

125 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Rockies Express Pipeline LLC

Docket No. CP07-208-002

ORDER GRANTING AND DENYING REQUESTS FOR CLARIFICATION
AND DENYING REQUEST FOR RECONSIDERATION

(Issued November 10, 2008)

1. On June 27, 2008, Murray Energy Corporation, Consolidated Land Company, and American Energy Corporation (the Murray Companies) filed a joint request for clarification of the order issued in *Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234 (2008) (May 30 Order).¹ In addition, on September 5, 2008, Elrod Water Company, Inc., d/b/a Hoosier Hills Regional Water District (Hoosier Hills) filed a request for reconsideration of the May 30 Order.
2. For the reasons discussed below, we will grant and deny the Murray Companies' request for clarification and deny Hoosier Hills' request for reconsideration.

I. Background

3. The May 30 Order authorized Rockies Express Pipeline LLC (Rockies Express) to construct and operate approximately 639 miles of 42-inch-diameter pipeline, with appurtenant facilities, commencing at the eastern terminus of Rockies Express' REX-West facilities in Audrain County, Missouri eastward to an interconnect with Dominion Transmission, Inc., Dominion East Ohio, and Texas Eastern Transmission, LP at the Clarington Hub in Monroe County, Ohio (the REX-East pipeline).² The REX-East

¹ Although the Murray Companies styled their pleading as a request for rehearing, the Murray Companies seek clarification of five portions of the May 30 Order. Thus, we will treat the Murray Companies' pleading as a request for clarification.

² The REX-East pipeline is the third leg of Rockies Express' system. In the first leg, we authorized Rockies Express to construct and operate approximately 327 miles of pipeline from supply basins in Colorado and Wyoming to the Cheyenne Hub in Weld

(continued...)

pipeline will have a capacity of 1,800,000 dekatherms per day and a maximum allowable operating pressure of 1,480 pounds per square inch absolute. In addition, we authorized Rockies Express to construct and operate seven compressor stations and 19 delivery meter stations at 13 locations. The REX-East pipeline was designed to link supplies of natural gas in the Rocky Mountain supply basin to major markets in Illinois, Indiana, Ohio, and the eastern United States.

II. The Murray Companies

A. The May 30 Order

4. The May 30 Order authorized Rockies Express to construct the REX-East pipeline through active and proposed coal mining areas held by the Murray Companies. Environmental Condition 50 required Rockies Express to consult with the Murray Companies, as well as other mining companies, and to file with the Secretary of the Commission (Secretary) its Mining Subsidence Plan for approval by the Director of the Office of Energy Projects (OEP) prior to construction. Environmental Condition 147 required Rockies Express to collaborate with the Murray Companies to develop a construction and operation plan that ensured the integrity of the pipeline and did not compromise existing or future mining activities by the Murray Companies. If a plan could not be developed, Environmental Condition 147 required Rockies Express to develop and file with the Secretary an alternative route that avoided construction through the mining reserves of the Murray Companies.³

County, Colorado. *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, *order on reh'g*, 113 FERC ¶ 61,327 (2005). In the second leg, we authorized Rockies Express to construct and operate approximately 713 miles of pipeline from the Cheyenne Hub to Audrain County, Missouri (the REX-West facilities). *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069 (2007).

³ On June 19, 2008, Rockies Express filed its Mining Subsidence Plan as required by Environmental Condition 50. In a July 2, 2008 filing, the Murray Companies call the Rockies Express plan “surprisingly brief and superficial, lacking technical support or any detail,” contending that Rockies Express did not communicate or consult with the mining companies in preparing the plan, did not incorporate the steps promised in Rockies Express’ May 8, 2008 data responses, and did not specify when mitigation measures would necessitate temporary reductions in pipeline pressures. The Murray Companies urge the Commission not to approve the plan. Rockies Express has not filed its plan under Environmental Condition 147.

B. Requests for Clarification**1. The Mining Entrance**

5. The REX-East pipeline will cross the underground entrance to the Murray Companies' mining operations. The May 30 Order stated that subsidence should not be a concern at this point.⁴

6. The Murray Companies contend that the Commission should clarify that potential impacts at the mine entrance, and the associated mine area, are included among the general mining impacts to be addressed in the manner specified by Environmental Conditions 50 and 147 and that the Commission did not intend to exclude impacts at the mine entrance from the environmental conditions.

7. We will grant the request for clarification and find that Environmental Conditions 50 and 147 shall address potential mining impacts at the mine entrance.

2. Surface Features

8. In comments filed before the May 30 Order was issued, the Murray Companies expressed concern about the pipeline's integrity and the fact that the pipeline could interfere with coal extraction. The May 30 Order found that numerous surface features, such as residences and an electric transmission line, were located along the REX-East pipeline corridor in the area where the Murray Companies have coal reserves. The order found that these surface features offered as much of a limitation on mining as the REX-East pipeline. In addition, the May 30 Order noted that (1) the Ohio Department of Natural Resources, Division of Mineral Resources Management (Ohio DNR) requires that underground mine applicants prepare a subsidence prevention or control plan if longwall or pillar mining is proposed; (2) in the plan, the mining company must provide an inventory of land features and structures above the coal to be mined, including utility transmission lines; and (3) the Ohio DNR determines if the mine applicant's plan is adequately designed to provide mine stability and prevent subsidence (room and pillar mining) or if the plan is designed to allow subsidence to occur in a predictable and controlled manner (longwall or pillar removal mining).⁵

9. The Murray Companies request that the Commission clarify that the comments about surface features are not intended to limit the scope of Environmental Conditions 50 and 147. Further, the Murray Companies request that the Commission reaffirm that the issues covered by Environmental Conditions 50 and 147 are matters of federal regulatory

⁴ May 30 Order, 123 FERC ¶ 61,234 at P 89.

⁵ *Id.* P 92.

jurisdiction under the Natural Gas Act and National Environmental Policy Act of 1969⁶ and not matters as to which the Commission will defer to Ohio's procedures on mining subsidence.

10. The language regarding surface features does not limit the application of Environmental Conditions 50 and 147. We were merely pointing out that if mining operations were extended into the vicinity of the pipeline, the existing surface features could prove to be as much of an impediment to the mining operations as the pipeline. Even in the absence of the pipeline, the Murray Companies would be required to provide notice to surface owners and prepare a subsidence prevention and control plan under Ohio law.

11. Congress intended the Natural Gas Act to vest exclusive jurisdiction in the Federal Energy Regulatory Commission to regulate the facilities of natural gas companies used in interstate commerce.⁷ However, mining issues, such as subsidence prevention or control plans to be prepared by mine operators, involve federal and state mining regulations that are beyond the scope of this proceeding. We believe that the Ohio DNR has the specific expertise in interpreting state and federal regulations involving subsidence mitigation and we will give appropriate weight to the Ohio DNR's requirements when exercising our jurisdiction.

3. Safety Concerns

12. The May 30 Order stated that Rockies Express developed measures to address safety concerns including the use of Class 2 pipe, the installation of mainline valves, the use of granular backfill, and the potential re-routing of the pipe around topographic features. The May 30 Order concluded that "Rockies Express' proposed measures are adequate to ensure safety and will not compromise longwall coal mining operations."⁸

13. The Murray Companies contend that the Commission should clarify that Rockies Express' proposed measures must be coupled with compliance with Environmental Conditions 50 and 147 and that the May 30 Order did not prejudge the contents of either plan.

⁶ 42 U.S.C. §§ 4321–4370f (2006).

⁷ *E.g., Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091, at 61,404 (1990). *See also, Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

⁸ May 30 Order, 123 FERC ¶ 61,234 at P 93.

14. We will grant the request for clarification. Rockies Express' proposed safety measures shall be part of the plans developed under Environmental Conditions 50 and 147. The May 30 Order did not prejudice the contents of the plans.

4. Alternative Route

15. The May 30 Order cited a Rockies Express filing that indicated that to avoid the Murray Companies coal reserves Rockies Express would need to construct approximately 12 to 15 miles of additional pipeline that impacted 277 to 346 acres at a cost of \$35 to \$43 million (the alternative southern route).⁹

16. The Murray Companies contend that the Commission should clarify that it is not making a finding here about the additional length or cost of pipeline that would be required to avoid the active coal mine and coal reserves. Murray contends that a re-route would be significantly shorter than Rockies Express claims and that the cost would be correspondingly reduced.

17. The numbers used in the May 30 Order for the alternative southern route were based on a Rockies Express filing. We clarify that we were not making a specific finding about the length, cost, or location of any alternative southern route that may be proposed in the future.

5. Paragraph 96 of the May 30 Order

18. In paragraph 96, the May 30 Order stated that:

Based on the information in the record, we concluded that Rockies Express' proposed construction will occur through past and potentially future areas of mining. We also conclude that Rockies Express provided the framework for a subsidence mitigation plan, as recommended in the final EIS. Further, Rockies Express agreed to be responsible for the costs associated with monitoring or mitigation of the pipeline should mining advance in close proximity to the pipeline. Given these factors, we do not recommend an alternative southern route due to the additional impacts to forested and other areas and the additional costs that would be required to completely avoid the mining interests of the Murray Companies.

19. The Murray Companies contend that the Commission should clarify that (1) the word "concluded" in the first sentence should read "conclude" because the word refers to conclusions in the order; (2) the word "framework" in the second sentence refers to

⁹ *Id.* P 95.

Rockies Express' May 8 and 12, 2008 filings, that the filings are not a substitute for the full plans required by Environmental Conditions 50 and 147, and that the Commission is not prejudging the adequacy of the plans; and (3) by not recommending the alternative southern route in the last sentence, the Commission may recommend the southern route following the parties' fulfillment of Environmental Condition 147 and that it is not prejudging the outcome of that condition.

20. We disagree with the Murray Companies request that the word "concluded" in the first sentence should read "conclude," since the word refers to a finding that we made earlier in the discussion. The Murray Companies are correct in contending that the word "framework" in the second sentence refers to Rockies Express' May 8 and 12, 2008 filings, that the filings are not a substitute for the full plans required by Environmental Conditions 50 and 147, and that we are not prejudging the adequacy of the plans. Finally, while we did not require the alternative southern route in the May 30 Order, the order does not preclude the Commission from adopting an alternative southern route in the future if Rockies Express and the Murray Companies cannot agree on a suitable plan.

III. Hoosier Hills

A. The May 30 Order

21. The proposed REX-East pipeline will cross Hoosier Hills' wellhead protection area. The May 30 Order required Rockies Express' to conduct water quality testing prior to, during, and for two years post construction (Environmental Condition 57); to implement a spill prevention, control, and countermeasure plan to restrict refueling or other liquid transfers within a specified distance of, among other things, water supply wells (Environmental Condition 55); and to develop a site-specific spill plan to reduce the likelihood of spills or leaks from construction-related equipment (Environmental Condition 56). The May 30 Order concluded that these conditions would avoid or minimize any impacts on Hoosier Hills' wellhead protection area.¹⁰

B. Hoosier Hills' Pleadings

22. Hoosier Hills requests that we reconsider the route of the REX-East pipeline because the size of its wellhead protection area has expanded since the issuance of the May 30 Order. Hoosier Hills asserts that the proposed pipeline not only encroaches farther into the five-year time-of-travel area but now encroaches into the one year time-of-travel area of the wellhead protection area, which means that any potential contamination from a wider range can be captured and drawn toward the wellheads. Hoosier Hills claims that the increased size of its wellhead protection area warrants a

¹⁰ *Id.* P 121.

fresh look at the impact that the pipeline and construction activities will have on its aquifer. Hoosier Hills also requests a technical conference to discuss these issues.

C. Rockies Express' Answer

23. Rockies Express contends that the REX-East pipeline will cross a portion of the five-year time-of-travel wellhead protection zone within the wellhead protection area and that the expansion of the wellhead protection area will not change this fact. Rockies Express contends that the presence of the REX-East pipeline in the expanded wellhead protection area is not significantly greater than it was in the previous boundaries of the wellhead protection area. Rockies Express alleges that the Commission's analysis of the effects of the project in the May 30 Order, and the required monitoring and mitigation measures, remain valid even if the wellhead protection area has expanded.

D. Commission Holding

24. We have considered all of the information filed by Hoosier Hills and Rockies Express concerning the change in size of Hoosier Hills' wellhead protection area. As summarized above, the May 30 Order required Rockies Express to develop a site-specific spill plan for crossing the area of concern; develop a water quality testing plan for Hoosier Hills existing wells; and notify Hoosier Hills at least 48 hours prior to construction in the area. We believe these conditions remain adequate and will address the concerns raised here by Hoosier Hills. Thus, we will not revise the route of the REX-East pipeline. Nevertheless, since Hoosier Hills' wellhead protection area has expanded, we will modify Environmental Condition 57 to require Rockies Express to monitor the wells for five years, rather than two, because construction will take place in the five-year travel-time area, to insure that any impact from construction will be identified and mitigated.¹¹

The Commission orders:

(A) The Murray Companies' requests for clarification are granted and denied as indicated in the body of the order.

¹¹ Although Rockies Express has permission from the Director of OEP to start construction near Hoosier Hills, the permission does not include the area between MPs 393 and 394, which is Hoosier Hills' area of concern, because the Director of OEP has not approved plans submitted by Rockies Express in compliance with Environmental Conditions 55, 56, and 57. These plans are undergoing review.

(B) Hoosier Hills' request for reconsideration and a technical conference is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.