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe.

Id. (citations omitted). As the defendant points out, the claim asserted here is not predominantly legal in nature. But neither does ascertainment of the scope of the easement in question depend on anything that might take place in the future. The FERC decision, and other contingencies of varying

degrees of probability, will surely affect the plaintiff's incentive to receive a favorable ruling on the scope of the easement. But the disagreement reflected by the plaintiff's complaint as to the width of the defendant's easement across the Harrison property is "rooted in the present" and in no way depends on a "chain of speculation." *Ernst & Young*, 45 F.3d at 538.

All of the other cases cited by the defendant, in which claims were held to be not yet ripe for adjudication, provide no authority to the contrary. In *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488 (5th Cir. 1986), the Fifth Circuit rejected as unripe a controversy over the extent to which a municipality enjoyed an option to purchase an electrical utility. *Id*. at 489. The determination turned on testimony of the chairman of the city council that the municipality had no "present intent" to exercise the option, but had "merely undertaken steps to maintain and preserve its legal rights under [it]." *Id* . at 490. By contrast, the defendant here obviously has a present intent to exercise its rights under the easement and the speculative character of the relief sought in *Middle South Energy* is therefore lacking. *Public Serv. Co. of New Mexico v. City of Albuquerque*, 755 F. Supp. 1494 (D.N.M. 1991), is similar to the present case in that it was a dispute over title to certain property used by a public utility. *Id*. at 1495. The plaintiff was concerned that, upon the upcoming expiration of a franchise agreement, the defendant municipality would claim title to the property and thus violate the plaintiff's rights under the Takings and Due Process clauses of the Constitution. *Id*. at 1495, 1497-98. The court found the controversy unripe for the simple reason that the defendant had taken no action to deny compensation under the Takings Clause, or to trigger its obligation to afford both procedural and substantive due process. *Id*. at 1498-99. In contrast to the constitutional rights at issue in that case, the property rights at issue here do not turn on actions to be taken in the future. *See also O'Neil v. Q.L.C.R.I., Inc.*, 750 F. Supp. 551, 553-54 (D.R.I. 1990) (claim based on

legality of possible future mortgage foreclosure unripe); *United States ex. rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170, 172 (D. Mass. 1990) (government reserved right to object to plaintiff's recovery in *qui tam* suit; validity of objection unripe where no objection actually filed and underlying *qui tam* claim unresolved), *aff'd*, 913 F.2d 17 (1st Cir. 1990); *Fagot v. F.D.I.C.*, 584 F. Supp. 1168, 1180 (D.P.R. 1984) (claim unripe where administrative remedies unexhausted).

Next, the defendant contends that the plaintiff's claim is not ripe for adjudication because the parties are not sufficiently adverse. The First Circuit had described adverseness as "the linchpin of ripeness." *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692 (1st Cir. 1994). It is a function of whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Riva*, 61 F.3d at 1010 (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). Adverseness "must be appraised in a practical, commonsense way" and the requirement "should not be applied woodenly" inasmuch as "[m]ost litigation has idiosyncratic features, and the adverseness criterion invites careful calibration on a case-by-case basis." *Narragansett Indian Tribe*, 19 F.3d at 692-93. Noting that some courts describe this requirement as "conclusivity," the First Circuit has suggested that adverseness often turns on whether the controversy in its present form is amenable to "specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id*. at 693 (citations omitted).

Were the plaintiff not the owner in fee of a property burdened by the easement in question, this quality of adverseness might well be lacking. In those circumstances, the plaintiff's interest in resolving the dispute as presented would turn entirely on what is presently a hypothetical state of

facts, i.e., the permitting by FERC of the pipeline as proposed and the resulting legal authority of the plaintiff to acquire by negotiation or eminent domain certain property interests that may presently be vested to at least some extent in the defendant. By contrast, no two parties could be more adverse in the sense contemplated by *Narragansett Indian Tribe* and *Riva* than the owner of a fee interest in a piece of property and owner of an easement that burdens such a fee interest. That the plaintiff may have deliberately contrived to place itself in this position of adverseness is immaterial.

The final aspect of the ripeness inquiry, and one also cited by the defendant in support of its position that dismissal is appropriate, is the so-called "hardship" or "[u]tility" test. *Riva*, 61 F.3d at 1010. Here the appropriate inquiry is whether "granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest." *Narragansett Indian Tribe*, 19 F.3d at 693. Thus, in *Narragansett Indian Tribe* a judicial ruling on whether the Indian Gaming Regulatory Act applied to land held in trust for the Narragansett Tribe's benefit, and thus whether Rhode Island could prevent the Tribe from building a casino on such land, met the utility test because such a ruling would "facilitat[e] the course of future tribal-state compact negotiations and clarify[] to some extent the legal status of the [tribal] lands at a time when substantially expanded use seems highly probable." *Id*. at 688, 694. By contrast, the First Circuit found the requisite hardship or utility lacking in *Ernst & Young*, where the plaintiff's asserted interest in obtaining a judgment lay in its desire to assess its exposure to money damages in connection with the civil liability it alleged had been unconstitutionally affected by the challenged legislation. *Ernst & Young*, 45 F.3d at 539-40 (utility/hardship test not satisfied "by a party showing that it has the opportunity to move from a position of utter confusion to one of mere befuddlement").

For purposes of assessing hardship and utility, the present case is more like *Narragansett Indian Tribe* than *Ernst & Young*. Resolution of the question presented will materially aid the plaintiff in negotiations that it has an interest in concluding expeditiously, given what is at least a substantial possibility that it will soon be constructing the pipeline project now pending before FERC. Such negotiations could well avoid condemnation proceedings and thus, unlike the plaintiff in *Ernst & Young*, the plaintiff here is not "faced with the incubus of pending litigation" as to the matters that are the subject of the litigation regardless of whether the court undertakes to resolve the dispute as presented in the complaint. *Id*. at 540.

"[A] litigant's plaints of hardship cannot be assessed in a vacuum. Rather, a claim of hardship demands an assessment of the complainant's position in light of all the attendant circumstances." *Id*. (citations omitted). The circumstances here are easily summarized: The plaintiff is a developer that desires to obtain the necessary property rights to complete its project prior to the receipt of regulatory approval, which it believes may be imminent, because the plaintiff wants to complete construction as quickly as possible. The risk in such circumstances that the plaintiff may acquire property interests it ultimately finds useless is a real one, but it is not sufficient to render the complaint unripe for judicial determination.[4]

For the foregoing reasons, I recommend that the defendant's motion to dismiss the plaintiff's complaint or to stay the action be **DENIED**.

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[4] The defendant also asks the court to exercise its discretion and stay the action pending the outcome of the FERC proceedings. Beyond a general invocation of the principle of judicial economy, the defendant offers no argument for a stay other than its position on ripeness. Having concluded the matter is ripe for consideration, I see no reason why the pendency of the FERC proceedings make the resolution of a fairly straightforward lawsuit in the nature of a quiet title action an unwise use of judicial resources at present.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of March, 1997.

David M. Cohen
United States Magistrate Judge