

108 FERC ¶ 61,255
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Greenbrier Pipeline Company, L.L.C.

Docket No. CP02-396-008

ORDER DENYING REHEARING AND RECONSIDERATION

(Issued September 20, 2004)

1. In this order, the Commission addresses Jim Williams' request for rehearing and Michelle Bankey's request for reconsideration of the letter order issued in this proceeding on April 30, 2004 (April 30 Letter Order) by the Director of the Office of Energy Projects (Director). The April 30 Letter Order granted Greenbrier Pipeline Company, LLC's (Greenbrier) request for an extension of time until November 1, 2007, to construct and make available for service the Greenbrier Pipeline Project. The April 30 Letter Order also directed Greenbrier to file a construction plan no later than 90 days prior to commencement of the project's construction.¹

2. For the reasons discussed below, the requests for rehearing and reconsideration are denied.

Background

3. On April 9, 2003, the Commission issued an order (April 9 Order) authorizing Greenbrier to construct and operate the Greenbrier Pipeline Project, consisting of 279 miles of pipeline, two compressor stations, and related facilities, located in West Virginia, Virginia and North Carolina, to provide up to 600,000 dekatherms per day of

¹ As discussed below, the "construction plan" contemplated by the April 30 Letter Order differs from the initial Implementation Plan which Greenbrier was originally required to file.

firm transportation service. Among other things, the April 9 Order conditioned Greenbrier's commencement of construction on submission of proof that it has entered into firm, long-term service agreements for 90 percent of its transportation capacity. Further, environmental condition No. 6 of Appendix B to the April 9 Order required Greenbrier to file an initial Implementation Plan describing how Greenbrier will implement the mitigation measures required by the April 9 Order.

4. On November 5, 2003, Greenbrier filed a request for extension of time until no later than 90 days prior to commencing construction of the Greenbrier Pipeline Project to file its initial Implementation Plan to meet environmental conditions. In its request, Greenbrier stated that due to evolving market conditions it is evaluating other options for serving existing and potential customers in the region to be served by its project.

5. On November 26, 2003, the Director of the Division of Gas – Environment and Engineering issued a letter order granting Greenbrier an extension of time until April 14, 2004 to file its initial Implementation Plan (November 26 Letter Order).² The November 26 Letter Order noted that the environmental conditions of the April 9 Order require the preparation of a number of environmental and cultural reports, studies, and surveys, some of which have seasonal restrictions, explaining that the Commission's ability to authorize construction of the Greenbrier Pipeline Project facilities depends on timely completion of these surveys, studies and conditions. Consequently, the November 26 Letter Order extended the time to a date certain rather than an unspecified date, as requested by Greenbrier.

6. On April 14, 2004, Greenbrier filed a request for a two-year extension of time to construct and make its project available for service and a second extension of time to file its Implementation Plan, again proposing a due date no later than 90 days prior to commencement of project construction. In support of its request, Greenbrier stated that due to evolving conditions in the energy market, it needs the additional time to explore market opportunities for its project.

7. The Director's April 30 Letter Order granted Greenbrier a two-year extension of time, until November 1, 2007, to construct and make the Greenbrier Pipeline Project available for service. The April 30 Letter Order also stated that Greenbrier is "granted its request to file its construction plan no later than 90 days prior to commencement of the project's construction." (emphasis added). However, as explained below, the plan to be

² In an order dated March 5, 2004, the Commission denied Ms. Michele Bankey's request for rehearing of the November 26 Letter Order. *See* Greenbrier Pipeline Company, 106 FERC ¶ 61,223 (2004)

filed pursuant to the April 30 Letter Order is not the originally contemplated Implementation Plan.

Mr. Williams' Rehearing Request

8. Mr. Williams claims that by extending the time for Greenbrier to comply with various parts of the April 9 Order, the April 30 Letter Order reopens the issue of the adequacy of the Environmental Impact Statement (EIS) for the project. According to Mr. Williams, because Greenbrier has yet to comply with the environmental conditions recommended in the EIS, and further, because the Commission's granting of time extensions has altered the EIS, the EIS is not final. Consequently, states Mr. Williams, the time limitation governing the filing of requests for rehearing in section 19(a) of the NGA has been tolled.

9. According to Mr. Williams, the April 30 Letter Order extended the time for Greenbrier to file its report for an additional three and a half years from the previous extension date, April 14, 2004, granted in the November 26 Letter Order. Mr. Williams argues that this extension of time reopens the issue of "the lawfulness of the EIS." Specifically, Mr. Williams argues that the Commission's action in allowing Greenbrier an extension of time to construct the Greenbrier Pipeline Project will destroy hundreds of natural streams in West Virginia in violation of West Virginia's Natural Stream Preservation Act.

10. Mr. Williams also contends that by granting the extension from April 14, 2004 to November 1, 2007, the Commission has violated the Fourth and Fifth Clauses of the Fifth Amendment to the United States Constitution. According to Mr. Williams, private property is being unlawfully taken from private citizens while Greenbrier contemplates its own profit motives.

Commission Response

11. Mr. Williams appears to have confused the two time extensions granted by the April 30 Letter Order. First, the April 30 Letter Order extended the date by which the Greenbrier Pipeline Project was to be constructed and available for service by two years, from November 1, 2005 to November 1, 2007. Second, the order provided that Greenbrier must file a construction plan no later than 90 days prior to commencement of the project's construction.

12. In any event, as previously noted in this proceeding, a final EIS is not a final order

of the Commission subject to the rules providing for rehearing requests.³ Therefore, to the extent Mr. Williams seeks rehearing of the EIS, no such relief lies. The question of whether there has been a “tolling” of the provisions of section 19 (a) of the NGA is therefore moot.⁴ To the extent Mr. Williams is challenging the adequacy of the EIS in light of potential delays in constructing the project, he has not shown any substantial changes to the project that would warrant preparation of a supplemental EIS.

13. Regarding Greenbrier’s initial Implementation Plan, the April 30 Letter Order essentially eliminated the requirement that Greenbrier file such a document. The Implementation Plan, as described in environmental condition No. 6 of the April 9 Order, was to detail how and when Greenbrier will implement the various mitigation measures required by the order. However, the need to develop a plan for implementing the outstanding “prior to construction” and other mitigation measures has been mooted by the passage of time. Now, since Greenbrier has until November 1, 2007, to place the project in service, we are requiring that Greenbrier complete all of the required surveys, consultations, landowner contacts, and other site specific construction and mitigation measures and file all of this information in one complete package, namely the construction plan, that is to be filed no later than 90 days prior to commencement of construction. Greenbrier is required at that time to have satisfied all “prior to construction” type conditions. Consequently, there is no need to file an implementation plan for completing this work.

14. In our prior order, we addressed Mr. Williams claim that the Commission’s action in authorizing the construction of the Greenbrier Pipeline Project will destroy hundreds of natural streams in West Virginia in violation of West Virginia’s Natural Stream Preservation Act.⁵ On rehearing, Mr. Williams does not explain why a two-year extension of the construction deadline would have any different impact on the natural streams affected by the project’s construction.

15. Finally, we are not persuaded by Mr. Williams’ argument that private property is

³ See Greenbrier Pipeline Company, LLP, 104 FERC at 61,517, n.4; see also Rule 713 of the Commission’s Rule of Procedure, 18 C.F.R. § 385.713.

⁴ Mr. Williams’ earlier request for rehearing of the July 28, 2003 Order denying in part and dismissing in part requests for rehearing of the April 9 Order was dismissed for his failure to meet the statutory deadline contained in section 19 (a) of the NGA for filing rehearing requests.

⁵ See Greenbrier Pipeline Company, LLC, 106 FERC ¶ 61,165 (2004).

being taken in violation of Article 5 of the Constitution. Section 7(h) of the NGA confers the right to obtain property through the power of eminent domain if the certificate holder cannot reach an agreement with the property owner. The courts have uniformly held that a pipeline's right to use eminent domain to acquire the necessary property does not violate the landowner's constitutional rights.⁶ Issues of an unconstitutional taking arise only when the government acts in a way to deprive a citizen of its property without compensation. The Fifth Amendment does not proscribe the taking of property; it proscribes taking property without compensation.⁷

Michelle Bankey's Request for Reconsideration

16. Michelle Bankey requests reconsideration of the Director's April 30 Letter Order alleging that (1) there is no actual need for the Greenbrier Pipeline Project; (2) objectives supporting the pipeline routing no longer exist; (3) seasonal time restrictions for various environmental reports and studies were ignored; (4) potential catastrophic impacts have never been addressed; (5) costs to communities and changes in land use have never been addressed adequately; and (6) landowners and small businesses are entitled to know if and when the pipeline will be built.

17. For the most part, Ms. Bankey's request is, as she admits in her filing, a reassertion of arguments already raised in her rehearing request of the April 9 Order and addressed by the Commission in its July 28, 2003 order denying her rehearing request (July 28 Order).⁸ Specifically, the July 28 Order addressed her claims that there is no actual need for the project, that project objectives no longer exist, that the EIS failed to adequately address catastrophic impacts, and that costs to the communities have not been adequately addressed. We stand by our responses to these claims in our July 28 Order.⁹

18. As discussed above, Greenbrier is no longer required to file an initial Implementation Plan detailing when and how it will implement the mitigation measures.

⁶ See, e.g., *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d (1950), *cert. denied* 340 U.S. 829, 71 S. Ct. 66, *reh'g denied*, 340 U.S. 885, 71 S. Ct. 195 (1950); *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (1950).

⁷ See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 194 (1985).

⁸ *Greenbrier Pipeline Company, LLC*, 104 FERC ¶ 61,145 (2003).

⁹ See *Id.* at 61,518 -520 (2003).

Instead, the April 30 Letter Order imposes on Greenbrier the burden of filing a full and complete final construction plan and to complete all required “prior to construction” mitigation measures no later than 90 days prior to commencing construction, thereby placing on Greenbrier the burden of conducting the necessary studies as dictated by seasonal time restrictions.

19. Finally, the April 30 Letter Order provides landowners and businesses with the certainty of specific deadline for the completion of the Greenbrier Pipeline Project, though extended from the date previously ordered. It is a fact that in light of evolving market conditions, similar to those confronting Greenbrier in this case, the Commission has on numerous occasions granted similar and longer extensions of time to complete projects.¹⁰

The Commission orders:

Jim Williams’ request for rehearing and Michelle Bankey’s request for reconsideration of the April 30 Letter Order are denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁰ See, e.g., TransColorado Gas Transmission Co., 76 FERC ¶ 61,366 (1996); Trans-Appalachian Pipeline, Inc., 53 FERC ¶ 61,336 (1990).