IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

OPINION AND ORDER

Plaintiff,

13-cv-187-bbc

v.

TOWN OF LIMA and DAVID KYLE,
in his official capacity as Town Board Chair,

Defendants.

- -

Plaintiff Enbridge Energy, Limited Partnership owns several crude oil pipelines that run through the town of Lima, Wisconsin. Plaintiff has filed a complaint in which it alleges that it is required by federal law to inspect a number of "anomalies" detected in the Lima portion of the pipeline and that defendants Town of Lima and David Kyle, the chair of the town board, are preventing it from performing the inspections within the deadlines imposed by the federal government. In particular, defendants have allegedly demanded that plaintiff pay exorbitant amounts of money and agree to unreasonable conditions before using town roads. Plaintiff says that defendants' demands will cause plaintiff to miss its inspection deadlines and be subject to federal criminal penalties.

Plaintiff asserts claims against defendants under the Supremacy Clause and the Commerce Clause. Under the Supremacy Clause, plaintiff contends that defendants' actions are preempted because they are interfering with plaintiff's ability to comply with federal law.

With respect to the Commerce Clause, plaintiff contends that defendants' actions violate the interstate commerce clause because defendants are discriminating against plaintiff as an out-of-state entity. Plaintiff has filed a motion for a preliminary injunction to stop defendants "from interfering with [plaintiff]'s use of roads in the Town of Lima during the pendency of this action." Plt.'s Mot., dkt. #3, at 2. In support of its motion, plaintiff relies only on its claim that defendants' actions are preempted by federal law.

After reviewing the parties' briefs and the evidence in the record, I conclude that plaintiff's motion for a preliminary injunction must be denied. Plaintiff has not shown that it has a likelihood of success on the merits of its preemption claim because it has not shown that defendants' actions pose an undue obstacle to its ability to inspect its pipelines or otherwise comply with federal law. Rather, the evidence in the record shows only that plaintiff and defendants have attempted to negotiate a road use agreement and are continuing to do so. Granting an injunction at this stage would effectively end the negotiations and deprive the parties of their ability to protect themselves through contract. Plaintiff has cited no authority suggesting that a preliminary injunction would be appropriate under such circumstances.

As neither party pointed to any material facts that were in dispute, it was not necessary to hold an evidentiary hearing to decide plaintiff's motion. I note that defendants disputed several of plaintiff's proposed facts, including (1) whether plaintiff could gain access to its pipelines without using town roads; (2) whether plaintiff delayed unnecessarily in approaching defendants about a road use agreement; (3) how much damage plaintiff is likely

to cause to town roads; (4) whether plaintiff could conduct its "integrity digs" in a less destructive manner; and (5) whether plaintiff has applied for a state road use permit. However, these disputes had no affect on the outcome of the motion. Thus, for the purposes of resolving this motion, I accepted all of plaintiff's proposed facts as true so long as they were supported by evidence in the record.

FACTS

Plaintiff Enbridge Energy, Limited Partnership, owns the United States portion of an interstate pipeline system that transports crude oil from western Canada to the eastern United States. Four of plaintiff's pipelines run through defendant Town of Lima in south-central Wisconsin.

As an operator of an interstate hazardous liquid pipeline, plaintiff is regulated by the Pipeline Safety Act, 49 U.S.C. § 6010, and attendant administrative regulations promulgated by the United States Department of Transportation, Pipeline Hazardous Material Safety Administration, 49 C.F.R. Part 195. Plaintiff is required by federal regulation to have an "integrity program" that includes procedures and protocols for the periodic inspection and maintenance of its pipelines. Under plaintiff's integrity program and federal regulations, 29 C.F.R. § 195.452, plaintiff is required to conduct physical excavations of its pipelines, known as "integrity digs," whenever "in line inspections" identify "anomalies," or areas of concern, in the pipelines.

Plaintiff often requires use of municipal roads in order to gain access to its pipelines

for integrity digs. Because some of the vehicles and equipment plaintiff uses for integrity digs exceed the weight limitations for municipal roads, plaintiff frequently enters into road use agreements with municipalities under which plaintiff receives permission to bring its equipment on the roads in exchange for its promise to compensate the municipalities for damage to the roads. Plaintiff has entered into road use agreements with the Town of Lima in the past, including in 2012.

Plaintiff has identified 69 anomalies on its pipelines that run through the Town of Lima and has scheduled the anomalies for inspection. Under plaintiff's integrity program, plaintiff has deadlines by which it must conduct the integrity digs on the 69 anomalies. The first of these deadlines is on May 1, 2013, with others in June and July 2013 and March 2014. (Plaintiff provided no evidence about when the 69 anomalies were discovered or how these deadlines were set.) In order to meet the May 1 deadline, plaintiff must begin the integrity digs on April 9, 2013.

On July 30, 2012, the Pipeline Hazardous Material Safety Administration issued a Corrective Action Order to plaintiff under 49 U.S.C. §§ 60112 and 60117 and 49 C.F.R. § 190.233 requiring plaintiff to, among other things, perform additional "in line inspections" of Line 14, one of the pipelines that runs through Lima. If plaintiff finds anomalies from these inspections, it will have until December 31, 2013 to conduct physical integrity digs of Line 14, make necessary repairs and test the pipelines. Plaintiff must perform the in line and physical inspections of Line 14 this summer in order to comply with the December 31 deadline. If plaintiff does not meet the deadlines imposed by the Corrective Action Order

and its Integrity Program, it may be subject to fines and penalties under 49 U.S.C. § 60122.

Plaintiff must use approximately 12.1 miles of the Town of Lima's roads to reach the sites of its integrity digs, including the dig with the deadline of May 1, 2013. Originally, plaintiff scheduled three integrity digs to be started in the Town of Lima in February 2013 and completed in March 2013. The locations were in wet areas, so performing the integrity digs while the ground was frozen was preferable. On January 28, 2013, Joan Miller, plaintiff's integrity program coordinator, wrote to the town board, stating that plaintiff had scheduled integrity digs in the town to begin mid-February. On February 21, the Town of Lima clerk emailed Miller, stating that as of March 1, 2013 the town was imposing a 12-ton weight limitation on all roads. Most of plaintiff's vehicles and equipment needed to conduct integrity digs weigh more than 12 tons.

After receiving the email, plaintiff's counsel contacted counsel for the town and offered to enter into a road use agreement for the 2013 integrity digs. The proposed road use agreement would have given the town the right to inspect the roads before and after plaintiff's use, indemnified the town for damages, expenses and costs incurred as a result of plaintiff's use of the town roads and would have required plaintiff to post a bond. The town rejected plaintiff's proposed road use agreement, stating that plaintiff's use of town roads in 2012 had caused significant damage. The town's counsel told plaintiff that the cost to resurface a town road was approximately $95,000 a mile and the cost to replace a road was approximately $200,000 a mile. On March 7, 2013, the town proposed a road use agreement, citing Wis. Stat. § 349.16 as the town's authority for doing so. Under the town's

proposed agreement, plaintiff's access to town roads for 2013 integrity digs was conditioned on (1) completion of all integrity digs between March 11 and 18, 2013; (2) payment of $570,000 for alleged damage caused to town roads from use in 2012; (3) payment of $147,500 for each mile of road upon which plaintiff drives a vehicle weighing more than 12,000 pounds; and (d) if the town, in its sole discretion, deems complete replacement of roads is necessary, payment of $200,000 for each mile of road upon which plaintiff drives a vehicle weighing more than 12,000 pounds. Dkt. #8-1.

On March 11 or 12, plaintiff's counsel called the town's counsel and stated that plaintiff could not complete all integrity digs between March 11 and 18, 2013 and could not agree to the large upfront payments demanded by the town. The town's counsel responded that the town likely would be willing to negotiate and that he would contact plaintiff after he returned from his vacation. Plaintiff told the town's counsel that it would have to file a lawsuit because it did not have time to wait for further negotiations.

Plaintiff filed this lawsuit on March 15, 2013. Since the town's counsel returned from vacation, the parties have attempted to reach a resolution. They have exchanged two additional road use agreement drafts. In the town's most recent proposal, the town removed the requirements that plaintiff pay for alleged damage from previous years and extended the project window to December 31, 2013. Dkt. #22. It also removed the provision requiring plaintiff to pay upfront costs for using the roads, but added provisions requiring plaintiff to post a $1,000,000 bond and pay for all damages to the roads caused by plaintiff. The proposal also requires plaintiff to weigh each vehicle before it uses town roads and to hire

a videographer to record plaintiff's work. Plaintiff rejected this proposal and the parties have not yet reached an agreement.

OPINION

Plaintiff is seeking the extraordinary relief of a preliminary injunction, which has several prerequisites. At the outset, plaintiff must show that it is reasonably likely to prevail on the merits of at least one of its claims. If it can make this showing, it must also show that it will suffer irreparable harm if an injunction is not granted, that the harm it will suffer if the injunction is denied will outweigh the harm defendant will suffer if the relief is granted and that an injunction will not disserve the public interest. Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health, 699 F.3d 962, 972 (7th Cir. 2012).

Plaintiff contends that it has a reasonable likelihood of prevailing on its claim under the Supremacy Clause because its evidence shows that defendants' actions are preempted by federal law. In particular, plaintiff contends that defendants' actions are preempted by the Pipeline Safety Act, 49 U.S.C. §§ 60101-60503, Pipeline Hazardous Material Safety Administration regulations and the July 30, 2012 Corrective Action Order.

Under the Supremacy Clause of Article VI of the Constitution, "[w]here state and federal law 'directly conflict,' state law must give way." Wos v. E.M.A. ex rel. Johnson, — U.S. —, 2013 WL 1131709, *7 (Mar. 20, 2013) (citation omitted). A federal law can displace state law through express preemption, field preemption or conflict preemption. Express preemption exists where Congress enacts an explicit statutory demand that state law

be displaced. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992). Field preemption exists "when the federal regulatory scheme is so pervasive or the federal interest so dominant that it may be inferred that Congress intended to occupy the entire legislative field." Planned Parenthood, 699 F.3d at 984. Conflict preemption"arises when state law conflicts with federal law to the extent that 'compliance with both federal and state regulations is a physical impossibility,' or the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (citing Arizona v. United States, — U.S. — , 132 S. Ct. 2492, 2501 (2012)). Regulations promulgated by a federal agency that conflict with state or local law preempt state and local law in the same manner as do specific acts of Congress. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986).

Plaintiff contends that defendants' actions are barred by express and conflict preemption. The Pipeline Safety Act contains an express preemption provision that expressly preempts all state and local laws affecting pipeline safety. 49 U.S.C. § 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."). See also Washington Gas Light Co. v. Prince George's County Council, — F.3d — , 2013 WL 1189296, *7 (4th Cir. Mar. 25, 2013) (Pipeline Safety Act "expressly preempts state and local law in the field of safety"). Plaintiff cites this provision as well as several cases in which courts have relied on the provision to conclude that state or local actions are preempted by the Act. E.g. Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872 (9th Cir. 2006) (Pipeline Safety Act preempted

City of Seattle from enforcing its own more stringent pipeline safety provisions); Kinley Corp. v. Iowa Utilities Board, Utilities Division, Department of Commerce, 999 F.2d 354 (8th Cir. 1993) (Iowa law imposing standards for pipeline operators expressly preempted); ANR Pipeline Co. v. Iowa State Commerce Commission, 828 F.2d 465 (8th Cir. 1987) (Iowa law imposing safety standards for pipelines was expressly preempted).

However, because defendants' road use proposal and demands are not safety regulations, they do not come within the express preemption provision of the Pipeline Safety Act. Washington Gas Light, — F.3d —, 2013 WL 1189296 at *7 (county zoning plans not preempted by Pipeline Safety Act); Texas Midstream Gas Services. v. City of Grand Prairie, 608 F.3d 200, 211 (5th Cir. 2010) (city development code not preempted by Pipeline Safety Act). For the same reason, the cases cited by plaintiff are not particularly helpful. In those cases, the courts relied on the express preemption provision of the Pipeline Safety Act.

Plaintiff makes no arguments about field preemption, which means that conflict preemption is the only remaining option. Plaintiff contends that conflict preemption applies because defendants' demands are "an obstacle to the accomplishment of the full purposes and objectives" of the Pipeline Safety Act, related regulations and the Corrective Action Order. Plt.'s Br., dkt. #4, at 15. Specifically, plaintiff contends that defendants are demanding unreasonable and exorbitant road use fees and conditions that effectively prevent plaintiff from inspecting its pipelines. As a result, the purpose of Congress is thwarted because plaintiff is unable to insure that its pipelines are safe.

I appreciate that plaintiff is concerned about its ability to inspect its pipelines within

the deadlines set by its integrity program and the Corrective Action Order and I understand that plaintiff believes that defendants' demands will make it impossible to do so. However, I am not persuaded by plaintiff's argument that defendants' actions are barred by the Supremacy Clause and preempted by federal law.

There may be situations in which a municipality's regulations, ordinances or negotiating positions truly stand as an obstacle to an entity's ability to comply with the requirements of the Pipeline Safety Act and attendant regulations. However, the record in this case shows that defendants are simply attempting to negotiate a road use agreement that would adequately protect the town from incurring costs to repair damage to its roads caused by plaintiff. Plaintiff has conceded that the town has the authority under state law to negotiate and enter into road use agreements and the evidence shows that all parties are willing and ready to enter into such an agreement. Although plaintiff is dissatisfied with the state and speed of negotiations, it has not shown that defendants have acted in bad faith or that their most recent demands are objectively unreasonable. In fact, defendants' most recent proposal appears to propose terms from which the parties should be able to negotiate a mutually agreeable contract.

In effect, plaintiff is asking this court to reject the additional protections proposed by defendants and to put an end to the negotiations between the parties by imposing plaintiff's preferred road use agreement terms. However, plaintiff has cited no cases in which a court issued a preliminary injunction under such circumstances and I conclude that doing so would be inappropriate in this case. Instead, the parties should continue negotiating in good faith

to reach a road use agreement. Although the final road use agreement might require plaintiff to pay more for its integrity digs than it wishes, that alone does not mean that plaintiff has a claim under the Supremacy Clause. Washington Gas Light, — F.3d —, 2013 WL 1189296 at *9 ("[There are alternative locations, albeit more costly, that [Washington Gas] could use for the proposed expansion. While Washington Gas objects to the use of these alternatives based on the cost, this objection is of no constitutional significance."); Texas Midstream, 608 F.3d at 211 ("[Texas Midstream] raises the prospect that an operator of a compressor station may have to acquire more land to comply with both requirements. This may cost [Texas Midstream] money, but it does not thwart the full purposes and objectives of Congress.") (internal citations and quotation marks omitted).

ORDER

IT IS ORDERED that plaintiff Enbridge Energy, Limited Partnership,'s motion for a preliminary injunction, dkt. #3, is DENIED.

Entered this 4th day of April, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge