

STATE OF SOUTH DAKOTA)
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:SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

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IN THE MATTER OF PUBLIC UTILITIES :
COMMISSION DOCKET NO. HP14-001, :
ORDER ACCEPTING CERTIFICATION OF :
PERMIT ISSUED IN DOCKET HP09-001 TO :
CONSTRUCT THE KEYSTONE XL PIPELINE :
:
:

32CIV16-33

**BRIEF IN SUPPORT OF MOTION TO
SUPPLEMENT THE RECORD ON
APPEAL**

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Under SDCL § 1-26-33, Appellee TransCanada Keystone Pipeline, LP (“Keystone”), seeks leave to supplement the administrative record with the addition of the Department of State’s Record of Decision and National Interest Determination dated March 23, 2017 (“Record of Decision”), and the Presidential Permit dated March 23, 2017. Both documents are exhibits to Keystone’s motion.

1. Background

The South Dakota Public Utilities Commission issued an Amended Final Decision and Order dated June 29, 2010, granting Keystone’s application for a permit to construct and operate the Keystone XL Pipeline in South Dakota. In September, 2014, Keystone filed a certification with the Commission under SDCL § 49-41B-27 (App. 0001), and a petition asking the Commission to accept its certification (App. 0003), that it could continue to meet the conditions on which the permit was granted. The Commission accepted Keystone’s certification by a Final Decision and Order dated January 21, 2016. (App. 0044.) This appeal followed. The briefing was completed in August, 2016. The Appellants filed a motion to remand the case to the Commission to hear further evidence related to an oil spill near Freeman, South Dakota. The

Court denied that motion by order dated December 29, 2016. Argument on the merits of the pending appeal was heard on March 8, 2017. The Court has not yet issued a decision.

Since the briefing was completed, the Court granted Keystone's motion to take judicial notice of the Presidential Memorandum Regarding Construction of the Keystone XL Pipeline dated January 24, 2017, and Keystone's Application for Presidential Permit for Keystone XL Pipeline Project dated January 26, 2017. The documents that are the subject of Keystone's current motion are the outcome of the documents that the Court judicially noticed. The process of obtaining a Presidential Permit is complete.

2. The documents should be added to the record because they are relevant to the appeal.

Under SDCL § 1-26-33, the Court "may require or permit subsequent corrections or additions to the record" after the administrative agency transmits to the reviewing court a certified copy of the entire record of the proceeding under review. The Commission certified the record on March 16, 2016. The Record of Decision and the Presidential Permit both issued after that date, and after briefing was completed.

On appeal, all of the Appellants have argued that the Commission erred in dismissing their joint motion to dismiss the certification proceeding because Keystone's Presidential Permit application was denied by the Department of State on November 6, 2015, thereby establishing that Keystone could not comply with Condition 2 of the Commission's Amended Final Decision and Order, which required that Keystone obtain a Presidential Permit from the Department of State. The Commission concluded that Condition 2 was prospective in nature and that no evidence established that Keystone would be unable to obtain a Presidential Permit in the future. (App. at 0070, ¶ 9.)

The Record of Decision and the Presidential Permit are relevant to this argument. They establish that Keystone has obtained the permit necessary for construction of the Keystone XL Pipeline at the international border, and that the argument is without merit.

This Court can affirm the Commission's decision for any reason that supports it, so a remand is not necessary for the Commission to consider the new evidence. *See, e.g., BAC Home Loans Servicing v. Tranczynger*, 2014 S.D. 22, ¶ 18, 847 N.W.2d 137, 142. The Record of Decision and the Presidential Permit are consistent with and support the Commission's determination.

Conclusion

The documents attached to Keystone's motion are relevant to one of the arguments on appeal. Keystone respectfully requests that its motion be granted.

Dated this 24th day of March, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Certificate of Service

I hereby certify that on the 24 day of March, 2017, I electronically served a true and correct copy of the foregoing Brief in Support of Motion to Supplement the Record on Appeal using the Odyssey File & Serve System, which will automatically send e-mail notification of such service to the following:

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