UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PERMIAN HIGHWAY PIPELINE, LLC AND KINDER MORGAN TEXAS PIPELINE, LLC,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 1:19-cv-00734-RP
CITY OF KYLE, TEXAS,	§	
Defendant.	§	

PLAINTIFFS PERMIAN HIGHWAY PIPELINE, LLC AND KINDER MORGAN TEXAS PIPELINE, LLC'S APPLICATION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Permian Highway Pipeline, LLC and Kinder Morgan Texas Pipeline, LLC (collectively, "Plaintiffs") file this Application for Preliminary Injunction against the City of Kyle, Texas ("Defendant").

I. INTRODUCTION AND BACKGROUND

This action arises out of Defendant's second attempt to impermissibly interfere with the construction and operation of the Permian Highway Pipeline (the "Pipeline"). Defendant first sued Plaintiffs, the Railroad Commission of Texas (the "Railroad Commission"), and several Railroad Commission officials in a state district court in Travis County, seeking a declaration that the Texas regulatory scheme governing gas utilities is unconstitutional and requesting an injunction specifically enjoining the construction of the Pipeline. After losing in that court, Defendant passed an ordinance[1] (the "Ordinance") that impermissibly imposes upon Plaintiffs a host of safety requirements related to the construction and operation of the Pipeline and subjects Plaintiffs to criminal penalties if they do not comply.

[1] A true and correct copy of the Ordinance is attached as Exhibit A.

The Ordinance cannot stand. The stated purpose of the Ordinance is "promoting risk reductions." At a minimum, the following sections of the Ordinance purport to regulate the safety of pipeline construction and operations: 8-250(2), (3), (5), (6), (8), (10)–(13); 8-253(1)–(6), (8); 8-255(1)–(2); 8-256(1)–(6); 8-258(2); 8-259; 8-260(1)–(2); and 8-261. Plaintiffs seek a declaration that the Ordinance is unconstitutional and preempted by both federal and Texas law, and request a preliminary injunction enjoining Defendant from implementing and enforcing the Ordinance until a final judgment is entered.

II. LEGAL STANDARD

To obtain a preliminary injunction, a plaintiff must usually demonstrate (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in plaintiff's favor; and (4) that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). However: "If a statute is expressly preempted, a finding with regard to likelihood of success fulfills the remaining requirements." *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010).

III. ARGUMENT

A. Plaintiffs have established a likelihood of success on the merits of their claims.

Plaintiffs seek three declaratory judgments focusing on: (1) federal and state preemption, (2) violations of the Commerce Clause of the U.S. Constitution, and (3) violations of the Texas Constitution. Plaintiffs have established a likelihood of success on each of these requests for declaratory judgment.

1. Federal and Texas law preempt the Ordinance.

The Pipeline is subject to federal and Texas laws and related regulations that apply to underground oil and gas activities as well as the safety of pipeline construction and operations.

Those laws and regulations expressly preempt local laws and regulations that purport to do the same, especially those directed at the safety of pipeline construction and operations.

(i) The Pipeline Safety Act regulates pipeline safety and expressly preempts local law that purports to regulate pipeline safety.

The Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.* (the "PSA"), was enacted in 1994 to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 60102(a)(1). The PSA requires the Secretary of Transportation (the "Secretary") to prescribe minimum safety standards for pipeline transportation that apply to owners and operators of pipelines, and may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipelines. *Id.* § 60102(a)(2); *see also* Compl. ¶ 14 (providing examples of applicable PSA regulations).

The PSA creates a broad federal regulatory umbrella that allows the Secretary to prescribe safety standards for virtually every aspect touching on the pipeline transportation of natural gas within the United States. The breadth and depth of the PSA itself demonstrates the intent of Congress to preempt the field with respect to safety of any pipeline or pipeline facility affecting interstate commerce. In addition to occupying the field, the PSA also *expressly* preempts municipal regulation of pipeline safety in Texas. The federal preemption applies to both interstate and intrastate pipelines.

> The PSA contains an express preemption provision that prohibits state authorities from adopting or enforcing safety standards for interstate pipeline facilities or interstate pipeline transportation. It also prohibits state authorities from adopting or enforcing safety standards for intrastate pipeline facilities and intrastate pipeline transportation unless the state authority is either certified by [the Secretary] or has an agreement with [the Secretary].

Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. CIV.A.3:08CV1724-D, 2008 WL 5000038, at *5 (N.D. Tex. Nov. 25, 2008) (citing 49 U.S.C. §§ 60104(c), 60106(a)), *aff'd sub nom.*, 608 F.3d 200 (5th Cir. 2010). Courts have long held that the PSA "preempts the entire domain of pipeline safety." *Id.* at 8; *see also* Compl. ¶ 16.

The Texas Legislature has delegated to the Railroad Commission the authority to seek certification under the PSA to regulate intrastate pipeline safety in Texas. TEX. UTIL. CODE ANN. § 121.201(a)(6)–(8). That delegation is *exclusive*. *Id.* § 121.201(b)(2). The Railroad Commission has sought and obtained such certification. U.S. Dept. of Transportation, Pipeline and Hazardous Materials Safety Administration, *Guidelines for States Participating in the Pipeline Safety Program*, Appendix F (State Program Certification/Agreement Status) (Revised January 2019) (hereinafter, the "Guidelines"). Texas law grants the Railroad Commission the power to regulate pipeline safety to the fullest degree possible in accordance with the PSA. TEX. UTIL. CODE ANN. § 121.201(b)(1), (2). As the certified state authority, the Railroad Commission has adopted safety regulations that mirror and build upon the PSA's regulations. *See* 16 TEX. ADMIN. CODE § 8.1(b) (adopting by reference federal minimum safety standards); *see also* Compl. ¶ 18 (noting requirements for all pipelines and requirements for natural gas pipelines).

In contrast, municipalities like Defendant are *expressly* prohibited by the PSA from adopting or enforcing any ordinance that establishes a safety standard or practice relating to pipeline transportation. Defendant is not authorized to seek certification under the PSA, *see Tex. Midstream I*, 2008 WL 5000038, at *5 n.5 (recognizing Texas law "prohibits municipalities from regulating the safety of pipeline facilities") (citing TEX. UTIL. CODE ANN. § 121.202(a)), and Defendant is in fact *not* so certified. Guidelines, Appendix F. Moreover, while the Texas Legislature has exercised its right under the PSA to delegate pipeline safety regulation to the

Railroad Commission, it has also exercised its rights under the PSA to expressly preempt such regulation by local authorities. TEX. UTIL. CODE ANN. § 121.202(a) ("A municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under this subchapter, another state law, or a federal law.").

(ii) Texas law significantly curtails the ability of local governments to regulate oil and gas activities, and expressly preempts local laws that do not meet stringent standards.

The Texas Legislature can preempt local regulation. "While home-rule cities have all power not denied by the Constitution or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law. Deciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative. The question is not whether the Legislature *can* preempt a local regulation . . . but whether it *has*." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592–93 (Tex. 2018) (emphasis in original).

The Texas Constitution mandates that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. ART. XI, § 5(a). "Therefore, a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016). The "critical inquiry in determining whether an ordinance is preempted is whether the Legislature expressed its preemptive intent through clear and unmistakable language." *Id.* at 8.

In the Texas Utilities Code, the Texas Legislature provided that the Railroad Commission shall: (1) "establish fair and equitable rules for the full control and supervision of the pipelines subject to this chapter and all of their holdings pertaining to the gas business in all of their relations to the public, as the railroad commission determines to be proper" and (2) "prescribe

and enforce rules for the government and control of pipelines subject to this chapter in respect to their pipelines and producing, receiving, transporting, and distributing facilities." TEX. UTIL. CODE ANN. §§ 121.151(2), (4). Additionally, the Texas Legislature may "prescribe or adopt safety standards for the transportation of gas and for gas pipeline facilities," and "take any other requisite action in accordance with [the PSA] and its subsequent amendments or a succeeding law." *Id.* § 121.201(a)(1), (7). In the very same statute, the Texas Legislature provided: "A municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under [the PSA]." *Id.* § 121.202(a).

These provisions of the Texas Utilities Code preempting municipal regulation of gas pipeline safety have been established for decades. More recently, the Texas Legislature passed yet another statute, codified in the Texas Natural Resources Code, unmistakably conferring upon the State "exclusive jurisdiction" over "oil and gas operations," which includes the "transportation of oil and gas."

> (b) **An oil and gas operation is subject to the exclusive jurisdiction of this state**. Except as provided by Subsection (c), a municipality or other political subdivision may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the municipality or political subdivision.
>
> (c) **The authority of a municipality or other political subdivision to regulate an oil and gas operation is expressly preempted**, except that a municipality may enact, amend, or enforce an ordinance or other measure that: (1) **regulates only aboveground activity** related to an oil and gas operation **that** occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (2) is commercially reasonable; (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (4) **is not otherwise preempted by state or federal law**.

TEX. NAT. RES. CODE ANN. § 81.0523(a)(2), (b), (c) (emphases added).

Plaintiffs are each a "gas utility" as defined in section 121.001 of the Texas Utilities Code, and are therefore subject to the applicable provisions in the Texas Utilities Code. Plaintiffs also own or operate the Pipeline and are therefore subject to Railroad Commission jurisdiction under the Texas Natural Resources Code. *See* TEX. NAT. RES. CODE ANN. § 81.051(a)(3), (b). Thus, the Ordinance, which purports to regulate the safety of pipeline construction, operations, and other activities, is preempted and violates the Texas Constitution, Texas Utilities Code, and Texas Natural Resources Code, in addition to violating federal law, including the U.S. Constitution and the PSA.

(iii) The Ordinance is almost entirely preempted.

Plaintiffs are seeking a declaratory judgment that the Ordinance is preempted by: (i) federal and Texas law to the extent it regulates the safety of pipeline construction and operations; (ii) Texas law to the extent it regulates belowground oil and gas activities; and (iii) federal and Texas law to the extent it imposes financial security requirements and enforcement provisions. Stripped up of these preempted regulations, there will not be much left of the Ordinance.[2] *See* Compl. ¶¶ 38–41. Accordingly, Plaintiffs have established a likelihood of success on their request for declaratory judgment based on preemption.

2. The Ordinance violates the Commerce Clause.

The U.S. Constitution affords Congress the power to "regulate Commerce . . . among the several States[.]" U.S. CONST. ART. I, § 8, cl. 3. "Although the Commerce Clause speaks only of Congress's power, it has long been understood that there is a dormant or negative

---

[2] For example, part of section 8-250(9) is not preempted; in fact, the Texas Legislature authorized municipalities to pass ordinances relating to mapping the location of pipelines. *See* TEX. UTIL. CODE ANN. § 121.202(b)(2)(A) (recognizing "ability of a municipality to" "adopt an ordinance that establishes conditions for mapping, inventorying, locating, or relocating pipelines over, under, along, or across a public street or alley or private residential area in the boundaries of the municipality").

aspect of the Commerce Clause that limits the power of the states to regulate commerce." *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006). State and local "regulations violate the dormant Commerce Clause by discriminating against or unduly burdening foreign or interstate commerce. Regulations that facially discriminate are virtually per se invalid," "whereas regulations that merely burden commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 750 (internal citations and quotation marks omitted). The latter standard of review for laws that burden but do not discriminate against interstate commerce is known as the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Because the Ordinance is facially neutral, it is subject to the *Pike* balancing test and it fails that test. Under *Pike*, the controlling question is whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007) (quoting *Pike*, 397 U.S. at 142). A regulation "imposes a burden when it inhibits the flow of goods interstate." *Id.* Here, the Ordinance invades the province of the federal government by attempting to regulate pipelines despite an extensive federal regulatory scheme reserving such authority over both interstate and intrastate pipelines to federal regulators and properly designated state regulators (in this case the Railroad Commission). The Pipeline will run through 16 counties and numerous municipalities. Compl. ¶ 10. Each county and municipality cannot pass its own pipeline construction, operation, and safety regulations, thereby subjecting the Pipeline and other pipelines to a patchwork of local regulations throughout the state that will unduly impede and disrupt interstate commerce. For these reasons, the Ordinance cannot withstand federal constitutional scrutiny, and therefore Plaintiffs have established a likelihood of success on this request for declaratory judgment based on violations of the Commerce Clause.

3. The Ordinance violates the Texas Constitution.

The Texas Constitution mandates that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. ART. XI, § 5(a). As set forth above, the Ordinance clashes with the laws of Texas and an intentional, prolonged effort by the Texas Legislature to regulate pipelines consistently across the state. Accordingly, the Ordinance cannot withstand state constitutional scrutiny, and therefore Plaintiffs have established a likelihood of success on this request for declaratory judgment based on violations of the Texas Constitution.

B. Although not required, Plaintiffs have satisfied the other requirements for preliminary injunctive relief.

1. Plaintiffs will suffer imminent and irreparable harm.

"A party may be irreparably injured in the face of the threatened enforcement of a preempted law." *Villas at Parkside Partners v. City of Farmers Branch*, No. CA 3:06-CV-2376-L, 2007 WL 1498763, at *9 (N.D. Tex. May 21, 2007) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)); *see, e.g.*, *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (concluding "that permitting states to regulate airline advertising in the face of the preemption language . . . would violate the Supremacy Clause, causing irreparable injury to the airlines"). As set forth above, federal and Texas law preempt the Ordinance, and there is nothing stopping Defendant from implementing and enforcing the Ordinance absent an injunction. Without a preliminary injunction, Plaintiffs face criminal liability and daily fines for alleged violations of the Ordinance. There is no adequate remedy at law because Plaintiffs will either have to capitulate to the unconstitutional and preempted regulations or be criminally prosecuted and fined until the litigation is over.

2. There is no threatened injury to Defendant.

There is no injury to Defendant to weigh against that which it threatens to inflict on Plaintiffs. *See Mattox*, 897 F.2d at 784. Because Congress and the Texas Legislature preempted the areas in which Defendant is attempting to regulate, Defendant cannot be injured by the injunction. *See Tex. Midstream I*, 2008 WL 5000038, at *4 n.4 ("There is no countervailing injury to the state because it is already obligated under the Supremacy Clause not to regulate in the preempted area."); *see also Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) (holding, if there is preemption, then bank "entitled to injunctive relief no matter what the harm to the State, and the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law").

3. A preliminary injunction will serve the public interest.

It is well established that natural gas pipelines serve a valuable public interest. *See* TEX. UTIL. CODE ANN. § 121.051 (stating that a gas utility "is affected with a public interest"). Moreover, where, as here, Congress and the Texas Legislature have determined that exclusive federal and state "regulation is desirable in the preempted area, the public interest weighs in favor of an injunction." *Tex. Midstream I*, 2008 WL 5000038, at *4 n.4. There is also a pipeline capacity crisis in Texas and any delay in constructing the Pipeline will result in the waste of natural resources, pollution, and other adverse consequences for energy consumers in Texas, throughout the United States, and elsewhere. Compl. ¶ 9. Accordingly, the public interest will be best served by preserving the *status quo* and enjoining the implementation and enforcement of the Ordinance until the Court determines the extent to which it is unconstitutional, preempted, or both.[3]

---

[3] No bond should be required. "The amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman, S. A.*, 569 F.2d 300, 303 (5th Cir. 1978); *see, e.g.*, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (affirming injunction without bond). Here, Plaintiffs request that the Court not

IV. Conclusion & Prayer

For all these reasons, Plaintiffs request that the Court set their Application for Preliminary Injunction for hearing, enter an injunction prohibiting the City of Kyle, Texas, and its officers, agents, servants, employees, representatives, and attorneys, and all others in active concert with them, from implementing and enforcing the Ordinance, and grant Plaintiffs such other relief to which they may be justly entitled.

---

require a bond. Defendant will not be economically harmed by an injunction, so there is no need for Plaintiffs to post a bond to secure Defendant from any economic damages that it may suffer. If the Court finds that some amount of security should be required, Plaintiffs request that the Court set the bond at a nominal amount.

Respectfully submitted,

By: */s/ Bill Kroger*
Bill Kroger
State Bar No. 11729900
James H. Barkley*
State Bar No. 00787037
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
713.229.1736
713.229.2836 (facsimile)
bill.kroger@bakerbotts.com
james.barkley@bakerbotts.com

Thomas R. Phillips
State Bar No. 00000022
Gavin R. Villareal
State Bar No. 24008211
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701
512.322.2500
512.322.2501 (facsimile)
tom.phillips@bakerbotts.com
gavin.villareal@bakerbotts.com

ATTORNEYS FOR PLAINTIFFS
PERMIAN HIGHWAY PIPELINE, LLC
AND KINDER MORGAN TEXAS
PIPELINE, LLC

**pro hac vice* motion being filed herewith

CERTIFICATE OF CONFERENCE

This certifies that, on July 22, 2019, I conferred with counsel for Defendant City of Kyle, Texas, and Defendant is opposed to the relief requested in this Application.

/s/ *Bill Kroger*
Bill Kroger

CERTIFICATE OF SERVICE

This certifies that, on July 22, 2019, a true and correct copy of the above and foregoing was electronically filed and served on the City of Kyle, Texas by U.S. certified mail, return receipt requested as follows:

Travis Mitchell
Mayor
City of Kyle
100 W. Center Street
Kyle, Texas 78640

/s/ *Bill Kroger*
Bill Kroger