

126 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rockies Express Pipeline LLC

Docket No. CP07-208-003

ORDER AMENDING CERTIFICATE

(Issued March 16, 2009)

1. On October 31, 2008, Rockies Express Pipeline LLC (Rockies Express) filed a petition to amend the authorization issued in *Rockies Express Pipeline LLC* (May 30 Order).¹ The May 30 Order authorized Rockies Express to construct and operate pipeline facilities expanding the capacity of its existing system and extending it from Missouri to Ohio (the REX-East facilities).

2. In its petition to amend, Rockies Express proposes to revise the initial incremental transportation rates on the REX-East facilities to reflect an increase in the cost of constructing the facilities. For the reasons discussed below, we will authorize Rockies Express' proposals.

I. Background

3. The May 30 Order authorized 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.² In addition, we authorized Rockies Express to construct and

¹ 123 FERC ¶ 61,234 (2008).

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 the Meeker Hub in Rio Blanco County, Colorado and the Wamsutter Hub in Sweetwater County, Wyoming to the Cheyenne Hub in Weld County, Colorado (Zone 1). *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,

(continued...)

operate seven compressor stations and 19 delivery meter stations at 13 locations. The REX-East facilities will expand the capacity of Rockies Express' system from 1,500,000 to 1,800,000 dekatherms (Dth) per day. The REX-East pipeline was designed to link supplies of natural gas in the Rocky Mountain supply basin to markets in Illinois, Indiana, Ohio, and the eastern United States. Currently, the REX-East facilities are under construction with an anticipated in-service date of April 1, 2009, for interim service prior to full service commencing at a later date.³

4. In an order issued prior to the in-service date for the REX-West facilities, the Commission authorized Rockies Express, among other things, to permit its customers to use the capacity release provisions of its tariff to market and release capacity prior to the in-service date for the REX-West and REX-East facilities.⁴ On April 28, 2008, Shell Energy North America (US), L.P. (Shell Energy) submitted a bid for capacity that Sempra Rockies Marketing LLC (Sempra Marketing) was releasing on the REX-West and REX-East facilities between Opal, Wyoming and Clarington, Ohio, i.e., transportation in Zones 1, 2, and 3. Shell Energy bid \$1.4863 per Dth per day, inclusive of all applicable reservation charges. Sempra Marketing awarded Shell Energy the capacity for a term from July 1, 2008, through March 31, 2013.⁵

II. Proposals

5. Rockies Express states that the jurisdictional costs to construct the REX-East (Zone 3) facilities will increase by an estimated \$1,181,849,340, from \$2,082,075,836, as reflected in the May 30 Order, to \$3,263,925,176. Rockies Express asserts that there has been a substantial increase in the cost of materials and labor associated with pipeline construction and construction-related activities, as well as engineering-related costs.⁶ Rockies Express cites a report stating that construction costs in the lower 48 states appear to have increased by 70 percent over the past three years.⁷ In addition, Rockies Express

Missouri (the REX-West facilities or Zone 2). *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069 (2007). The REX-West facilities are now in service.

³ Rockies Express' petition to amend at 8.

⁴ *Rockies Express Pipeline LLC*, 121 FERC ¶ 61,130, at P 7, 40-42 (2007) (2007 *Rockies Express* Order).

⁵ At the time of the bid, Shell Energy was known as Coral Energy Resources, L.P.

⁶ See Rockies Express' January 7, 2009 response to a staff data request.

⁷ See Energy Information Agency, Annual Energy Outlook 2008, Issues in Focus, P 33.

acknowledges that it underestimated land acquisition costs and legal fees associated with the REX-East facilities.⁸

6. Due to the increased costs, Rockies Express proposes to revise the firm and interruptible incremental transportation rates approved in the May 30 Order for the Zone 3 facilities. Specifically, Rockies Express proposes to increase the firm monthly reservation recourse rate from \$17.7797 per Dth to \$26.6651 per Dth and the interruptible transportation rate from \$0.5870 per Dth to \$0.8792 per Dth. Rockies Express states that rates for the Park and Loan Service on REX-East will also increase. Rockies Express states that it does not propose to make any changes to the rate design billing determinants, return, depreciation, or other cost of service factors underlying the initial rates approved in the May 30 Order.⁹

7. Rockies Express states that all of the firm shippers on REX-East will be paying negotiated rates under their individual service agreements. Rockies Express contends that the applicability of additional incremental, tariff-based recourse rates to the services provided to negotiated rate shippers is limited.

8. In its petition to amend, Rockies Express states that tariff sheets containing the applicable recourse rates for Zone 3 must be in place before any REX-East capacity can be released to assure the release will be effective and performed in accordance with Commission policy.¹⁰ Following the Commission's approval of its proposals, Rockies Express asserts that it will submit revised tariff sheets to enable its shippers to use the capacity release provision of its tariff to market and release Zone 3 capacity prior to the in-service date for the REX-East facilities.

III. Interventions

9. Notice of Rockies Express' amended application was published in the *Federal Register* on November 4, 2008 (73 Fed. Reg. 66,235). Chevron Natural Gas, a division of Chevron U.S.A. Inc; ConocoPhillips Company (ConocoPhillips); and Shell Energy

⁸ Rockies Express' petition to amend at 6.

⁹ The May 30 Order also authorized Rockies Express to construct a compressor station in Zone 1 and another compressor station in Zone 2 that increased the capacity of Zones 1 and 2 from 1,500,000 to 1,800,000 Dth per day. Rockies Express is not seeking authorization to revise the transportation rates for Zones 1 and 2.

¹⁰ Rockies Express' petition to amend at 2.

filed timely, unopposed motions to intervene. In addition, BP American Production Company and BP Energy Company filed a timely, unopposed joint motion to intervene.¹¹

10. Sempra Marketing filed an untimely motion to intervene. Sempra Marketing has demonstrated an interest in this proceeding and has shown good cause for intervening out of time. Further, Sempra Marketing's untimely motion to intervene will not delay, disrupt, or otherwise prejudice this proceeding. Thus, we will grant Sempra Marketing's untimely motion to intervene.

11. ConocoPhillips and Shell Energy filed a joint protest to Rockies Express' amended application. Rockies Express and Sempra Marketing filed an answer to the joint protest. Shell Energy filed an answer to Rockies Express' and Sempra Marketing's answers. Answers to protests and answers to answers are not allowed under our rules.¹² Nevertheless, we will accept Rockies Express', Sempra Marketing's, and Shell Energy's pleadings because they provided information that assisted us in our decision making.

IV. Discussion

12. Since the amended application herein involves facilities used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the proposals are subject to the requirements of subsections (c) and (e) of section 7 of the Natural Gas Act.

A. Certificate Policy Statement

13. The May 30 Order analyzed Rockies Express' proposals in light of the Commission's Certificate Policy Statement¹³ and found that the proposals were in the public convenience and necessity.¹⁴ Specifically, the May 30 Order found, among other things, that the cost of the REX-East facilities would be recovered through Rockies Express' proposed Zone 3 rates. Since there were no existing customers, the order concluded that there would not be any subsidization.¹⁵ The May 30 Order also found that

¹¹ Timely, unopposed motions to intervene are granted by operation of Rule 214. 18 C.F.R. § 385.214 (2008).

¹² 18 C.F.R. § 385.213(a)(2) (2008).

¹³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999); *order on clarification*, 90 FERC ¶ 61,128; *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹⁴ May 30 Order at P 34.

¹⁵ *Id.* P 28.

there would not be any adverse effects on existing pipelines or their customers and that there would be limited impacts on landowners and communities.¹⁶

14. Rockies Express proposes to revise its initial firm and interruptible incremental transportation rates due to the rising costs associated with constructing the REX-East facilities. Rockies Express has demonstrated that the cost for constructing these facilities has risen due to the increased costs of material and labor associated with pipeline construction, as well as engineering-related costs. No party has protested the proposed level of the increase. In addition, the firm customers on the REX-East facilities will pay negotiated rates.

15. The May 30 Order authorized Rockies Express' proposals based on the findings discussed above. Rockies Express' proposals to revise the firm and interruptible incremental transportation rates due to an increase in the cost to construct the REX-East facilities do not change the basis for any of our findings in the May 30 Order. Thus, consistent with the public convenience and necessity, we will amend the May 30 Order to authorize Rockies Express to revise the incremental firm and interruptible transportation rates the REX-East facilities.

B. Shell Energy's and ConocoPhillips' Protest

1. Capacity Release

a. Pleadings

16. Due to Rockies Express' statement that no capacity release may take place in Zone 3 unless the Commission approves the proposed recourse rate, Shell Energy and ConocoPhillips request that the Commission confirm that capacity release rights on Rockies Express, granted in the 2007 *Rockies Express* Order, will not be impacted by the proposed rate increases. Shell Energy and ConocoPhillips contend that shippers have already released long-term REX-East capacity at stated rate amounts, even though Rockies Express' tariff does not contain sheets with a specified recourse rate for Zone 3. To the extent that the Commission requires maximum recourse rates be stated in a pipeline's tariff prior to the implementation of capacity release rights, Shell Energy and ConocoPhillips assert that the Commission should require Rockies Express to file tariff sheets immediately that implement the maximum recourse rates for Zone 3 approved in the May 30 Order. Otherwise, they assert that Rockies Express will hold the capacity release process hostage to approval of the change in rates while there are shippers willing to release Zone 3 capacity and bidders willing to acquire it at the recourse rate that was approved in the May 30 Order.

¹⁶ *Id.* P 30 and 33.

17. Rockies Express agrees with Shell Energy and ConocoPhillips that the effectiveness of the capacity releases approved in the 2007 *Rockies Express* Order should not be delayed or affected by the proposals herein. Rockies Express contends that its statement that no capacity release may take place in Zone 3 unless the Commission approves the proposed revised recourse rate was meant to demonstrate its intent to seek to implement early release of new capacity created by the expansion of the REX-East system.¹⁷

b. Commission Holding

18. The 2007 *Rockies Express* Order specifically found that Sempra Marketing could make temporary or permanent assignments of some or all of its capacity on Rockies Express prior to the in-service date of the facilities.¹⁸ Rockies Express asserts that the statement in its petition to amend was not intended to propose changes to the finding in the 2007 *Rockies Express* Order. Based on Rockies Express' statements, we find that the proposals herein do not limit Shell Energy's and ConocoPhillips' ability to release their capacity on Rockies Express.

2. Rate for the Capacity Release

a. Pleadings

19. Shell Energy also requests that the Commission confirm that its capacity release contract with Sempra Marketing will be at the rate submitted in its bid – \$1.4863 per Dth per day – rather than the higher recourse rate proposed herein. Shell Energy contends that it submitted a fixed-rate bid, rather than a maximum-rate bid because (1) Rockies Express' tariff contained a provision that the maximum recourse rate for service from Opal to Clarington was \$1.4973 per Dth per day on a 100 percent load factor basis and (2) the intent of the parties and the language of the bid was that Shell Energy would pay a specified rate, rather than a maximum rate that might be adjusted in the future.¹⁹ Specifically, Shell Energy contends that it never stated that its bid was a maximum-rate bid.²⁰ Also, Shell Energy points out that a bidding shipper can specify the percentage of

¹⁷ Rockies Express' answer at 6. In the May 30 Order, Rockies Express proposed to phase in service on the REX-East facilities, initially starting with 1,600,000 Dth per day of capacity and increasing to 1,800,000 Dth per day capacity.

¹⁸ The 2007 *Rockies Express* Order at P 41.

¹⁹ Shell Energy's bid stated "REX-East MDQ 50,000 MMBtu per day REX-East Rate: \$1.4863 (Current Max pro forma tariff) Opal Receipt to Zone 3."

²⁰ Shell Energy's December 4, 2008 answer to motions at 7.

the maximum rate it is bidding in a pull-down box on Rockies Express' electronic bulletin board. Shell Energy states that a bidding shipper that wanted to subject itself to a fluctuating maximum rate could have selected 100 percent of the maximum tariff rate. Shell Energy asserts that it did not make that selection, but instead submitted a bid for a specified rate and clarified the bid with the language "current max pro forma tariff," which demonstrated that it was making a fixed-rate bid.²¹ In addition, Shell Energy contends that it was never informed by Sempra Marketing or Rockies Express that its fixed-rate bid would be subject to future rate changes.²² Further, Shell Energy asserts that since it has been using capacity in Zones 1 and 2 under the contract with Sempra Marketing since July 1, 2008, the Commission would need to act under the *Mobile-Sierra* doctrine if it were to change the rate for the capacity release after the fact.²³ Finally, Shell Energy also states that it reserves the right to challenge the rate increase proposed herein if it is required to pay the increase.

20. Sempra Marketing contends that Shell Energy submitted a maximum-rate bid and not a fixed-rate bid for the term of the capacity release, asserting that (1) it understood Shell Energy's bid to be a maximum-rate bid; (2) the language and terms of Shell Energy's bid indicates that it was not a fixed-rate bid; and (3) Rockies Express' tariff provides that the rate payable by Shell Energy is subject to future adjustment. Sempra Marketing also points out that Shell Energy's assertion that its bid was lower than the Zone 3 rate when stated on a 100 percent load factor basis is misleading because that rate includes a reservation and commodity charge, while Shell Energy's bid consists of only a reservation rate. Sempra Marketing contends that Shell Energy could have protected itself by submitting less than a maximum-rate bid²⁴ or expressly stated that the rate would be fixed during the term of the capacity release even though it was bidding the then-applicable maximum tariff rate. Sempra Marketing concludes that the *Mobile-Sierra* doctrine is not applicable, since Rockies Express' tariff and the firm transportation agreement governing the capacity release authorize Rockies Express to make changes to its rates.

²¹ *Id.* at 7-8.

²² *Id.* at 8-9.

²³ *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

²⁴ Sempra Marketing contends that one of Shell Energy's competitors bid \$0.0001 less than the maximum rate because it was unwilling to assume the risk that the maximum rate would increase during the term of the lease.

21. Rockies Express asserts that this is not the appropriate proceeding to discuss issues relating to Shell Energy's contract provisions.

b. Commission Holding

22. Rockies Express proposes to revise its initial firm and interruptible Zone 3 transportation rates due to burgeoning construction and labor costs. In its protest, Shell Energy requests that we determine what rate it should pay under its capacity release contract with Sempra Marketing. This is not the appropriate proceeding to address provisions in Shell Energy's capacity release contract with Sempra Marketing. Since Shell Energy has not raised any concerns about the level of increase in the cost of constructing the facilities as submitted by Rockies Express or Rockies Express' calculation of revised rates to reflect those increased costs, we will dismiss Shell Energy's protest of this issue, without prejudice of its right to pursue the matter in an appropriate forum.

23. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the petition to amend, as supplemented, and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record,

The Commission orders:

(A) The certificate issued in the May 30 Order is amended to revise the firm and interruptible transportation rates to reflect an updated estimate of the REX-East project's cost of service, as more fully described in this order and in the petition to amend.

(B) Sempra Marketing's untimely motion to intervene is granted.

(C) In all other respects, the May 30 Order shall remain in full force and effect.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.