

128 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rockies Express Pipeline LLC

Docket Nos. CP07-208-000
CP07-208-001

ORDER DENYING STAY

(Issued July 22, 2009)

1. On June 5, 2009, John and Catherine Rowe (collectively, the Rowes) filed a request, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,¹ for the Commission to stay construction across the Rowes' property. For the reasons discussed below, we deny the Rowes' request for a stay.

I. Background

2. On May 30, 2008, the Commission issued an order (the May 30 Order)² authorizing Rockies Express Pipeline LLC (Rockies Express) to construct and operate approximately 639 miles of 42-inch-diameter pipeline, with appurtenant facilities, between the eastern terminus of Rockies Express's REX-West facilities in Audrain County, Missouri and the Clarington Hub in Monroe County, Ohio (the REX-East pipeline).

3. The approved REX-East pipeline route will cross Caesar's Creek in Ohio via a horizontal directional drill (HDD) located at approximately milepost (MP) 459.7 and continue east traversing Caesar's Creek State Park (the Park) and the Rowes' property in Clinton County, Ohio. The Rowes' property, on which they live and operate a horse

¹ 18 C.F.R. § 385.212 (2008).

² *Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234.

farm, is bounded by the Park on its western side and by Mound Road on its eastern side between MPs 459.8 and 460.1 of the certificated REX-East pipeline route.³

4. Rockies Express originally filed a plan to access the Caesar's Creek HDD site via a temporary access road that would run north from Mound Road through the Park. However, when Rockies Express requested authorization on February 2, 2009, to begin construction across Caesar's Creek, the Park, and the Rowes' property, it had removed the access road from its construction plan. In its February 2, 2009 request, Rockies Express stated that instead of constructing the separate temporary access road associated with the HDD, it would use Mound Road and the portion of the right-of-way that traverses the Rowes' property to access the pipeline right-of-way through the Park, as well as the HDD site at Caesar's Creek. On May 5, 2009, Commission staff granted Rockies Express authorization to commence construction across the Rowes' property and the Park and to begin construction on the Caesar's Creek HDD.

5. On June 5, 2009, the Rowes filed a request to stay construction across their property. On June 9, 2009, Rockies Express filed an answer to the Rowes' request (corrected by Rockies Express on June 10, 2009) and on June 12, 2009, the Rowes filed a response to Rockies Express's answer. Although the Commission's Rules of Practice and Procedure do not permit answers to answers,⁴ we may for good cause waive this provision.⁵ We find good cause to accept the answer because it provides information that has assisted us in our decision making.

³ As originally proposed, the pipeline route ran diagonally across the Rowes' property, crossing all three of the Rowes' horse pastures. In the May 30 Order, the Commission adopted staff's recommendations in the REX-East project's final environmental impact statement that the route be moved to the Rowes' property line, so that the pipeline would affect only one pasture (Environmental Condition No. 40) and that prior to construction Rockies Express must submit a plan, developed in consultation with the Rowes, describing how potential impacts to the horses and the operation of the horse farm would be avoided, minimized, or mitigated and how Rockies Express would protect the horses during construction and restoration (Environmental Condition No. 111). Rockies Express states that as part of the easement agreement it paid the Rowes a lump sum to transport and board their horses at an off-site facility during construction.

⁴ 18 C.F.R. § 385.213(a)(2) (2008).

⁵ 18 C.F.R. § 385.101(e) (2008).

II. The Rowses' Request for a Stay

6. In their pleadings, the Rowses state that they entered into an easement agreement with Rockies Express on or about September 15, 2008, for construction of the REX-East pipeline across their property. The Rowses state that during negotiations for the easement, Rockies Express affirmatively represented that access to the Park would occur via a separate access road off of Mound Road and pipeline construction in the Park would proceed through the Park. The Rowses state that Rockies Express told them that their easement would only be used for the installation of the pipeline across their property, which would be accomplished in about four weeks, during which time the Rowses would need to board their horses elsewhere.

7. According to the Rowses, they met with representatives of Rockies Express on June 1, 2009, to discuss the commencement of construction across their property, scheduled to start the following day. According to the Rowses, it was at this meeting that they learned for the first time that Rockies Express intended to access the Park from the Rowses' property and that the construction accessed through their property would not be complete for approximately three to four months. The Rowses state that at this meeting they told Rockies Express's representatives that Rockies Express did not have the authority to occupy the Rowses' property in this manner. The Rowses state that counsel for Rockies Express reiterated Rockies Express's intent to use the easement agreement and right-of-way to access the Park.

8. The Rowses state that they are not requesting a permanent stay, but rather a temporary stay of construction until Rockies Express acknowledges it will not use the easement across the Rowses' property for accessing other portions of the pipeline not on the Rowses' property. The Rowses argue that they negotiated with Rockies Express for an easement through their property that would be used solely for the construction of that portion of the REX-East pipeline that crossed their property; they did not negotiate for, nor did Rockies Express ask for, the additional use of the easement as a road to access remote areas of the right-of-way not located on the Rowses' property.

9. The Rowses further argue that Commission staff's May 5, 2009 authorization to commence construction does not trump the easement agreement between the Rowses and Rockies Express, which is the governing document between the parties. The Rowses assert that, under Ohio law, the rules of contract construction require the parties to look first at the language within the four corners of the document and only if the language is ambiguous will courts go outside the document to determine the intent of the parties. In this case, the Rowses argue, the purpose of the easement, as stated in the document, is to build a pipeline across their property, nothing more.

10. The Rowses contend that they have met the Commission's standard for granting a stay. The Rowses allege that they will suffer irreparable harm because Rockies Express is going to use the easement in an unauthorized way, as an access road to move large

equipment back and forth to other areas along the REX-East pipeline right-of-way, greatly increasing the time, noise, dust, disruption, and intensity of use of the Rowe easement. The Rowes also contend that if the Commission were to grant their request for a temporary stay, no other parties would be substantially harmed; they assert that with a little bit of additional effort, Rockies Express will be able to complete its pipeline in the timeframe it has committed to the market. Finally, the Rowes maintain that requiring Rockies Express to live up to its bargain and act in good faith is in the public interest.⁶ Therefore, the Rowes request that the Commission issue an order prohibiting Rockies Express from using the easement across the Rowes' property to access other portions of the pipeline right-of-way not on the Rowes' property and staying construction until such time as Rockies Express agrees not to use the Rowes' property to access other portions of the pipeline right-of-way.

III. Rockies Express's Answer

11. In its response to the Rowes' June 5 stay request, Rockies Express argues that the express wording of the easement agreement does give Rockies Express the right to use the Rowes' land to access other portions of its pipeline route and does not limit Rockies Express's use of the Rowes' land to direct pipeline construction thereon.

12. Rockies Express goes on to explain that when it originally submitted a request for a Notice to Proceed from the Commission on August 13, 2008, for construction in the area of the Rowes' property, it included a temporary access road from Mound Road to the Caesar's Creek HDD site that avoided the Rowes' property. However, Rockies Express states that during the course of negotiations with the U.S. Army Corps of Engineers (Corps), which owns the land on which the temporary access road would have been located, and with the Ohio Department of Natural Resources (Ohio DNR), which helps manage the property, Rockies Express came to the conclusion that the environmental disturbance, such as the clearing of trees and effects on biological species, associated with construction of the temporary access road, as well as the time required to process a request for permission to construct such a road across the Corps's property, were not justified. Therefore, Rockies Express states, on December 23, 2008, it filed new alignment sheets that deleted the temporary access road from its originally filed alignment sheets.

13. Rockies Express argues that by deleting the temporary access road and using the right-of-way across the Rowes' property, less environmental disturbance will occur. In addition, Rockies Express states the deletion of the temporary access road will not affect

⁶ On June 29, 2009, the Rowes filed an affidavit in support of their request for a stay in which Catherine Rowe discusses her conversation with a Corps official and reiterates concerns raised in the Rowes' earlier filings.

the dimensions or change the character of the right-of-way across the Rowes' property (i.e., Rockies Express will not gravel the right-of-way). Rockies Express also states that it never anticipated construction in the area would be completed in four weeks, noting that it entered into a contract with the Rowes to board their horses offsite for 4 to 6 months.

14. Rockies Express also argues that, in failing to show that they would suffer irreparable harm if a stay is not granted, the Rowes have failed to meet the Commission's standard for granting a stay. Rockies Express states that it is required by the Commission to restore the Rowes' property to its original condition and that the Rowes have been compensated for the easement and temporary disturbance. Rockies Express argues that the desire to motivate a party to resolve a dispute is not the legal standard for the issuance of a stay.

15. In addition, Rockies Express argues that the issuance of a stay would prevent Rockies Express from completing the pipeline to the Clarington Hub as scheduled and, therefore, producers that are depending on the pipeline in order to meet contractual commitments, as well as consumers, will be harmed.

IV. Discussion

16. In its consideration of motions for a stay, the Commission applies the standards set forth in section 705 of the Administrative Procedure Act,⁷ and has granted a stay "[w]hen ... justice so requires."⁸

17. In deciding whether justice requires a stay, we generally consider several factors, which include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.⁹ Our general policy is to refrain from granting

⁷ 5 U.S.C. § 705 (2006).

⁸ See, e.g., *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992); *United Gas Pipe Line Co.*, 42 FERC ¶ 61,388 (1988); *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987); *City of Centralia, Washington*, 41 FERC ¶ 61,028 (1987).

⁹ See, e.g., *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,631 (1991), *aff'd sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert denied*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Co.*, 81 FERC ¶ 61,102 (1997).

stays in order to assure definiteness and finality in Commission proceedings.¹⁰ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹¹ As the court recognized in *Wisconsin Gas Co. v. FERC*,¹² although the concept of irreparable harm does not readily lend itself to definition, courts have developed well known principles to guide a determination, which includes that “the injury must be both certain and great; it must be actual and not theoretical” and that economic loss alone does not in and of itself constitute irreparable harm.¹³

18. We have found that a pipeline’s use of a landowner’s property for construction activities can be compensated in monetary terms, either through easement negotiations or through eminent domain proceedings.¹⁴ Thus, such activity generally does not amount to irreparable harm. As relates to this standard, the Rowses have at most shown that the use of their property to access other portions of the construction area will be temporarily disrupted. They have not demonstrated that the construction will result in irreparable harm. Therefore, we deny the Rowses’ request for a stay of construction.

19. Whether the express terms of the easement agreement between Rockies Express and the Rowses allow Rockies Express to use the easement to access other portions of the pipeline right-of-way is a question of Ohio law, and is therefore beyond the Commission’s jurisdiction.¹⁵ Once we have authorized pipeline construction, we do not oversee the acquisition of necessary property rights. This is a matter between the pipeline company and the affected landowners, which they may resolve by agreement or through the courts. The Commission is not involved in these matters. Moreover, we have no expertise in Ohio contract law. Therefore, to the extent that the Rowses ask us to

¹⁰ *Id.* See also *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

¹¹ *Id.*

¹² 758 F.2d 669 (D.C. Cir. 1985).

¹³ *Id.* at 674.

¹⁴ See, e.g., *Midwestern Gas Transmission Company*, 116 FERC ¶ 61,182, at PP 61, 65 (2006).

¹⁵ See, e.g., *Central New York Oil & Gas, LLC*, 116 FERC ¶ 61,277, at P 22 (2006) (Commission has no authority to determine what constitutes just compensation); *Earle and Julie Smith v. Portland Natural Gas Transmission System*, 90 FERC ¶ 61,034, at 61,173 (2000), *order denying reh’g*, 91 FERC ¶ 61,231 (2000) (Complaint for insufficient compensation for easement rights is beyond the purview of the Commission).

interpret the terms of their easement agreement with Rockies Express, we decline to do so.

20. Finally, we note that the pipeline construction activities at issue here are temporary in nature and will end when the HDD and pipeline construction in the area are complete. Moreover, Rockies Express's certificate requires, once construction is complete, that Rockies Express must perform restoration on the right-of-way. This restoration will be monitored by the Commission. Thus, although they will admittedly be impacted during the course of construction, once construction is completed, the Rowes will be able to resume previous use of their property.

The Commission orders:

The Rowes' request for stay is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.