STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
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COUNTY OF HUGHES	)	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 **APPEAL BRIEF OF TRANSCANADA KEYSTONE PIPELINE, LP, IN RESPONSE TO INTERTRIBAL COUNCIL ON UTILITY POLICY**

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Intertribal Council on Utility Policy ("COUP") intervened in the South Dakota Public Utilities Commission Docket HP 14-001, the docket that is the subject of this appeal. In its appeal brief, COUP raised burden-of- proof issues that are addressed by Appellee TransCanada Keystone Pipeline, LP ("Keystone") in its common brief on that subject. This brief addresses the balance of the issues raised in COUP's briefing.

Statement of the Issues

1. Should the Commission have denied Keystone's certification petition because two of Keystone's engineers were not licensed in South Dakota and some of the drawings submitted in the 2009 permit proceedings were not signed by a South Dakota registered engineer?

   The Commission did not directly address these arguments because they were not the subject of any motion made by COUP and were not in issue in the certification proceedings.

2. Should the Commission have allowed expert testimony related to climate change?

   The Commission granted Keystone's motion to preclude evidence related to climate change as not relevant under SDCL § 49-41B-27.

Statement of the Case and Facts

Keystone relies on the facts and procedural history stated in its separate brief responding to common arguments on the burden of proof and sufficiency of the evidence raised by several Appellants, including COUP. Facts relevant to the issues addressed in this brief are included in this separate briefing and argument.

Argument

1. There was no irregularity in Keystone's engineering drawings and Keystone's engineers were not required to be licensed in South Dakota.

Although somewhat hard to follow, COUP seems to argue that the Public Utilities Commission erroneously accepted Keystone's certification that the project could be constructed per the 2009 permit conditions because some of the drawings submitted in the 2009 permit proceedings were not signed by a South Dakota registered engineer. (Coup brief, unnumbered seventh page, 2nd paragraph.) COUP then appears to contend Keystone engineer witnesses Kothari and King should not have been allowed to testify because they are not licensed in South Dakota.

As has been argued throughout the briefing, the 2015 certification proceedings were neither an appeal nor a retrial of the matters considered in the original docket, HP09-001. Challenges to HP09-001 exhibits should have been pursued in December of 2009. The only matter in issue in this proceeding is whether Keystone can continue to meet the fifty conditions imposed in the 2010 permit, not whether exhibits offered in the 2009 hearing were properly admitted into evidence.

In its brief, COUP discusses an exchange between the Keystone XL Project Engineer Meera Kothari and PUC Commissioner Nelson (not Hansen as suggested in COUP's brief)

regarding a 2009 hearing exhibit, an engineer's drawing of a river crossing that interested him.[1] COUP morphs that discussion into an argument that testimony from Project Engineer Kothari and TransCanada Chief Engineer Dan King, licensed as professional engineers only in Canada, was "sadly insufficient" because they weren't licensed in South Dakota. (Coup brief, unnumbered seventh page, 2nd paragraph.)

Ms. Kothari's pre-filed direct testimony and more than thirteen hours of cross examination demonstrate that she is a registered engineer in Canada, in the employ of Keystone, served as project engineer for the KXL project, and has a deep and through understanding of the engineering aspects of the proposed project. Her qualifications as an engineering expert were unchallenged during her direct testimony and unshaken during her extensive cross examination. Her cross examination encompasses more than 400 pages in the transcript. (Tr. 995-1414.) Ms. Kothari's knowledge of the engineering aspects of the project was expert, professional and complete. To argue that she is not qualified as a witness is simply not supported by the record.

COUP did not challenge Ms. Kothari's qualifications before the Commission. No objection to her qualifications as an engineering expert was voiced in the hearing, and no motion was made to strike her testimony. Objections which are not raised before the administrative agency at the hearing are not preserved for appeal. *Matter of State of S.D. Water Management Bd.*, 351 N.W. 2d 119, 122 (S.D. 1984).

[1] Note that Commissioner Nelson prefaced his question with "I apologize because this doesn't have anything to do with the Permit Conditions. . . ." Tr. 1286. The drawing was not offered in evidence, although it can be found in the record of the 2009 underlying permit proceedings at

http://www.puc.sd.gov/commission/dockets/hydrocarbonpipeline/2009/hp09-001/exhibitc/sitespecific3.pdf

Dan King, TransCanada's chief engineer and an internationally-respected pipeline engineer in charge of all engineering for one of Canada's largest energy businesses, testified in rebuttal. COUP cross examined Chief Engineer King, engaging him in a discussion of whether the conceptual drawings used in the 2009 permit should have been submitted under an engineer's seal, over extensive objection that the drawings were not in issue. (Tr. at 2312-2326.) Chief Engineer King made the point that many of the drawings used in permit applications are preliminary and not final, and that preliminary designs cannot and should not be sealed. (Tr. at 2322-2323.) COUP uses that exchange to underscore its argument that the certification should have been denied because the preliminary drawings submitted in the 2009 application should have contained a South Dakota engineer's seal.

COUP ignores the fact that the certification proceeding, HP14-001, was not a challenge to the 2010 permit or a retrial of the 2009 underlying permit hearing. COUP offers no explanation how the efficacy of the 2010 permit is now in issue. COUP also cites no authority for the proposition that the Public Utilities Commission's duties include assuring that all engineering drawings are signed and sealed. COUP nonetheless contends that the Commission's decision should be reversed and certification denied because the 2009 drawings were not signed and sealed.

COUP cites SDCL Chap. 36-18A, the South Dakota code chapter that deals with licensing professional engineers as the anchor for its argument. SDCL § 36-18A-45 says a licensee's signature and seal is certification that the work was done by the licensee and directs that the seal be attached before *final* plans are submitted to a client or government agency. Subdivision 2 of SDCL § 36-18A-45 requires that *preliminary* drawings be marked with an

explanation that the plan is not final, as was the case with the river crossing drawing. Nothing in the code requires that preliminary drawings be signed or sealed, and nothing in code requires that evidentiary submissions before the Commission be final drawings.

As to Kothari and King's work and the work of Keystone-employed engineers, SDCL § 36-18A-9 provides:

> This chapter *does not apply to*:
>
> (5) Any full-time employee of a corporation while exclusively doing work for . . . the corporation . . . if the work performed is in connection with the property . . . utilized by the employer.

Simply stated, SDCL Ch. 36-18A does not apply to Keystone employees Meera Kothari and Dan King's work, or the work of Keystone's staff engineers. There is nothing in South Dakota law that requires plans prepared by Keystone's staff for Keystone's use to be signed and sealed by a South Dakota licensed engineer for any purpose.

Preliminary drawings prepared for Keystone by outside engineers contracted to work on the pipeline project need not be signed and sealed as long as they note they are preliminary. Drawings prepared by Keystone employees need not ever be signed and sealed. Nothing prohibits use of preliminary drawings as demonstrative exhibits in the Commission certification process, whether or not they are marked preliminary or signed and sealed. COUP fails to explain why the Commission should have denied certification on that basis, or how the 2009 exhibits can be in issue in this proceeding. COUP's argument is not well founded, and the Court should so rule.

2. The Commission properly excluded evidence of climate change as irrelevant.

COUP closes its brief with one paragraph noting the Commission refused to allow expert testimony about climate change in the 2015 certification hearing. COUP expresses no legal theory, makes no argument, and cites no cases. Failure to cite authority in support of an argument waives the argument. *Niesche v. Wilkinson*, 213 S.D. 90, ¶ 15, 841 N.W.2d 250, 253; *Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29. Accordingly, COUP's appeal on the point is abandoned.

Even so, the Commission was correct in sustaining Keystone's motion to not allow climate-change testimony. On October 9, 2014, COUP applied for party status as an intervener in this proceeding. COUP recited its interest in the matter, primarily focused on the route of the pipeline, but made no reference to climate change. (Record 341-342.) On October 30, 2014, Keystone filed a motion to limit the scope of discovery to matters pertaining to certification, arguing that the certification proceeding was not a retrial of the 2009 permit hearing and not a forum to interject new issues untried in 2009. (Record 1000-1009.) The Commission heard the motion on December 9 and entered an order December 17, 2014, limiting discovery to "whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in . . . the Amended Final Decision and Order, notice of entry issued June 29, 2010 in Docket HP09-001" and requiring pre-filed direct testimony to be filed by April 2, 2015. (Order Granting Motion to Define Issues, Record at 1528-1529.) As is self-evident from the 2010 Order granting Keystone its permit and the conditions appended to it, climate change was not considered.

On April 3, 2015, COUP identified three witnesses it intended to call in its case in chief, purportedly experts on climate change. (Statement of Objections Regarding Submission of

Written Testimony, Record at 3067-3078.) However, COUP did not pre-file testimony for the witnesses, as required by the Commission's December 17, 2014 scheduling order. Keystone moved to preclude testimony from the witnesses because no testimony was filed as required by the December order, and noted, in a footnote to its brief: "All of COUP's witnesses would testify about climate change, an issue that is not relevant to the certification under SDCL 49-41B-27. . . . If COUP is allowed to call their witnesses, Keystone will move to exclude their testimony as not relevant." (Keystone Motion to Preclude, Record at 3103-3111.)

On April 14, the Commission heard argument on the motion. The Commission decided, memorialized with a written order dated April 23, 2015, that COUP failed to comply with the Commission's directive to pre-file testimony, and accordingly, COUP could not offer its climate-change witnesses as part of its case in chief. (Order Granting Motion to Preclude, Record at 4857-4858.)

On April 24, 2015, COUP filed a motion (Record at 5203-5206) asking for a time certain for its rebuttal witnesses to testify during the hearing, asserting complications with witness schedules, but really a notice it intended to call the climate change witnesses in rebuttal. Keystone objected (Record at 5231-5237), noting that COUP had previously characterized the witnesses as case-in-chief witnesses, and contended COUP was simply trying to back door the Commission's April 23 order preventing their testimony because of COUP's untimely disclosure. On May 18 the PUC staff joined in Keystone's objection, but on the grounds that climate change testimony was not relevant to the issues in the certification proceedings. (Record at 6679-6686.) COUP responded with a supplemental filing on May 20, 2015, asserting for the first time that climate change was an issue that could not be ignored in the proceedings, despite

the limited scope of the certification process. (Record at 6702-6716). On May 26, 2016, the Commission ruled that the proposed climate change witnesses testimony would exceed the scope of the certification process, and accordingly excluded their testimony. (See Order, Record at 6967-6968.)

The statute that is the genesis of this case, SDCL § 49-41B-27, provides:

> 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*. (italics added for emphasis).

In its December 17, 2014 order defining the scope of discovery, and essentially defining the scope of the evidence in the case, the Commission held the question at issue was whether the proposed XL Pipeline "continues to meet the fifty permit conditions" contained in the 2010 permit. (Record at 1528-1529.) There are no reported cases addressing the statute. This Court's review of the Commission's interpretation of SDCL § 49-41B-27 is therefore deferential. "When faced with an agency's interpretation of a statute that it administers, 'so long as the agency's interpretation is a reasonable one, it must be upheld.' " *Mulder v. South Dakota Department of Social Services*, 2004 S.D., ¶ 5, 675 N.W. 2d 212, 214 (quoting *Emerson v. Steffen*, 959 F. 2d 119, 121 (8th Cir. 1992)). The Court must give the language of the statute its ordinary and plain meaning. *See, e.g., Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. An agency may not " 'enlarge the scope of the statute by an unwarranted interpretation of its language.' " *Paul Nelson Farm v. South Dakota Department of Revenue*,

2014 S.D. 31, ¶ 24, 847 N.W. 2d 550, 558 (quoting *In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W. 2d 394, 400).

None of the fifty conditions in the 2010 permit, or any circumstance identified by Keystone in its 2014 Certification Petition even remotely relates to climate change, which the Commission correctly recognized in its December 17, 2014 order. COUP tried to introduce climate change into the hearing commencing with its witness list in April 2015, finally forcing the Commission to directly address climate change as an issue in its May 26 hearing. The Commission correctly decided that climate change was not among the issues presented by the fifty conditions in the 2010 permit and accordingly was not an issue on which COUP could offer rebuttal testimony. The Commission's decision was correct then and remains correct today. This Court should so order.

Conclusion

The standard of review for administrative appeals requires a showing that "substantial rights of the appellants have been prejudiced" before reversal is appropriate. SDCL § 1-26-36. COUP make no such showing, on any grounds. COUP raises no issues that warrant reversal. Keystone respectfully requests that the Commission's order be affirmed.

Request for Oral Argument

Keystone respectfully requests oral argument to address the issues briefed by the parties.

Dated this 20th day of July, 2016.

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Certificate of Service

I hereby certify that on the 20th day of July, 2016, I served electronically and by United States first-class mail, postage prepaid, a true and correct copy of Appeal Brief of TransCanada Keystone Pipeline, LP, in Response to Intertribal Council on Utility Policy, to the following:

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