

STATE OF SOUTH DAKOTA )  
: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

**KEYSTONE'S BRIEF IN  
OPPOSITION TO JOINT MOTION  
FOR LEAVE TO PRESENT  
ADDITIONAL EVIDENCE**

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All of the Appellants filed a joint motion on July 18, 2016, asking this Court to remand this appeal to the Public Utilities Commission under SDCL § 1-26-34 to consider additional evidence related to a 400-barrel leak from the Keystone Pipeline that was discovered on April 2, 2016, near Freeman, South Dakota. Evidence related to the spill is not material to the Commission's certification decision under SDCL § 49-41B-27 and would unnecessarily delay this proceeding. Appellee TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that the motion be denied.

**Background Facts**

In Docket HP09-001, the Commission issued a permit, in the form of an amended final decision and order, dated June 29, 2010, for the construction of the Keystone XL Pipeline. Because more than four years elapsed and construction had not yet begun, Keystone filed with the Commission a certification dated September 29, 2014, that it "continues to meet the conditions on which the permit was issued" under SDCL § 49-41B-27. After extensive discovery, the Commission held a nine-day evidentiary hearing on the certification petition. The Commission entered a final order on January 21, 2016, approving Keystone's certification.

After the certification decision, the Freeman leak was discovered on April 2, 2016. On April 9, 2016, the Pipeline Hazardous Materials Safety Administration ("PHMSA"), which is an

agency of the U.S. Department of Transportation, the federal regulatory body with jurisdiction over pipeline safety, issued a corrective action order. The Keystone Pipeline was shut down until April 10, 2016, when PHMSA authorized Keystone to restart the pipeline at a reduced operating pressure. On September 12, 2016, Keystone submitted to PHMSA a root cause failure analysis (RCFA), which was required by PHMSA's corrective action order. The RCFA was submitted to PHMSA as exempt from disclosure under the Freedom of Information Act. On September 13, 2016, PHMSA approved Keystone's request to remove the pressure restriction imposed by the corrective action order, and the Keystone Pipeline returned to normal operations. A copy of PHMSA's letter is attached as Exhibit A.

### **Argument**

The remand motion should be denied. Remanding the case and reopening discovery related to the Freeman spill would not yield any evidence material to the Commission's decision, and would merely delay disposition of the appeal.

#### **1. Remand is not warranted under SDCL § 1-26-34.**

Under SDCL § 1-26-34, the Court may in its discretion remand this appeal to the Commission to take additional evidence "upon conditions determined by the Court." SDCL § 1-26-34. Before remanding, the Court must determine that "the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency." *Id.* Because the spill did not happen until after the Commission issued the final order that is the subject of this appeal, the second part of the standard is not at issue. Remand should be denied, however, if the proposed evidence would be immaterial. *Ashland v. South Dakota Dept of Labor*, 321 N.W.2d 103, 106-07 (S.D. 1982) (finding no error in refusal to consider new evidence under SDCL § 1-26-34 because it was immaterial).

The Appellants' motion presumes that "material" means "relevant," but the cases under SDCL § 1-26-34 do not define "material." As commonly defined in the context of civil litigation, "material" means that the evidence must affect the outcome. *See, e.g., Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633 ("A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 17, 714 N.W.2d 884, 891)); *Hall v. State ex rel. S.D. Dept. of Transportation*, 2011 S.D. 70, ¶ 9 n.3, 806 N.W.2d 217, 221 n. 3 ("Disputes of fact are not material unless they change the outcome of a case under the law."). Thus, remand would be appropriate only if the Court finds that evidence related to the Freeman spill would likely change the Commission's mind about its decision accepting Keystone's certification.

- 2. The spill is not material to the certification decision under SDCL § 49-41B-27.**
  - a. This proceeding is limited to consideration of Keystone's continuing ability to meet the conditions on which the permit was granted.**

To determine whether evidence related to the Freeman spill would change the outcome under the law, the Court must consider the applicable substantive law. By statute, Keystone certified to the Commission that the proposed Keystone XL Pipeline project "continues to meet the conditions upon which the permit was issued." SDCL § 49-41B-27. The Commission determined early in the case and again in its conclusions of law in the final order that "conditions" means "the 50 Conditions attached as Exhibit A to the Decision." (Final Decision, Jan. 21, 2016, Conclusions of Law, ¶ 6.) The Commission rejected the Intervenor's arguments that the proceeding was a vehicle for reconsideration of Keystone's burden of proof in the original permit proceeding under SDCL § 49-41B-22. To be material, therefore, evidence related to the Freeman spill must affect Keystone's ability to meet one or more of the permit

conditions. The motion for remand does not, however, identify any permit condition that would be affected by evidence related to the Freeman spill. No condition requires that the pipeline be spill-free. The spill is not, as the Intervenors argue, evidence of "TransCanada's history of non-compliance in its hazardous pipeline operations." (Br. in Support of Motion to Remand at 13.)

**b. There is no evidence of a pattern of non-compliance.**

The Intervenors argue instead that the evidence they seek to develop "will not raise new issues," but instead "is relevant and material as part of TransCanada's history and continuing pattern and practice of non-compliance with PHMSA hazardous pipeline construction and operational requirements, permit conditions, and specifications in the record." (Br. in Support of Motion to Remand at 4.) The fatal flaw in this argument is that, despite the Intervenors' best efforts, the Commission did not find a history and continuing pattern and practice by Keystone of non-compliance with federal law, compliance with which is overseen by PHMSA, Keystone's federal regulator. The Intervenors presented evidence at the hearing in an effort to prove such a pattern through the testimony of Evan Vokes, a disgruntled former Keystone employee. The Commission considered Vokes' testimony in its findings of fact, and concluded that it was "insufficient to establish that Keystone cannot meet any permit condition." (Final Decision, Jan. 21, 2016, Findings of Fact, ¶¶ 69-77.)

More particularly, the Intervenors submitted evidence related to the Bison Pipeline Project in North Dakota and a PHMSA warning letter from March, 2011, as proof of federal non-compliance. (Br. in Support of Motion to Remand at 13-15.) The Commission considered this evidence and addressed it in paragraph 75 of its findings of fact, but did not find that it was evidence of regulatory non-compliance.

The Intervenors also discuss evidence related to Keystone's Gulf Coast Project, in part based on the testimony of Evan Vokes and in part based on two exhibits from PHMSA, both of which were excluded from evidence as not timely disclosed. (*Id.* at 15-19.) The Commission addressed Vokes' testimony about the Gulf Coast Project in paragraphs 76-77 of its findings of fact. To the extent that the Intervenors' argument relies on exhibits that were excluded by the PUC, the exhibits do not qualify as "additional evidence" under SDCL § 1-26-34 that was not presented for good reason.

Finally, the Intervenors discuss an incident involving pipeline corrosion near St. Louis in which a small area of corrosion was identified after being caused by stray electrical current from another pipeline in the same utility corridor. (Br. in Support of Motion to Remand at 22-24.) This issue is not addressed in the Commission's findings of fact because it is not evidence that Keystone cannot continue to meet the conditions on which the permit was granted. First, Keystone itself discovered the corrosion through an inline inspection. (Tr. at 1154.) Second, Keystone presented testimony that it learned from the incident and added a passive cathodic protection system supplementing the active system on the Keystone Pipeline. (Tr. at 265, 309-10, 1152-54.) Third, Keystone presented evidence that there are no shared utility corridors in South Dakota where a similar incident could occur. (Tr. at 1187.)

Given the evidence presented at the hearing on the issue of Keystone's regulatory compliance, it does not support remand based on an argument that the Freeman spill is further evidence of a pattern of regulatory noncompliance. The Intervenors have not shown that a remand would change the outcome of the Commission's decision.

**c. The Freeman spill is being addressed by PHMSA.**

As is evident from the Intervenor's argument, they are unsatisfied with PHMSA's regulation of the Keystone Pipeline. The Intervenor devotes three pages of their brief to the steps that Keystone must take at PHMSA's direction after the Freeman spill, including taking certain corrective actions, submitting a root cause failure analysis, and submitting quarterly reports. (Br. in Support of Motion to Remand at 10-12.) Referring to PHMSA's authorization after the Freeman spill for Keystone to restart Pipeline operations on April 8, 2016, however, the Intervenor suggests that PHMSA's efforts are insufficient, and they dismiss "the low bar set by PHMSA to safeguard the interests of the South Dakota people, their property, and the environment." (Br. in Support of Motion to Remand at 9.)

The problem for the Intervenor's argument is that the Pipeline Safety Act, which applies to the proposed Keystone XL Pipeline, expressly preempts any state "safety standards." In a section labeled "preemption," the Act states that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). The Courts have construed this and similar language regarding pipeline safety issues to preclude state regulation. *See Northern Nat'l Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 824 (8<sup>th</sup> Cir. 2004); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8<sup>th</sup> Cir. 1987). The Commission acknowledged this preemption in Conclusion of Law ¶ 12 of its Final Decision and Order in HP09-001. The Commission requires that Keystone comply with all applicable laws and regulations, including "the various and other pipeline safety statutes currently codified at 49 U.S.C. § 60101 et seq. (collectively the 'PSA')" and "the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R. Parts 194 and 195." (Amended Final Decision & Order, Condition 1.) Thus, PHMSA, not the

Commission is the final arbiter of matters involving pipeline safety and compliance with the Pipeline Safety Act and 49 CFR Parts 194 and 195.

As the Intervenor's brief establishes, PHMSA is handling matters involving the Freeman Spill. Keystone is responsible to PHMSA, which has not made any finding based on the Freeman spill that the Keystone Pipeline is not being operated in compliance with federal law and regulation. PHMSA's most recent action, on September 13, 2016, was to remove the pressure restriction on the Keystone Pipeline that had been imposed by the Corrective Action Order. It would be anomalous for this Court to remand this matter to the Commission to review a matter that is primarily within the jurisdiction of PHMSA, that is being handled by PHMSA, and that has not resulted in PHMSA taking any action suggesting that the Pipeline is not being operated in compliance with federal law.

**3. Remand would greatly delay the proceedings.**

The Intervenor's do not seek an open-ended remand, but rather a remand with instructions that the Commission allow discovery related to the Freeman spill and conduct a further evidentiary hearing. (Br. in Support of Motion to Remand at 1-2, 27.) Given that PHMSA's review process is ongoing and that Keystone has submitted its root cause failure analysis as exempt from disclosure under the Freedom of Information Act, discovery would likely take months and involve motions concerning confidentiality and whether discovery should be stayed pending PHMSA's completion of its review of the spill. It has always been in the Intervenor's interest to delay the certification proceeding, which started on September 15, 2014, over two years ago, and which, if subject to further appeal after this Court's decision, may not be finally concluded for another year. Further delay due to a remand would frustrate the statutory directive that this administrative appeal be "speedily heard and determined." SDCL § 1-26-33.6.

## Conclusion

The pending motion is an effort to use the certification process under SDCL § 49-41B-27 to compel Commission regulation of a matter currently under PHMSA review. A remand is not warranted by the known facts of the Freeman spill or by the fact that under PHMSA's direction the Keystone Pipeline is currently in operation at the same pressure as before the spill was discovered. The Intervenor has not met their burden under SDCL § 1-26-34 of showing that further evidence related to the Freeman spill would be material, i.e., that it would cause the Commission to change its decision, made after a nine-day evidentiary hearing, and reject Keystone's certification. Keystone respectfully requests that the motion for remand be denied.

Dated this 14th day of October, 2016.

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### Certificate of Service

I hereby certify that on the 14th day of October, 2016, I filed and served via Odyssey File & Serve System, a true and correct copy of the foregoing Keystone's Brief in Opposition to Joint Motion for Leave to Present Additional Evidence, which will automatically send e-mail notification to the following:

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