IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COLUMBIA GAS TRANSMISSION, LLC, *Plaintiff*,	*	
v.	*	
0.12 ACRES OF LAND, MORE OR LESS, IN WASHINGTON COUNTY, MARYLAND; STATE OF MARYLAND, DEPARTMENT OF NATURAL RESOURCES, *Defendants*.	*	No. 1:19-cv-01444-GLR

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants, the State of Maryland, Department of Natural Resources ("MDNR" or "the State"), file this memorandum in support of its motion to dismiss the Complaint in Condemnation (ECF 1, "Complaint" or "Compl."). Because the State has sovereign immunity, this Court lacks the power to adjudicate this action.

PERTINENT FACTUAL ALLEGATIONS

The Complaint alleges the following facts: Plaintiff Columbia Gas Transmission, LLC ("Columbia") is a Delaware limited liability company authorized to do business in the State of Maryland. Compl. ¶ 1. Columbia's business is the transport of natural gas in interstate commerce through pipes and conduits; it is a natural gas company within the meaning of the Natural Gas Act, 15 U.S.C. §§ 717a(6) and (1). Compl. ¶ 2.

On July 19, 2018, the Federal Energy Regulatory Commission ("FERC") granted Columbia a certificate of public convenience and necessity ("CPCN") approving the

construction and operation of approximately 3.37 miles of 8-inch diameter natural gas pipeline, extending from existing pipeline in Fulton County, Pennsylvania, to a site in Morgan County, West Virginia. Compl. ¶¶ 7, 8. FERC has approved the route of the project, Compl. ¶ 12, and the certificate facially authorizes Columbia to exercise "the right of eminent domain" to effectuate the route, Compl. ¶¶ 11-13, 25.

The project route impacts 22 tracts of real property. Compl. ¶ 14. Columbia has negotiated voluntary acquisition of easements through 18 privately-owned tracts. *Id.* Columbia has not, however, obtained easements for at least four parcels of publicly owned land. Three of those parcels are owned by the federal government and managed by the National Park Service in connection with the Chesapeake & Ohio Canal National Historical Park. *Id.* The fourth tract, which is the subject of this condemnation action ("the Tract"), is owned by the State of Maryland to the use of the Department of Natural Resources as a rails-to-trail bike path. Compl. ¶¶ 3, 14; Md. Code Ann., Nat. Res. § 1-109(a)(2).

STANDARD OF REVIEW

A claim of governmental immunity is properly analyzed as a jurisdictional matter. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (observing that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'"); *United States v. Mitchell*, 445 U.S. 535 (1980) (observing that the sovereign's consent to suit "define[s] that court's jurisdiction to entertain suit" (citation omitted)); *Smith v. Wash. Metro. Area Transit*, 290 F.3d 201, 205 (4th Cir. 2012) (observing that government immunity is

properly addressed under Rule 12(b)(1)); *Dennard v. Towson Univ.*, 62 F. Supp. 3d 446, 449 (D. Md. 2014) (same). When a governmental entity challenges subject matter jurisdiction, "the plaintiff bears the burden of persuasion, and the court is free to consider exhibits outside the pleadings 'to resolve factual disputes concerning jurisdiction.'" *Smith*, 290 F.3d at 205 (quoting *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)).

Because a state's claim of sovereign immunity acts as a jurisdictional bar to suit, it is an issue that should be addressed at the earliest stages of litigation. Thus, although Fed. R. Civ. P. 71.1 does not provide an express mechanism for filing motions to dismiss, a number of federal courts have recognized that Rule 71.1 does not bar motions to dismiss based on claims of sovereign immunity. *See Sabine Pipe Line, LLC v. A Permanent Easement of 4.25+/- Acres of Land in Orange Co., Texas*, 327 F.R.D. 131, 136-37 (E.D. Tex. 2017) (collecting cases and denying condemnor's motion to strike state agency's motion to dismiss). An early resolution of such a motion comports with the purpose of Rule 71.1, which is to avoid delay in condemnation proceedings. *Id*. at 137.

ARGUMENT[1]

Immunity from suit is a fundamental aspect of sovereignty. *Alden v. Maine*, 527 U.S. 706, 713 (1999). Upon the formation of the United States, the States retained their

[1] This Argument is identical to the discussion of the State's Eleventh Amendment immunity that appears in the portion of the State's opposition to plaintiff's motion for a preliminary injunction that addresses the likelihood of success on the merits.

status as sovereign entities and thereby retained their immunity from suit. *Id.* Under the Eleventh Amendment, a state's immunity from suit limits federal court jurisdiction. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64 (2001). By its terms,[2] the Eleventh Amendment explicitly applies to suits like this one, which is brought against a state by citizens of another state. Columbia is a business organized under the laws of Delaware pursuing litigation against the State of Maryland. Compl. ¶ 1. Moreover, the Supreme Court has "extended the Amendment's applicability to suits by citizens against their own States." *Id.* In other words, the Eleventh Amendment bars federal jurisdiction over suits by any private citizen against a state. *Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011). Furthermore, the State's immunity extends to state agencies such as MDNR.[3] *See Lee-Thomas v. Prince George's County Public Schools*, 666 F.3d 244, 248 (4th Cir. 2012) (recognizing that immunity extends to state agents and state instrumentalities).

The Eleventh Amendment bar to suit is subject to three exceptions not applicable here: (1) where the State has consented to suit, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); (2) where Congress has abrogated the State's immunity pursuant to a valid grant of constitutional authority, *Garrett*, 531 U.S. at 363; and (3) where the suit seeks prospective injunctive relief against state officials acting in violation

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI.

[3] MDNR is a principal department of Maryland State government. Md. Code Ann., Nat. Res. § 1-101(a) (LexisNexis 2018).

of federal law, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

The third of these exceptions does not apply because this suit is not an action against state officials for alleged violations of law. It is a condemnation suit by a private party arising under the Natural Gas Act, 15 U.S.C. §§ 717-717z ("NGA"). As developed below, neither the first nor second exception applies either: the State has not consented to such suits, and Congress has not abrogated the State's immunity from such suits.

I. THE STATE HAS NOT CONSENTED TO SUITS FOR CONDEMNATION BY PRIVATE PARTIES.

The State cannot be subject to suit in federal court unless it "consented to suit, either expressly or in the 'plan of the [Constitutional] convention.'" *Blatchford*, 501 U.S. at 779 (citation omitted); *cf. Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (holding that a state may waive Eleventh Amendment immunity by voluntarily availing itself of federal forum). There is no allegation that MDNR has consented to this suit, either expressly or by affirmative conduct, and consent is not implicit in the plan of the convention. Although, "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government," *Alden*, 527 U.S. at 755, the consent to suit by the United States "is not consent to suit by anyone whom the United States might select." *Blatchford*, 501 U.S. at 785; *see Alden*, 527 U.S. at 756 (observing that "[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States"). Consequently,

although the federal government could pursue a condemnation action against the State in federal court, it has no authority to assign its Eleventh Amendment exemption to a private party like Columbia.

Significantly, the complaint alleges only that the federal government delegated its eminent domain authority to Columbia, not that it assigned its Eleventh Amendment exemption. Compl. ¶¶ 11, 25. Nor could Columbia have alleged such an assignment because the federal government's Eleventh Amendment exemption is a permission granted *by the states*—it is not the federal government's to give. The consent granted by the states to the federal government cannot be redelegated to private pipeline companies like Columbia. As the Supreme Court observed in *Blatchford*:

> We doubt, to begin with, that that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

501 U.S. at 785 (emphasis in original).

The Eastern District of Texas, in *Sabine*, provides a helpful explication of the distinction between the federal government's eminent domain powers and its Eleventh Amendment exemption. Like this case, *Sabine* involved a condemnation action by a natural gas company against a state agency pursuant to a grant of eminent domain under the NGA. The plaintiff argued that, because the federal government can exercise eminent domain against state land in federal court, so can the delegee of the government's

eminent domain power. 327 F.R.D. at 139. Rejecting this contention, the *Sabine* court observed that the plaintiff was conflating two distinct concepts: (1) the federal government's power to exercise eminent domain; and (2) its power to sue the states in federal court. *Id*. at 139-40. Those powers must be treated distinctly because they arise from different sources. Whereas the power of eminent domain is an implicit attribute of sovereignty, the power to sue states in federal court is a permission granted to the federal government by the states.[4] *Id.* at 140; *see Alden*, 527 U.S. at 755 (observing that by ratifying the Constitution, the states consented to suits by the federal government).

As discussed above, the Supreme Court in *Blatchford* expressed "doubt" that the federal government's exemption from the state's sovereign immunity "can be delegated," 501 U.S. at 785, and the canon of constitutional avoidance cautions against ignoring the Court's warnings about intruding on this aspect of the states' sovereignty. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (observing that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems"). Other courts have concluded, accordingly, that the State's consent to suit is the State's to give or withhold and cannot be conferred by the federal government. *See*

[4] With little analysis, the United States District Court for the District of New Jersey recently reached the opposite conclusion of the *Sabine* court in an unreported decision; that case is now pending in the Third Circuit Court of Appeals. *See In re Penneast Pipeline, LLC*, Civ. No. 18-1585, 2018 WL 6584893 (D.N.J., Dec. 14, 2018), *appeal filed*, No. 19-1214 (3d Cir., Jan. 11, 2019). The Third Circuit heard argument on June 10, and the audio recording is available at https://www2.ca3.uscourts.gov/oralargument/audio/19-1191InRePennEastPipelineCoLLC.mp3.

U.S. v. Tex. Tech Univ., 171 F.3d 279, 294 (5th Cir. 1999) ("[T]he United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment."). This Court should reach the same conclusion.

II. CONGRESS HAS NOT ABROGATED THE STATE'S SOVEREIGN IMMUNITY.

The statutory basis for Columbia's claim to pursue eminent domain, the NGA, does not abrogate the states' Eleventh Amendment immunity. An abrogation of a state's immunity requires both a clear statement of congressional intent and a valid exercise of congressional power. *Garrett*, 531 U.S. at 363; *see Lizzi v. Alexander*, 255 F.3d 128, 134 (4th Cir. 2001) (citing *Seminole Tribe*, 517 U.S. at 55), *abrogated in part on other grounds by Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003). The NGA does not embody a clear statement of congressional intent to abrogate the states' immunity, and it is not a valid source of congressional power for abrogation.

As a preliminary matter, "statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted." *Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 172 (D.N.D. 1981) (citation omitted); *accord Transwestern Pipeline Co. v. 17.19 Acres of Prop.*, 550 F.3d 770, 774 (9th Cir. 2008); *East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004); *Moore v. Equitrans, L.P.*, 49 F. Supp. 3d 456, 474 (N.D.W. Va. 2014). Although the NGA authorizes natural gas companies to acquire property rights "by the exercise of the right of eminent domain in the district court of the United States for the district court in which such property may be located, or in the State courts," 15 U.S.C. § 717f(h),

nowhere in this provision, or in other sections of the NGA, does it mention either the Eleventh Amendment or the states' sovereign immunity. *See id.*; *Sabine*, 327 F.R.D. at 141. The NGA's general authorization to file suit is the sort of statutory language that the Supreme Court has held to be insufficient for establishing an intent to abrogate state sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). "Consequently, the court is without the authority to read this exemption into the statute." *Id.* (citing *Blatchford*, 501 U.S. at 786 (refusing to read a delegation of the Eleventh Amendment exemption where the statute did not contain the word "delegation" or "the slightest suggestion of such an analysis")).

In any event, even if Congress had intended to abrogate the states' immunity to suit, the NGA does not provide a valid vehicle for abrogation. The Supreme Court has held that Congress cannot abrogate Eleventh Amendment immunity simply by enacting legislation under its general grant of Article I legislative powers, such as the Commerce Clause. *See Seminole Tribe of Fla.*, 517 U.S. at 72-73. ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.") The only valid source of Congressional power that would allow for the abrogation of a state's immunity from suit

by private citizens is Section 5 of the Fourteenth Amendment.[5] *See Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 35 (2012). The NGA, however, was enacted pursuant to Congress's Commerce Clause power, not pursuant to the Enforcement Clause. *See* 15 U.S.C. § 717; *Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 506 (1942); *National Steel Corp. v. Long*, 718 F. Supp. 622, 628 n.6 (W.D. Mich. 1989) (discussing *Panhandle E. Pipe Line. Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 344 (1951)). Consequently, even if it could be argued that Congress intended to abrogate the states' immunity under the NGA, it had no authority to do so.[6]

CONCLUSION

The complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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[5] Section 5 of the Fourteenth Amendment—referred to as the Enforcement Clause—states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

[6] In addition to the State's constitutional objections to this Court's jurisdiction, Columbia has not sufficiently alleged satisfaction of the statutory preconditions for bringing a condemnation action in federal court. The Natural Gas Act provides 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). In its complaint, Columbia does not affirmatively allege satisfaction of that requirement, but states only that, "[u]pon information and belief," the amount "claimed by" the State exceeds $3,000. ECF 1 at 5 (¶ 22). However, the appraised value of the easement was only $180, and the $5,000 in compensation that Columbia offered was not the result of a claim by the State, but simply Columbia's effort to expedite conclusion of the easement negotiations. Although MDNR ultimately recommended approval of the easement for the $5,000 in compensation offered by Columbia, that recommendation was not the result of a claim made by the State.

/s/ Adam D. Snyder

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June 17, 2019

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CERTIFICATE OF SERVICE

I certify that, on this 17th day of June, 2019, the foregoing was served by CM/ECF on all registered CMF users.

/s/ Adam D. Snyder

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