

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

IN THE CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF PUBLIC UTILITIES)	32 CIV. 0036
COMMISSION DOCKET HP14-001,)	
PETITION OF TRANSCANADA)	
KEYSTONE PIPELINE, LP, FOR ORDER)	APPELLANT INTERTRIBAL
ACCEPTING CERTIFICATION OF PERMIT)	COUNCIL ON UTILITY POLICY'S
ISSUED IN DOCKET HP09-001 TO)	OPENING BRIEF
CONSTRUCT THE KEYSTONE XL)	
PIPELINE)	

COMES NOW the Appellant Intertribal Council On Utility Policy (“COUP”), on behalf of itself and its member Tribes, by and through its attorney Robert Gough, to provide its Opening Brief in the above entitle matter of an appeal take with respect to the *Public Utilities Commission Docket Hp14-001, Petition Of TransCanada Keystone Pipeline, LP, For Order Accepting Certification Of Permit Issued In Docket Hp09-001 To Construct The Keystone Xl Pipeline*, from *FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION in HP14-001*.

BACKGROUND

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Applicant" or "Keystone"), a foreign, non-U.S. for-profit corporation, filed an application with the South Dakota Public Utilities Commission ("Commission" or “PUC”) for a permit as required by SDCL Chapter 49-41 B to construct the South Dakota portion of the Keystone XL Pipeline ("Project"). The original application described the Project as proposed to be an approximately 1,702 mile pipeline for transporting crude oil from Alberta, Canada, to the greater Houston area in Texas, with approximately 1,375 miles to be located in the United States and 313 miles located in the western part of South Dakota.

On September 15, 2014, after failing to commence any construction in South Dakota over a four year period under its permit granted in 2010 under HP09-001, TransCanada Keystone Pipeline, LP (“Keystone,” “TransCanada,” or “Applicant”) filed a Certification with the PUC signed by Corey

Goulet on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41B-27.

On January 6, 2016, the South Dakota PUC unanimously approved TransCanada's re-certification petition for continued construction, or more accurately, lack of construction of the Keystone XL through the western half of South Dakota, know by those who live here as 'West River, South Dakota'. This region of the state, carved out of the heart of the Great Sioux Nation in 1889, remains home to five of the nine federally recognized protected Indian reservations located within the geographic boundaries of South Dakota. This region is presently untraversed by any major crude oil, refined products and highly volatile or hazardous liquids pipelines.

(<http://www.pipeline101.com/where-are-pipelines-located>). The only pipeline system of any real significance in this half of South Dakota is the Mni Wiconi Rural Water Supply Project which carries drinking water from the Missouri River below Pierre to 'West River' communities and ensures safe and adequate municipal, rural, and industrial water supply for the residents of the Pine Ridge Indian, Rosebud Indian, and Lower Brule Indian Reservations and the citizens of Haakon, Jackson, Jones, Lyman, Mellette, Pennington, and Stanley Counties, South Dakota.

The South Dakota Public Utilities Commission has granted both TransCanada's original permit under HP 09-001 and the subsequent HP 14-001 re-certification of the HP 09-001 permit over the objections of Tribes and land owning citizens of South Dakota living along the proposed route.

To be built as proposed and originally permitted, the Keystone XL pipeline needs permits from each of the states through which it passes. Presently, it holds a state permit in South Dakota, whose four-year grant has run; it lacks a valid permit for Nebraska; and it also requires a federal presidential permit, because it crosses international borders, which has been altered, rejected and finally denied. The federal presidential permit was rejected by the United States Department of State, after failed environmental reviews, as not in our national interest and denied on November 7, 2015 by President Obama cited concerns about climate change, energy prices and jobs as his major reason. The PUC

approved TransCanada's permit despite many days' worth of testimony from opponents and intervenors stating that the company was incapable of fulfilling its permit conditions, presenting extensive amounts of evidence concerned with TransCanada's proven track record of disregarding pipeline construction code, especially given the post-hearing issues with the disastrous leaking from original Keystone Pipeline in eastern South Dakota, subject to many of the very same conditions and assurances as in the Keystone XL Pipeline permit.

LEGAL STANDARD

In appeals to a circuit court from decisions of administrative agencies, South Dakota law is subject to de novo review without the need for deference to the PUC. SDCL 1-26-36 sets forth the standard of review to be applied in an administrative appeal. Findings of Fact are reviewed for clear error. Conclusions of Law are reviewed de novo. Mixed questions of fact and law are reviewed de novo.

ARGUMENT

In its decision of January 6, 2016, the Commission lists several Conclusions of Law with which this Appellant takes issue.

CONCLUSION OF LAW NUMBER 3.

3. Even though more than four years have elapsed since the permit was issued in Docket HP09-001, **the permit has not lapsed or expired**. Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-418-22, which the Commission concluded in the Amended Final Decision entered in Docket HP09-001 it had met. Keystone's burden of proof under SDCL § 49-418-27 is distinct from its burden under SDCL § 49-418-22.
(Emphasis added)

We agree with Keystone having the burden of proof, but disagree as to whether it has met that burden with any substantial evidence. To begin, the Intertribal Council On Utility Policy would like the record of this proceeding to show that it joined in the oral motion made at the close of the nine-day hearing by the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, the Yankton Sioux Tribe, IEN, Intertribal COUP, Dakota Rural Access, and Bold Nebraska hereby

move for an immediate order denying certification of the Permit for the Keystone XL Pipeline in South Dakota.

See: TRANSCRIPT, *In re the Application of TransCanada Keystone Pipeline LLP for a Permit Under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Keystone XL Pipeline, Vol. I*, at pp. 2451-2452 (hereinafter cited as “Tr.”).

That oral motion was based on TransCanada's failure, after nine days of hearings, to provide substantial evidence of compliance with the Amended Conditions. They failed to meet their burden of proof and also failed to prove their case, as a matter of law, since the recent federal regulations under the Clean Water Act have been revised, and the original environmental studies relied upon in HP 09-001 by TransCanada were conducted under a less stringent regulatory regime.

Intertribal COUP, due to other pressing commitments at the time, was unable to the join with the Standing Rock Sioux, a member Tribe and other fellow interverors in the more formal arguments presented in *Joint Post Hearing Brief of the Standing Rock Sioux Tribe, Bold Nebraska And Indigenous Environmental Network* submitted into the record of the PUC HP14-001 on October 1, 2015.

Nevertheless, Intertribal COUP hereby supports, adopts and incorporates in full by this reference, the arguments made in that *Joint Post Hearing Brief*. For brevity sake, those arguments will be provided here in summary form.

The burden of proof in the PUC certification proceeding under SDCL §41-49B-27 was clearly on TransCanada. ARSD §20:10:01:15.01. TransCanada’s burden was to certify that it continues to meet all conditions incorporated into the permit issued in HP 09-001, with substantial evidence. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816, 822 (SD. 2011); *Therkildsen v. Fisher Bev.*, 545 N.W.2d 834 (1996). TransCanada failed to do so and accordingly the Commission should have denied the petition for certification, but it did not. The PUC regulations impose the burden of proof on TransCanada in this docket. ARSD §20:10:01:15.01. The applicable rule provides that “In any contested case proceeding...petitioner has the burden of proof as to factual allegations which form the

basis of the... application or permit.” Id. (emphasis added). For this reason, the Commission Counsel, John Smith, opened the hearing by stating:

It is the Petitioner, TransCanada, that has the burden of proof. And under SDCL 49-41B-27, that burden of proof is to establish that the proposed facility continues to meet the 50 conditions set forth in the Commission’s Amended Final Decision. (Tr. P. 10)

And again, the underlying statute itself imposes the burden of proof on TransCanada. SDCL §41-49B-27 provides in relevant part:

... if such construction, expansion or improvement commences more than four years after a permit has been issued, then **the utility must certify** to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis added).

The plain words of the statute impose the evidentiary burden on the permittee, and must be interpreted so. See *Matter of SDDS, Inc.*, 472 N.W.2d 502, 509 (S.D. 1991). And the plain words of §41-49B-27 require the utility to certify that it continues to meet the conditions. The statute does not state that intervenors who object to the permit must demonstrate non-compliance – in that case the burden of proof would fall upon the objecting parties. Nevertheless, TransCanada advanced this unmeritorious argument at the evidentiary hearing:

Under the statute, **we could have said we certify and at that moment the burden of proof shifts to anyone who wants to contest that certification** to come forward with affirmative proof that there are conditions in our permit issued in 2010 that we cannot meet. And **they have to provide permanent proof** of that. Tr. at 2467 (emphasis added).

The South Dakota Supreme Court has rejected the concept advanced by TransCanada. The Court explained, “The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.” *Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (1996). TransCanada’s argument is also contrary to the plain words of section 27 of the Energy Conversion and Transmission Facilities Act, SDCL §41-49B-27, the PUC regulations, ARSD

§20:10:01:15.01, and the sound advice of Commission Counsel John Smith at the evidentiary hearing. Tr. at 10. This interpretation is further supported by the structure and conduct of the evidentiary hearing procedure. It would appear to be ‘magical thinking’ to assert, as does Mr. Taylor (Tr. 2467) that Keystone merely has to say the words: “We Certify” with no evidence or proof, to shift the burden. Section 49-41B-27 reads as follows:

Construction, expansion, and improvement of facilities. Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the **utility must certify** to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. **Source:** SL 1977, ch 390, § 29.

It has now been almost six years since the permit was granted, and still no “construction, expansion or improvement of facilities.” What happens in one more year, or in four more years? How long is the recertification extended? Under the Commission’s interpretation as found in its *Order Granting Motion to Define Issues and Setting Procedural Schedule* dated December 17, 2014, and its Conclusion of Law Number 3, this is an unexpired, unexpired and like the Post Office’s ‘forever stamps’ the permit remains as long as someone promises to fulfill its conditions. This is must be an arbitrary, capricious and erroneous interpretation insofar as the Commission’s view of SDCL § 49-41B-27, as demonstrated above, renders the statute meaningless by creating a never-ending permit in perpetuity.

CONCLUSION OF LAW NUMBER 9.

9. “With respect to prospective conditions that are unaffected by the updates since June 29, 2010, Keystone is as able today to meet the conditions as it was when the permit was issued as certified to in the Certification signed by Corey Goulet. No evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future. Keystone offered sufficient evidence to establish that Keystone can continue to meet the conditions.”

Appellant does not contest the assert that as a matter of both fact and law, Keystone is “as able today to meet the conditions as it was when the permit was issued as certified to in the Certification

signed by Corey Goulet.” Keystone can clearly continue to promise to meet the conditions, but as discussed above, it offered precious little at the hearing. Appellant asserts that Keystone was neither ready or able to meet the conditions in 2010 and continues to be unable to do so. To rely upon the mere signing of a ‘certificate petition’ that the Keystone has in fact and law met its burden is to make a mockery of the very expensive nine-days of hearings and the time and resources but in by all parties. While there are numerous examples have TransCanada’s failure, many of which are explicated in our fellow intervenor briefs, Intertribal COUP will focus on a narrow area in which TransCanada has failed to comply, and which Intertribal COUP clearly brought to the attention of the Commission, which failed then to recognize or uphold.

At the request of Commissioner Hansen, there arose a question with regard to an engineering diagram (TR. at p. 1370 and forward), wherein the pipeline would proceed to ultimately make a ‘contested’ 90 degree bend Tr. at p. 1355 to 1379) under apparently several South Dakota rivers, which included in the original permit and which involved much discussion through the course of the geotechnical and construction engineering witnesses provided by TransCanada, none of which where either licensed in South Dakota or anywhere in the United States. Further, during the hearings, each TransCanada expert witness with either engineering training or responsibility, dutifully passed along the responsibility for answering questions on the next witness in the queue, such as Ms. Kothari (TR at p.901) who is unlicensed in the U.S. and may not be licensed in Canada. These are but two examples of unqualified expert witnesses who were sadly insufficient to provide adequate testimonial evidence at the hearing.

An other example is that provided in the testimony of TransCanada’s Mr. King that makes the point, to wit:

THE WITNESS KING: You couldn't hear who? Me or Mr. Gough?

A. I said I am accountable for setting TransCanada standards and specification for how pipelines -- for the engineering aspects of the pipeline. I'm accountable to

do checks as the -- around those technical issues as the pipeline's constructed.

My group provides technical support to the construction groups where they require it. I'm accountable for the reliability of the projects after they go into service.

Q. Thank you.

Your responsibility includes the preparation of permits as well?

A. No, it does not.

Q. It does not.

Do you review the documents that go into a Permit Application?

A. It depends. If there are some very engineering specific documents, I may do them if my group has the expertise in that area.

Q. Your testimony is that you've been in this position since 2008?

A. I've been in this vice president position since about 2008. Yeah. 2004. Yeah.

Q. 2004. Thank you.

Did you have responsibility to or an opportunity to review the engineering documents submitted in the Keystone Application to the State of South Dakota PUC?

A. No, I did not.

Q. You did not.

So while this is an area of responsibility, this was not one for this project?

A. As I said, depending on the project and the aspect of engineering engaged, I may be brought in to, you know, provide comments or support.

Q. Were you brought in to inspect the river crossings, designs, engineering designs?

A. No, I was not.

Q. You were not.

You're a licensed engineer in Canada?

A. I'm a registered professional engineer in the province of Alberta.

Q. Are you registered in the United States?

A. No, I'm not.

Q. You're not.

Do you have any registered engineers on your staff who are registered in the United States?

A. Many.

Q. Many. Out of the 600, what percentage would you say?

A. I probably have 40 that are registered in the U.S.

Q. 40. Do you know if they worked on Keystone Pipeline?

A. I don't believe -- I don't believe any of my staff provided -- or any of my engineering staff provided support to the Keystone XL Application.

Q. Okay. Thank you.

Are you familiar with Section 36-18A-45 pertaining to South Dakota Board of Technical Professions?

A. No, I'm not.

Q. Are you familiar with the requirements for engineers to sign off on documents submitted to government agencies on engineering documents?

A. Generally, yes.

Q. Is that the usual practice in Canada, to submit documents of an engineering nature, design nature, to government agencies that are signed or sealed?

A. On final documents, yes.

Q. Right. Are you aware that in South Dakota the seal, signature, and date shall be placed in such a manner that can be legibly reproduced on the following: All originals, number one, preliminary work, and in the case of multiple -- I don't need to go to multiple seals, but on preliminary work as well?

A. So the ethics and the issue around sealing drawings is that when you put the seal on it means that people can take that work and move forward with it.

I would argue that sealing preliminary work has to be done very carefully because of what it may imply as to what you're taking accountability for.

Q. So you would not build a pipeline based on documents that were not sealed or signed? Is that what I understand?

A. I would --

Q. You would not submit documents for a permit that were not sealed or designed?

A. I can't say that.

Q. Would you expect agencies in Canada to approve projects with unsigned or unsealed engineering documents?

A. Depending on what they were, yes.

Q. Even though it's your testimony that an unsigned or unsealed document is not completed?

A. Permit approvals often contain prospective requirements. Obviously prospective requirements can't be signed off as final and sealed until the work is done.

Q. Until the work is done on the document or the work is done in the field?

A. The work is done on the design.

Q. So that what assurance do we have that any document submitted that's unsealed or unsigned is ready to be relied upon?

A. So I can't talk specifically to this one, but in general there are other measures, other checks and balances, to make sure that projects, pipelines, are built according to regulations. There are other forms of regulatory inspection.

Q. Are you aware that the Keystone Application in '09 and the Permit in 2010 contained unsigned engineering documents?

A. I'm not aware of the specifics, other than I saw one drawing that I think was shown here that didn't have a seal on it.

(Tr. at 2319 to 2323)

CONCLUSION OF LAW NUMBER 13.

13 “The Commission concludes that the Certification and all required filings have been filed with the Commission in conformity with South Dakota law.

Following on the example provided above, Mr. White received sustained objections to Intertribal COUP’s questioning the qualifications of the witnesses to provide testimony or evidence as to the engineering drawings submitted in the original permit and discussed at length in the HP14-001 hearing above.

Because what I did want to obtain was the name of the engineer who did sign off on this diagram.

A. I don't have that in front of me. This is a not authenticated drawing. So it's an earlier version of the drawing, as I mentioned previously. The drawings have been updated, and I don't have that information in front of me.

Q. Does that authenticated drawing appear any place in the record?

A. No, it does not.

Q. So all of this testimony has been by a nonlicensed engineer over a nonauthenticated, unsigned engineering document?

(Tr. at p. 1378 to 1379)

STATE OF SOUTH DAKOTA CODIFIED LAWS Chapter 36-18A sets forth the professional requirements for practicing as an professional engineer in South Dakota. Certain acts are prohibited,

36-18A-65 Prohibited acts--Violation as Class 2 misdemeanor, such as:

(2) Use or employ the title of architect, landscape architect, land surveyor, professional engineer, petroleum release assessor, or petroleum release remediator with or without qualifying adjectives without being licensed in accordance with the provisions of this chapter.

(3) Use any other words, letters, or figures indicating or intending to imply that the person is a professional engineer, architect, land surveyor, landscape architect, petroleum release assessor, or petroleum release remediator without being licensed in accordance with the provision of this chapter;

36-18A-73 Certification required for environmental technical services - Violation as misdemeanor

Unsigned engineering drawings by unknown professional engineers strikes Intertribal COUP as there being an underlying invalid permit under state law and a demonstrated lack of compliance with the conditions and ongoing certification of those conditions in this matter.

Lastly, the fact that conditions have changed over all, particular with regard to the governmental recognition worldwide (though apparently not in South Dakota) of climate change and weather extremes, one of the primary reason that President Obama's State Department rejected and the President denied Trans Canada's repeated application, is another sad short-coming of this PUC hearing process. Intertribal COUP was denied offering expert testimony on this point and, unbelievably, climate was deemed not relevant to the Keystone XL Pipeline proceeding.

For these and the other reasons, provided by our fellow intervenors, Intertribal COUP respectfully requests that the PUC decision be overturned; the TransCanada permit re-certification be denied and a new, more comprehensive hearing be held in this matter when and if TransCanada can demonstration that it can comply with the laws of the state of South Dakota.

Respectfully submitted this 16th day of May 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2016, the foregoing Opening Brief on Appeal was filed with the Office of the Clerk of Hughes County Circuit Court, via the Odyssey system or email via Heather Covey or Kelli Sitzman, Sixth Circuit Court, and that a true and correct copy of the same was served upon the following via email or first class US Mail, postage prepaid:

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