

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

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COUNTY OF HUGHES)

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF PUBLIC UTILITIES)	32CIV16-000033
COMMISSION DOCKET NO. HP 14-001,)	
PETITION OF TRANSCANADA KEYSTONE)	COMMISSION STAFF’S RESPONSE
PIPELINE, LP FOR AN ORDER ACCEPTING)	TO JOINT MOTION FOR LEAVE TO
CERTIFICATION OF PERMIT ISSUED IN)	PRESENT ADDITIONAL
DOCKET HP09-001 TO CONSTRUCT THE)	EVIDENCE/REMAND AND MOTION
KEYSTONE XL PIPELINE)	FOR STAY OF PROCEEDINGS

COMES NOW, Staff of the South Dakota Public Utilities Commission (Commission Staff) through and by its undersigned counsel, and files this Response to Joint Motion for Leave to Present Additional Evidence/Remand and Motion for Stay of Proceedings for the purpose of responding to Appellants’ Joint Motion for Leave to Present Additional Evidence/Remand and Motion for Stay of Proceedings (Joint Motion). Commission Staff opposes the Joint Motion because the outcome of the hearing would not change. Because the outcome would not change, the evidence is not material.

Leave to take additional evidence may “only be granted if a motion is made prior to the date set for hearing, and the court finds that the evidence is material and that good reason exists for the failure to present evidence before the [Commission].” *Cavender v. Bodily, Inc.*, 1996 S.D. 74, ¶ 15, 550 N.W.2d 85, 87 (quoting, *Beville v. Univ. of S.D./Bd. of Regents*, 420 N.W.2d 9, 13 (S.D.1988); *Matter of Gridley*, 345 N.W.2d 860 (S.D.1984)). .

Evidence is material if there is a reasonable probability that, had such evidence been available, the result of the proceeding would have been different. *Erickson v. Weber*, 2008 S.D. 30, ¶18, 748 N.W.2d 739, 745 (citations omitted). Thus, evidence of the leak at Freeman, South Dakota (hereafter “Freeman Leak”) is material only if there is a reasonable probability that the

Public Utilities Commission (Commission) would not have granted TransCanada Keystone Pipeline, LP's (TransCanada) Petition for approval of its certification, had this evidence been available and introduced at the time of the certification hearing.

The burden of proof for administrative hearings is preponderance of the evidence. *Irvine v. City of Sioux Falls*, 2006 SD 20, ¶ 10, 711 N.W.2d 607, 610. For the purposes of this response, Commission Staff observes that the Commission applied the correct burden of proof in its interpretation of SDCL § 49-41B-27 and would apply that same standard if it were to take additional evidence.

The Commission heard testimony on various events in the history of TransCanada's pipeline system, including potentially serious events such as corrosion on the existing Keystone I pipeline near St. Louis, Missouri, and previous leaks along the Keystone I pipeline.¹ Further, the Commission heard testimony during the evidentiary hearing from Dakota Rural Action witness Evan Vokes about issues identified by PHMSA for TransCanada's Bison pipeline project² and Gulf Coast pipeline project.³ After considering the evidentiary record and all testimony, including testimony on previous spills from the Keystone I pipeline and TransCanada's practices on previous pipeline projects, the Commission entered its Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry for the Keystone XL project (Final Order and Decision).

Because the Commission heard similar testimony it is not at all likely that the outcome would change with this similar evidence. It is Commission Staff's position that any Pipeline and

¹ See testimony of Meera Kothari, ET 355:3. (Exhibit A)

² See testimony of Evan Vokes, ET 1614. (Exhibit C)

³ See Id. at 1754. (Exhibit D)

Hazardous Materials Safety Administration (PHMSA) action against TransCanada due to the Freeman Leak would not cause the Commission to change course. Because the Commission already considered past PHMSA-identified issues on two TransCanada projects, the probability of the Commission reversing its decision on one additional PHMSA action against TransCanada is low. Aside from the fact that the Freeman Leak occurred in South Dakota, there is no difference between a potential PHMSA Letter of Warning (or Notice of Violation) for the Freeman Leak and PHMSA Letters of Warning for other TransCanada projects that were already considered by the Commission in docket HP14-001. Commission Staff notes that PHMSA allowed TransCanada to fix the leak and return the Keystone pipeline to normal operating pressure, as demonstrated in Keystone's Exhibit A (PHMSA letter), attached to their brief. It is most noteworthy that the PHMSA letter states that "no other girth weld features similar to the one that failed are present..." It can be reasonably inferred that if PHMSA determined any further risk to the integrity of the pipeline existed, the agency would not have allowed the pipeline to return to normal operations. Clearly, PHMSA did not believe there was a pattern of noncompliance that would result in risk to the entire pipeline.

If, in fact, this was an isolated incident, rather than the result of a pattern of conduct, and had no effect on the rest of the Keystone pipeline, it is unlikely that it would have any effect on TransCanada's ability to comply with safety and operational requirements on TransCanada's other existing or proposed pipelines. Because PHMSA is the federal regulatory agency responsible for overseeing the safety and integrity of the interstate pipeline, Commission Staff defers to PHMSA's authority and conclusions on this matter. Given that PHMSA has concluded that no further danger exists, Commission Staff has no reason to believe that the incident increases the likelihood of further or future incidents.

In the state of South Dakota, the Department of Environment and Natural Resources (DENR) is charged with protecting the states' natural resources by monitoring cleanup after an incident such as the Freeman Leak. A letter and memorandum from DENR to TransCanada is attached hereto as Exhibit B. That letter is publicly available. In the memorandum, DENR notes that there were no observable impacts to groundwater. See page 7, Exhibit B. Further, because no potential risks remained, the author of the memorandum recommended "closure status for [the spill] site." Id.

In addition, the scope of the requested remand is unclear based upon the filings and oral arguments. While the Joint Motion, on its face, focuses on the Freeman Leak, Movants allude to looking outside of the geographic boundaries of South Dakota at other events which may or may not have occurred subsequent to the hearing. As shown by the extensive discovery conducted by the parties prior to the evidentiary hearing, the number of discovery motions filed, and the enormity of the administrative record, it is highly unlikely that any further discovery would move forward quickly, as that has not been the case with past proceedings in this docket. A remand would likely result in more than a years' delay in the appeal proceedings. South Dakota law requires appeals to be speedily heard and determined. See SDCL § 1-26-33.6. A protracted pause in the proceedings is inconsistent with the philosophy of the statute.


Should the Court be inclined to grant the Joint Motion, Commission Staff requests the Court also rule on the other material issues within the appeal, as the remedy sought by the Joint Motion and that sought by the underlying appeal are identical. This would avoid the possibility that the docket is remanded more than once. Further, because the burden of proof is a central issue of the appeal, it is in the interest of judicial economy that, if the docket were to be remanded, all parties can present their case under the appropriate standard.

Conclusion

The outcome of this matter at the Commission is unlikely to change based on the considerations in the Joint Motion. The Commissioners took their time, studied the issues and the evidence, and made a carefully reasoned decision which took all of the factors in the Joint Motion into account. There's no reason to think that a different decision is likely or even possible based on cumulative evidence as sought to be introduced here.

Staff does not request further oral argument on this issue.

Dated this 25th day of October, 2016.



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