UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ANR PIPELINE COMPANY,
Plaintiff,

v. **Case No. 24-C-0524**

9.33 ACRES, MORE OR LESS, IN WAUKESHA COUNTY, WISCONSIN, and AMERICA FARMS, INC.,
Defendants.

DECISION AND ORDER

ANR Pipeline Company brings this action under Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) and Federal Rule of Civil Procedure 71.1, to obtain easements through properties owned by America Farms, Inc. Before me now is ANR's motion for partial summary judgment and its motion for immediate possession of the easements.

I. BACKGROUND

ANR is an interstate natural-gas company subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Under the Natural Gas Act, 15 U.S.C. §§ 717–717z, ANR must obtain permission from FERC to construct, extend, or abandon natural-gas transportation facilities.

On November 14, 2022, ANR filed an application under sections 7(b) and (c) of the Natural Gas Act for authorization to implement a pipeline-modernization project known as the Wisconsin Reliability Project. The project will replace existing pipeline and compression facilities in parts of Wisconsin and Illinois with new, more modern facilities. A chief component of the project is the replacement of approximately 48 miles of existing pipeline originally installed in 1949, 1950, and 1960 with approximately 51 miles of new,

larger-diameter pipeline in certain counties in eastern Wisconsin and northern Illinois. On December 19, 2023, FERC issued a written order granting ANR a certificate of public convenience and necessity to construct and operate the project. (FERC Certificate, ECF No. 1-2.) FERC conditioned its approval of the project on ANR's completing the project within two years, *i.e.*, by December 19, 2025. (*Id.* at 64.)

The approved route of the project runs through two neighboring parcels of land owned by defendant America Farms, Inc., in Waukesha County, Wisconsin. In this action, ANR seeks to condemn the easements necessary to construct the pipeline underneath the properties. The proposed easements include permanent easements for the right-of-way necessary to operate and maintain the pipeline and additional temporary easements for construction-related activities that will last only until construction and restoration of the property is complete. In addition, ANR seeks to acquire the right of ingress and egress to and from the easements and the right of access through any existing and future roads on the property. Finally, ANR seeks the right to clear encroachments and fell trees and clear brush or other vegetation as necessary for completing the project and maintaining the pipeline.

ANR attempted to acquire the easements from America Farms through negotiation but was unsuccessful. ANR opened negotiations with America Farms in March 2022 and sent written offers to purchase the easements in September 2023, November 2023, and March 2024. However, America Farms did not accept the offers. On May 1, 2024, ANR commenced the present action to acquire the easements by eminent domain under § 7(h) of the Natural Gas Act, which grants a natural-gas company the right to use the eminent domain power of the United States to acquire property necessary for the construction of

a natural-gas pipeline and related facilities. ANR now moves for summary judgment on the issue of its right to obtain the easements by eminent domain. Further, ANR has filed a motion for immediate possession of the easements. In the motion, ANR requests an order allowing it to exercise its rights under the easements no later than October 1, 2024, which it contends it must do to complete the project by the deadline set by FERC. Because a trial on the issue of just compensation could not occur prior to October 1st, ANR requires the order granting it immediate possession to begin preparations for construction.

America Farms currently operates the properties at issue as a natural sanctuary known as the Promised Land Ranch & Preserve.[1] The sanctuary is a nonprofit, and its mission is to introduce disadvantaged persons (including people with disabilities and veterans with PTSD) to animals, nature, and outdoor activities. The property supports a range of activities, including horse riding, miniature golf, hiking, tree planting, organic farming, sale of in-season fruits and vegetables, and technical skills training. The improved portions of the property include horse stables and a fenced horse paddock used for equine therapy and trail riding. America Farms currently provides boarding for five horses, and it has space for up to 24 horses. It charges $150 per horse for boarding, which is well below the market rate. In the summer and fall months, America Farms erects a 40-foot by 80-foot frame tent on the property, which it rents out for weddings at the rate of $5,000–$6,000 per day. This income helps America Farms provide its other services

[1] I have taken the facts about America Farms' operations from the declaration of its president, Timothy M. Winter, Th.D. (ECF No. 29.) For purposes of the present motions, I accept Winter's factual representations about America Farms' operations as true.

to the disadvantaged. The property also includes a sheep paddock, a group home, storage buildings, a barn that local manufacturers rent for equipment testing, and an office.

America Farms contends that the easements ANR seeks to acquire would disrupt its operations in several ways. First, the easements would run through the horse paddock. America Farms believes that ANR's use of heavy machinery to construct the pipeline would potentially spook the horses and endanger the safety of the horses and their riders. As a result, America Farms is considering relocating the horse paddock and ceasing its horse-boarding operations. Second, America Farms believes that the manufacturers who rent the barn for equipment testing will no longer do so if they are forced to navigate around the heavy machinery ANR might use during construction. Third, the easements would run through the part of the property that America Farms rents out for weddings. The easement itself will run through the area where the frame tent is located, and construction of the pipeline will require clearing a stand of old-growth trees that currently provides a buffer between nearby roads and the wedding area. America Farms states that it has already turned down wedding rentals due to the anticipated construction. Fourth, removal of the old-growth trees will prevent America Farms from offering educational sap-collection field trips to school classes and Boy Scout groups, and from offering contracts to organizations that use the nature trails that run through the tree stand. America Farms states that the anticipated clearing of the trees has resulted in the loss of sponsorships that previously supported the sanctuary's operations.

America Farms does not dispute that ANR has proved the elements necessary to invoke § 7(h) of the Natural Gas Act. However, it contends that ANR has failed to comply

with its obligations under a separate federal statute, the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("URA"), 42 U.S.C. §§ 4601–55. Specifically, America Farms contends that ANR was obligated to provide it, as a "displaced person" within the meaning of the URA, with relocation assistance advisory services in accordance with 42 U.S.C. § 4625(b) and (c). Relatedly, America Farms contends that ANR failed to plan the Wisconsin Reliability Project in a manner that minimized the project's impacts on displaced persons, as required by § 4625(a). For these reasons, America Farms contends that ANR is not entitled to summary judgment on its right to acquire the easements by eminent domain. Alternatively, America Farms contends that ANR is not entitled to immediate possession of the easements because it has not shown that it will suffer irreparable harm if immediate possession is not granted and because the irreparable harm to America Farms outweighs any such harm to ANR.

II. DISCUSSION

A. Motion for Partial Summary Judgment

Under Section 7(h) of the Natural Gas Act, a holder of a FERC certificate of public convenience and necessity has a limited right to use the eminent domain powers of the United States to acquire property necessary for the construction, operation, or maintenance of a natural-gas pipeline. 15 U.S.C. § 717f(h). Specifically, Section 7(h) provides:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas [and related facilities], it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the state courts.

15 U.S.C. § 717f(h).[2] Courts have interpreted this provision to mean that the natural-gas company must prove three elements to establish the right to condemn: (1) it holds a valid certificate of public convenience and necessity; (2) the property to be condemned is necessary for the natural-gas pipeline authorized by the certificate; and (3) the holder cannot acquire the necessary easements by contract. *See Transcont'l Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres*, 910 F.3d 1130, 1154 (11th Cir. 2018).

America Farms does not dispute that ANR has proved the three elements of its claim under § 7(h). However, America Farms contends that ANR's alleged failure to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("URA"), 42 U.S.C. §§ 4601–55, requires that I deny its motion for summary judgment on the issue of its right to condemn. America Farms apparently takes the position that the URA creates an affirmative defense that a property owner may assert in an eminent domain action. Because, as explained below, the parts of the URA that America Farms seeks to enforce do not create such an affirmative defense, ANR's having proved the elements of its § 7(h) claim requires entry of summary judgment on the issue of its right to condemn.

The URA is intended to "establish[] a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance." 42 U.S.C. § 4621(b). The URA's

[2] Section 7(h) also has a $3,000 amount-in-controversy requirement for jurisdiction in the district court. Here, that requirement is met because America Farms claims that the value of the easements exceeds $3,000. (Am. Farms Resp. to ANR Prop. Findings of Fact ¶ 20.)

primary purpose is to "ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons." *Id.* To further these purposes, the URA contains several provisions that apply to federal agencies when they undertake projects that result in displacement.[3] Among other things, the URA provides that a displacing federal agency shall pay reasonable moving expenses, 42 U.S.C. § 4622, and shall provide relocation assistance advisory services, *id.* § 4625, to "displaced persons." The URA defines "displaced person," in general, as "any person who moves from real property, or moves his personal property from real property" as a result of certain actions undertaken by a federal agency. *Id.* § 4601(6)(A). Although America Farms has not attempted to show that it meets the definition of a displaced person, I believe that its argument would be that the need to relocate its wedding tent and horse paddock from the easement area qualifies as a displacement of personal property that entitles it to the URA's protections.

America Farms seeks to enforce the URA requirements contained in 42 U.S.C. § 4625.[4] First, America Farms contends that ANR failed to comply with the relocation-

[3] Under the URA, "any person who has the authority to acquire property by eminent domain under Federal law" is considered a federal agency. 42 U.S.C. § 4601(1). ANR does not dispute that, for purposes of this action under § 7(h) of the Natural Gas Act, it is a federal agency as defined in the URA.

[4] Although America Farms mentions the moving expenses required by 42 U.S.C. § 4622, it concedes that "[t]he pre-payment of relocation expenses is not a precondition to the exercise of eminent domain under the Natural Gas Act." Br. in Opp. at 16 n.1 (citing *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc.*, 6 F. Supp. 2d 102 (D. Mass. 1998)). Thus, I will not further discuss the possibility that America Farms is entitled to payment of moving expenses under the URA.

planning requirements of § 4625(a) and the related implementing regulation promulgated by the Department of Transportation, 49 C.F.R. § 24.205(a). These provisions require a displacing federal agency to recognize the problems associated with the displacement of individuals, families, businesses, and farm operations during the planning stages of a project. Here, America Farms contends that ANR has not shown that it prepared a relocation plan to address displacements caused by the Wisconsin Reliability Project. Second, America Farms contends that ANR has failed to offer it relocation assistance advisory services, as required by § 4625(b) and (c). America Farms does not precisely identify the advisory services that it would have liked to have received from a pipeline company, but it generally cites the advisory services mentioned in the URA, namely: (1) determining, and making timely recommendations on, the needs and preferences, if any, of displaced persons for relocation assistance; (2) providing current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations; (3) assuring that a person shall not be required to move from a dwelling unless the person has had a reasonable opportunity to relocate to a comparable replacement dwelling; (4) assisting a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location; (5) supplying information concerning other federal and state programs which may be of assistance to displaced persons and technical assistance to such persons in applying for assistance under such programs; and (6) providing other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation. *See* 42 U.S.C. § 4625(c).

Several courts have held that there is no private right of action to enforce the relocation-assistance provisions of the URA. *See Delancey v. City of Austin*, 570 F.3d 590, 594–95 (5th Cir. 2009); *Clear Sky Carwash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861, 877 (E.D. Va. 2012). However, because America Farms has not brought a counterclaim seeking relief under the URA,[5] the question in this case is not whether there is a private right of action to enforce the URA, but whether a failure to comply with the URA's relocation planning and assistance provisions provides a defense to an eminent domain proceeding.

America Farms has not cited authority holding that § 4625 may be asserted as a defense to condemnation.[6] Moreover, nothing in the text of § 4625 suggests that Congress intended for its requirements to create such a defense. The provision does not reference eminent domain but instead places certain obligations on the heads of federal agencies to consider the needs of displaced persons when planning federal projects and to offer them the required advisory services. In contrast, other provisions of the URA (which are not applicable here) specifically apply to federal condemnation proceedings. *See* 42 U.S.C. § 4654 (requiring payment of certain litigation expenses). Further, § 4625

[5] Indeed, America Farms likely could not have brought such a counterclaim because Federal Rule of Civil Procedure 71.1(e)(3) does not allow additional pleadings in an eminent domain action beyond an answer. *See New West v. City of Joliet*, Nos. 05 C 1743, 07 C 7214, 11 C 5305, 2012 WL 366733, at *6 (N.D. Ill. Jan. 30, 2012) (collecting authorities stating that Rule 77.1 bars counterclaims).

[6] America Farms cites *United Family Farmers, Inc. v. Kleppe*, but in that case the displaced persons brought a lawsuit against the displacing agency to enforce the relocation-assistance provisions of the URA. 418 F. Supp. 519, 602–03 (D.S.D. 1976). The case was not a condemnation action, and the URA issue was not raised as a defense to condemnation.

does not necessarily provide benefits to property owners, who are the usual defendants in eminent domain proceedings. Instead, the benefits are conferred on (1) displaced persons, who will often be tenants or lessees of the property in question, and (2) in some cases, "any person occupying property immediately adjacent to the property where the displacing activity occurs." *Id.* § 4625(b). These beneficiaries of the statute will not usually be parties to an action seeking to condemn the real property, and therefore Congress likely would not have viewed § 4625 as creating rights that could be asserted as a defense to condemnation. Instead, to the extent that Congress intended for the beneficiaries of § 4625 to be able to enforce their rights at all, it would have expected them to bring a separate claim for benefits under the statute, either through an administrative claim or a separate lawsuit.

America Farms points out that a provision of the URA, *see* 42 U.S.C. § 4602(a), specifically provides that another substantive provision of the Act, *see id.* § 4651, does not apply to property acquisitions by purchase or condemnation. America Farms contends that because Congress did not also specifically provide that the relocation-assistance provisions of § 4625 are not enforceable in condemnation proceedings, Congress must have intended for them to be so enforceable. But the substantive provision of the URA that Congress specifically identified as not being enforceable in condemnation proceedings appears to confer rights that, absent Congress's directive to the contrary, would be enforceable in such proceedings. That is so because the provision at issue governs real estate acquisition practices and directly applies to a federal agency's use of eminent domain. *See* 42 U.S.C. § 4651. In contrast, as explained above, the provision America Farms seeks to enforce does not directly regulate the acquisition of real estate.

Instead, it focuses on aid to persons displaced by federal agency actions and occupants of adjacent properties, who will not necessarily be the owners of the real property at issue. Because § 4625 does not appear to regulate the acquisition of real property in the first place, Congress would have had no reason to specify that it does not apply to condemnation proceedings, as it did with respect to § 4651. The lack of a provision specifically excluding § 4625 from condemnation proceedings is therefore not evidence that Congress intended § 4625 to be enforceable in such proceedings.

For these reasons, I conclude that a federal agency's failure to carry out its duties under the relocation-assistance provisions of the URA does not defeat the agency's right to acquire real property by condemnation. Therefore, even if America Farms is a "displaced person" entitled to relocation assistance advisory services under the Act, and even if ANR failed to provide America Farms with the services to which it was entitled, ANR's right to obtain the easements under § 7(h) of the Natural Gas Act would not be impaired. Because America Farms does not otherwise dispute that ANR has proved the elements necessary to obtain the easements by eminent domain under § 7(h), I will grant ANR's motion for partial summary judgment and confirm its right to obtain the easements by eminent domain.

Before moving on, I note that nothing in this order should be construed as precluding America Farms from bringing a separate administrative claim or lawsuit seeking the relocation assistance to which it may be entitled under the URA. I take no position on whether § 4625 creates a private right of action or is otherwise enforceable outside of a condemnation proceeding, or on whether America Farms is a "displaced person." Further, because the obligations imposed on a federal agency by § 4625 do not

appear to terminate upon the acquisition of real property, America Farms may be entitled to receive relocation assistance advisory services from ANR even after ANR has taken possession of the easements. For example, America Farms may have an ongoing right to have ANR provide it with "current and continuing information on the availability, sales prices, and rental charges of . . . suitable locations for businesses and farm operations," 42 U.S.C. § 4625(c)(2), and assistance in "becoming established in a suitable replacement location," *id.* § 4625(c)(4). If America Farms has a genuine interest in receiving these services from a pipeline company, it is free to pursue a claim under the URA in separate proceedings.

B. Motion for Immediate Possession

In its motion for immediate possession of the easements, ANR requests an order allowing it to exercise its rights under the easements prior to the court's determining the amount of just compensation. Here, ANR requests access to the property immediately, but no later than October 1, 2024. ANR contends that it must begin preparations for construction by that date in order to compete the project by December 23, 2025, as ordered by FERC.

The Seventh Circuit has held that a natural-gas company cannot obtain a preliminary injunction granting it immediate access to a property it seeks to condemn under § 7(h) of the Natural Gas Act unless it first establishes a substantive entitlement to the property. *See Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471–72 (7th Cir. 1998). After the Seventh Circuit issued this decision, the Fourth Circuit determined that a company may gain immediate possession of the property under a preliminary injunction if, before issuance of the preliminary injunction, the district court

determines that the company has a substantive right to condemn the property. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823–28 (4th Cir. 2004). Other circuits have followed the Fourth Circuit's approach, *see Transcont'l Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less*, 910 F.3d 1130, 1152 (11th Cir. 2018) (collecting cases), as have district courts within the Seventh Circuit, *see, e.g., Guardian Pipeline, L.L.C. v. 295.49 Acres of Land*, Nos. 08-C-0028, 08-C-29, 08-C-30, 08-C-54, 2008 WL 1751358, at *21 (E.D. Wis. 2008); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976, 978–79 (N.D. Ill. 2002). Thus, the weight of authority now holds that once a district court establishes, via a motion for summary judgment, the gas company's right to condemn the property, the court may also grant the gas company immediate possession of the property if the standards for granting a preliminary injunction are satisfied. America Farms does not take issue with this authority or argue that the Seventh Circuit's decision in *Northern Border Pipeline* prevents ANR from seeking an order granting it immediate possession of the easements. Accordingly, I will assume that the Seventh Circuit would agree with the authorities cited above.[7]

To obtain immediate possession, ANR must show that the standards for granting a preliminary injunction are met. *See Sage*, 361 F.3d at 828. Under those standards, a plaintiff must show that it is likely to succeed on the merits, and that traditional legal remedies would be inadequate, such that it would suffer irreparable harm without the

[7] Neither party has requested a hearing on the motion for immediate possession. Moreover, the material facts are not generally disputed, in that neither side has claimed that it could weaken the other's evidence if given a chance to do so at an evidentiary hearing. Thus, I conclude that I may resolve the motion without holding an evidentiary hearing. *See Dexia Credit Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997).

injunction. *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 539 (7th Cir. 2021). If the plaintiff makes this showing, the court weighs the harm of denying an injunction to the plaintiff against the harm to the defendant of granting one. *Id.* This balancing test is done on a sliding scale: If the plaintiff is likely to win on the merits, the balance of harms need not weigh as heavily in his favor. *Id.* In balancing the harms, the court also considers the public interest. *Id.*

In the present case, because I have granted ANR's motion for summary judgment on its right to condemn the easements, ANR doesn't just have a likelihood of success on the merits, it is *certain* to prevail on the merits. The only issue that remains is the amount of just compensation, which will not affect ANR's right to possess the easements. Thus, the likelihood-of-success element is satisfied.

Turning to the irreparable-harm element, ANR contends that, without immediate access to the easements, it will be unable to complete the project by the deadline set by FERC. ANR has submitted a declaration from its project manager that explains why delaying access to the property beyond October 1, 2024, would jeopardize ANR's ability to meet the FERC-imposed deadline. (Declaration of Project Manager, ECF No. 20-1.) First, the project manager states that industry-standard practices require that the entire 51 miles of pipeline be constructed using linear construction. (*Id.* ¶ 16.) This means that ANR cannot start construction on the parcels where ANR already has the necessary easements, skip over a parcel that is subject to ongoing condemnation proceedings, and then return to that parcel once the proceedings have concluded. (*Id.*) The project manager explains that skipping properties would be inefficient and present safety hazards:

> Skipping properties requires equipment disassembly, loading and unloading, and reassembly for all phases of the construction process. Repeatedly disassembling, moving, and reassembling construction equipment increases the chances of errors, malfunctions, or accidents compared to continuous, linear operations. Skipping properties also involves moving equipment over felled trees and other obstacles that pose additional hazards and threaten worker safety.

(*Id.* ¶ 18.) Second, the project manager explains that ANR must finish certain preparatory work on the easements by October 2024 to prevent construction being delayed. America Farms' property is located in an area that has been federally designated as a nesting and foraging habitat for an endangered bumble bee. (*Id.* ¶ 21) To prevent the bumble bee from occurring in the path of the Wisconsin Reliability Project, ANR must begin ground mowing by October 2024 and keep the ground in a mowed condition throughout construction. Relatedly, ANR must assess whether there are bald eagle nests on the property that would be affected by the project's tree felling. (*Id.* ¶ 23.) If there are, ANR must formulate a plan to avoid impacting those nests. If there are not, ANR must begin tree felling by October 1, 2024, to prevent eagles from building and occupying new nests. If eagles build new nests, ANR would be precluded from conducting construction activities between January 15, 2025 and July 30, 2025. (*Id.*) Third, the project manager explains that ANR is unlikely to be able to work efficiently during the winter months because of the possibility of severe snowfall and high winds. (*Id.* ¶ 22.) Thus, any delay that prevents ANR from beginning work until the winter will lead to even further delays, which would further jeopardize ANR's ability to meet the FERC-imposed deadline. (*Id.*) Finally, before beginning any construction, ANR must have its survey crew walk the entire length of the project to stake out the boundaries of the easements, and it must relocate a light pole that currently exists on the easement over America Farms' property. (*Id.* ¶¶ 19–20.)

America Farms does not dispute that ANR would suffer irreparable harm if it failed to meet the deadline set by FERC for completing the project. Indeed, courts have recognized that failing to meet such a deadline is a form of irreparable harm. *See Guardian Pipeline, L.L.C. v. 295.49 Acres of Land*, Nos. 08-C-0028, 08-C-54, 08-C-29, 08-C-30, 2008 WL 1751358, at *22 (E.D. Wis. April 11, 2008). However, America Farms contends that ANR has not demonstrated that the lack of immediate access to its property will cause it to miss the deadline. Here, America Farms contends that ANR has not sufficiently explained why it must use linear construction and therefore cannot skip over America Farms' property until these proceedings have concluded. But I find that the project manager's declaration adequately explains this. As I quoted above, he states that not using linear construction would require disassembly of equipment and moving around obstacles such as felled trees, which causes delays and presents safety hazards. (Decl. of Project Manager ¶ 18.) America Farms also claims that it stands to reason that ANR cannot simultaneously work on all 51 miles of pipeline at the same time. However, ANR has shown that it must commence preparatory work—such as surveying, mowing, locating eagle nests, and felling trees—on all 51 miles by October 1, 2024. In particular, ANR must take steps to prevent endangered bees and eagles from occupying the property and preventing ANR from commencing construction soon. (*Id.* ¶¶ 2, 23.) Perhaps ANR has not shown that it must begin installing the pipeline on America Farms' property by October 1st, but it has shown that it would suffer irreparable harm in the form of delay if it were unable to commence the preparatory work by that date. Accordingly, I find that

ANR has shown that it would suffer irreparable harm without immediate access to the easement areas.[8]

Next, I must weigh the harm of denying an injunction to the plaintiff against the harm to the defendant of granting one. *See Life Spine*, 8 F.4th at 539. As noted, this balancing test is done on a sliding scale: If the plaintiff is likely to win on the merits, the balance of harms need not weigh as heavily in his favor. *Id.* The purpose of balancing the parties' respective harms on a sliding scale is to "avoid the error that is more costly in the circumstances." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984). That is, "the task for the district judge in deciding whether to grant or deny a motion for preliminary injunction is to minimize errors: the error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose." *Id.* A wrinkle in this case is that here, we *do* know for sure who is going to win the case on the merits: because I have already granted summary judgment to ANR on the issue of its right to acquire the easements by eminent domain, its likelihood of acquiring the easements at the end of the case is 100%. The only remaining issue is the amount of just compensation to which America Farms is entitled, and that issue will not affect ANR's right to possess the easements at the end of the case. Thus, I question whether America Farms' irreparable harm is even relevant to the balance of harms. So long as ANR is likely

[8] America Farms also contends that ANR has an adequate remedy at law, namely, this condemnation proceeding. But this argument does not respond to the irreparable harm that would be caused by the delay inherent in these proceedings. ANR's taking possession of the easement after just compensation is eventually determined would not be an adequate remedy for the harm caused by ANR's inability to begin construction by October 1, 2024.

to suffer *some* irreparable harm before the issue of just compensation is determined, the balance of harms will weigh in its favor even if immediate possession would irreparably harm America Farms, since America Farms is destined to incur that harm at the end of the case. Indeed, although the existing appellate cases generally instruct district courts to consider the landowner's irreparable harm when deciding whether to grant immediate possession to a natural-gas company, those cases also disregard certain forms of claimed harm on the ground that they necessarily will be incurred once just compensation is determined. *See Sage*, 361 F.3d at 828 (disregarding landowner's claimed harm to the productive capacity of land on the ground that it was "simply a timing argument").

Perhaps I should consider whether immediate possession would harm America Farms in a way that possession at the end of the case would not. *Cf. Transcont'l Gas Pipe Line Co.*, 910 F.3d at 1166 (noting that district court considered "any damages that might result from a defendant losing possession of the property in question sooner, rather than later, after compensation for the taking has been finally determined"). Even this seems wrong, however, because in an ideal world with no litigation delays, the amount of just compensation would already have been determined, and ANR would already have taken possession of the property. Because a defendant does not have a right to reap the benefits caused by delays inherent in litigation, there is no reason to consider the loss of those benefits a harm that the court should try to avoid. Things would be different if the landowner could show that it would suffer irreparable harm caused by the delay in *paying* just compensation. That is, if immediate possession deprived a landowner of a source of income, and immediate payment of just compensation were required to prevent the landowner from going out of business during the litigation, then the landowner's financial

harm might be a form of irreparable harm that the district court should balance against the harm to the gas company. Here, however, I do not understand America Farms to be claiming that immediate payment of just compensation is necessary to save its operations. Further, to the extent that this becomes an issue, America Farms may request distributions from the amount ANR deposits with the court under Federal Rule of Civil Procedure 71.1(j). *See Sage*, 361 F.3d at 824, 829.

In any event, America Farms has not demonstrated that it would suffer harm from ANR's possessing the easements immediately that it would not suffer when ANR takes possession at the end of the case. America Farms contends that immediate possession would interfere with its equine therapy programs, force the relocation of its horse paddock, and disrupt its wedding venue business. (Winter Decl. ¶¶ 13, 16.) But all these disruptions will occur once ANR takes possession of the property after just compensation is determined, so these would not be harms caused by *immediate* possession. Further, America Farms' evidence establishes that most of this harm has already occurred. America Farms states that, in anticipation of the easements being granted, it has already ceased its horse-boarding operations (*id.* ¶ 14), that it has already turned down weddings (*id.* ¶ 16), and that it has already stopped offering contracts to organizations that use the nature trails near the trees to be felled for the project (*id.* ¶ 17). To the extent that America Farms has shown that immediate possession would cause it any harm that has not already occurred or would not occur once ANR is granted possession at the end of the case, I find that such harm is outweighed by ANR's irreparable harm coupled with its certainty of success on the merits.

The remaining preliminary-injunction factor is consideration of the public interest. Here, because FERC has determined that timely completion of the Wisconsin Reliability Project will serve the public interest (FERC Certificate ¶ 154), this factor largely weighs in ANR's favor. *See Sage*, 361 F.3d at 826–27, 830. America Farms notes that the public also has an interest in its non-profit operations, which serve the needs of disabled individuals and veterans with PTSD. I agree that the public has an interest in America Farms' laudable operations. But because those operations have already been disrupted to some extent and must be disrupted further to complete the Wisconsin Reliability Project, delaying that project is not in the public interest.

In short, I conclude that the preliminary-injunction factors weigh in favor of granting ANR's motion for immediate possession of the easements.

C. Bond/Deposit with the Court

Under Federal Rule of Civil Procedure 65(c), a court may issue a preliminary injunction only if the movant "gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Alternatively, under Rule 71.1(j)(1), the plaintiff in an eminent domain proceeding "must deposit with the court any money required by law as a condition to the exercise of eminent domain." Neither party addresses whether a bond or a deposit with the court is the correct alternative. ANR states that it "is willing to deposit a sum of money representing ANR's determined value of the Easements into the Court registry or post bond as a condition of immediate possession." (ECF No. 20 at 11.) This indicates that ANR is indifferent between the two alternatives. America Farms does not say anything about either the bond requirement or ANR's offer to deposit money into court.

Under the circumstances, I conclude that requiring ANR to deposit money with the court is the appropriate alternative. "The purpose of an injunction bond is to compensate the defendant, in the event he prevails on the merits, for the harm that an injunction entered before the final decision caused him." *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002). Here, that purpose does not apply, for, as noted above, there is no chance of America Farms' prevailing on the merits. On the other hand, there is some chance that America Farms would benefit from being able to draw down money that ANR has deposited with the court before the amount of just compensation is finally determined, as Rule 71.1(j)(2) allows. Although Rule 71.1(j) appears to require the payment of a deposit only when some other law requires it, a condemnation court has inherent power "to authorize immediate entry by the condemnor upon the condemned premises, and, it may, for that purpose and for the protection of the owner, permit or require the payment of the amount of the award into the registry of the court." *Atl. Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 460 (4th Cir. 1963). Requiring ANR to deposit money with the court better fits the reality of what's happening in this case than does requiring ANR to post an injunction bond.

The remaining question is to identify the amount of money ANR must deposit with the court. Oddly, neither party has proposed an exact dollar amount for either a deposit or a bond. ANR has asserted that the amount should be "ANR's determined value of the Easements," but it has not stated what that value is. (ECF No. 20 at 11.) America Farms has said nothing on this topic whatsoever. However, the parties agree that ANR has made several written offers to purchase the easements prior to commencing this suit. (Am. Farms Resp. to ANR Prop. Findings of Fact ¶ 15.) I conclude that ANR should be required

to deposit with the court double the highest dollar amount it previously offered to America Farms in writing to purchase the easements. Although this amount is likely on the high side, ANR will be entitled to a refund of any overpayment once the amount of just compensation is finally determined. Therefore, erring on the side of a larger deposit is unlikely to harm ANR. Further, to the extent this amount presents a problem for either party, that party may request that I modify the deposit amount.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that ANR's motion for partial summary judgment (ECF No. 21) is **GRANTED**.

IT IS FURTHER ORDERED that ANR's motion for immediate possession of the easements (ECF No. 19) is **GRANTED**. The court will issue a separate order granting immediate possession of the easements upon ANR's depositing double the highest dollar amount it previously offered to America Farms in writing to purchase the easements.

Dated at Milwaukee, Wisconsin, this 22nd day of August, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge