

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION)	HP 14-001
OF TRANSCANADA KEYSTONE PIPELINE, LP)	
FOR ORDER ACCEPTING CERTIFICATION)	ROSEBUD SIOUX TRIBE
OF PERMT ISSUED IN DOCKET HP09-001 TO)	REPLY BRIEF
CONSTRUCT THE KEYSTONE XL PROJECT)	

For its reply brief to the Applicant, TransCanada Keystone Pipelines and Staff, the Rosebud Sioux Tribe states the following:

Introduction

Both TransCanada Keystone Pipelines (hereafter referred to as Keystone) and the SD PUC Staff (hereafter referred to as Staff), submitted initial post-trial briefs following the close of the evidentiary hearing on docket HP09-001. Each reaches the conclusion that Keystone satisfied its certification burden under SDCL 49-41B-27 when it filed its Petition for Certification on September 15, 2014. Applicant’s Post Hearing Brief pages 1 through 4 and PUC Staff Post Hearing Brief page 18.

For the reasons stated below, both Keystone and Staff urge the Public Utilities Commission (hereafter referred to as the Commission) to abuse its discretion in reaching the conclusion that they request. Accordingly, the Rosebud Sioux Tribe requests that the arguments be rejected, as they represent a misunderstanding and misapplication of the law, and that Keystone’s Petition for Certification be denied.

Keystone asked the Commission to accept its certification in compliance with SDCL 49-41B-27 by filing its Petition for Certification (hereafter referred to as Petition). Applicant Post

Hearing Brief at page 3. Rather than accept the filing as complete on its face, the PUC assigned a new docket number and opened a new docket, permitted numerous parties to intervene and engage in the discovery process and required written direct and rebuttal testimony in a manner that purported to comply with the requirements of SDCL 1-26 “Administrative Procedures Act” PUC administrative rules. The treatment of the case in its entirety is consistent with the requirements for contested cases as specified by SDCL 1-26 and the Commissions administrative rules.

From the moment the Petition was filed it was treated as if it were a contested case for the simple reason that it is a contested case. The Commission determined that the Petition was subject to the requirements of a contested case proceeding and afforded the parties all associated statutory and constitutional rights therein. At no point in time prior to the conclusion of the evidentiary hearing did Keystone ever purport that they satisfied their burden at the moment they filed the Petition. As stated in its post-trial brief, Keystone *asked* the Commission to accept its certification in compliance with SDCL 49-41B-27. Had the Commission determined that the requirements of SDCL 49-41B-27 were satisfied at the time the Petition was filed, then the Commission would have issued an order to that effect. The simple fact is that the Commission took no such action. By considering the case a contested case under SDCL 1-26, the Commission determined that a hearing was necessary before making a decision on the request.

Applicable Law

There are a number of statutes that the Commission must consider in determining whether Keystone satisfied its burden upon the *filing* of its Petition including SDCL 1-26-1, 1-26-16, 1-26-17, 1-26-17.1, 1-26-18, 49-41B-27, Administrative Rules 20:10:01:15.1 and the

PUC's Order for and Notice of Evidentiary Hearing dated July 2, 2015. Each statute, rule and order will be identified and addressed in turn.

SDCL 1-26 is the South Dakota Administrative Procedure Act and governs contested cases taking place in front of administrative agencies such as the Commission. SDCL 1-26-1 "Definitions of Terms" (2) defines a contested case as "a proceeding, including rate making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings related to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in SDCL 1-15-20 or student academic proceedings under the jurisdiction of the Board of Regents." When afforded the opportunity to specifically exclude certain types of cases from the requirements of contested cases, the legislature clearly chose not to exclude certification proceedings brought pursuant to SDCL 49-41B-27 from contested cases.

SDCL 1-26-16 "Notice and Hearing Required in Contested Cases" requires that "in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice."

SDCL 1-26-17 "Contents of Notice in Contested Cases" addresses the requirements of the content of the Notice of Hearing and provides that the Notice shall include a statement of time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing will be held; a reference to the statutes involved; a short and plain statement of the matters asserted; a statement of any action authorized by law, which may affect the parties as a result of any decision made at the hearing; a statement that the hearing is an adversary proceeding and that a party has the right to be present at the hearing and to be represented by a lawyer, a statement that these and other due process rights may be forfeited if not exercised at the

hearing and a statement that the decision based on the hearing may be appealed to the Circuit Court and the State Supreme Court as provided by law.

Consistent with the requirements of SDCL 1-26-16 and 1-26-17, by Order dated July 2, 2015, the Commission issued its Order for and Notice of Evidentiary Hearing on Docket HP14-001 (hereafter referred to as Notice). The Notice provided notice of the following: locations, dates and starting times for the hearing, and notice that each party would be permitted an opening statement limited to ten minutes in length. Additionally, the Notice provided that the hearing would be an adversary proceeding, that all parties would have the right to be present and to be represented by an attorney, that these rights and other due process protections could be forfeited if not exercised at the hearing, and that all persons testifying would be subject to cross examination. The Notice of Hearing also provided that any final order issued by the Commission would be appealable to the Circuit Court and to the Supreme Court as provided by law.

Perhaps most importantly, the Notice of Hearing identified the issue to be determined at the hearing as “whether TransCanada and its proposed facility continues to meet the conditions set forth in the Amended Final Decision upon which the permit was issued and the Commission shall therefore accept TransCanada’s certification as conforming to SDCL 49-41B-27.” The contents of the Notice and the manner in which the issue was defined by the Commission prior to the hearing indicate clearly and without question that the Commission understood that the only way to decide the issue presented was through the contested case evidentiary hearing process as provided for under SDCL 1-26. The language used and its consistency with the requirements of SDCL 1-26-17 and 1-26-18 does not even remotely consider the position that Keystone satisfied

its burden upon the filing of its Petition. Had this been the case, the requirements of the contested case and the resulting evidentiary hearing would have been entirely pointless.

It is also important to consider the application of SDCL 1-26-17.1 “Intervention in contested case by person with pecuniary interests” and its ramifications for the determination of the resolution of the question presented by Keystone regarding the burden of proof. SDCL 1-26-17.1 provides that “a person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency’s order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.” Clearly, under SDCL 1-26-17.1 intervention is only permitted in contested cases. Clearly and without question the Petition is a contested case where due process protections are required and where decisions issued by the Commission are based on evidence and testimony put forward at the evidentiary hearing.

The Commission must also consider the implications of the application of SDCL 1-26-18 “Rights of parties at hearings on contested cases” which provides that “opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy.” It also permits agencies, upon motion of any party, to dispose of any claim or defense under the following circumstances: 1) when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law, or 2) at the close of the evidence offered by the proponent of the defense or claim if it is determined that the evidence offered by the proponent of the defense or claim is legally insufficient to sustain the defense or claim.

The remainder of SDCL 1-26-18 provides that “a party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party’s interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party’s behalf.” In consideration of the foregoing statutes as well as the entire manner in which the Commission applied the law, it is incomprehensible that Keystone and Staff could state that the burden was satisfied upon the filing of the Petition and somehow shifted to the interveners.

Furthermore, the Commission must examine its own administrative rules as they apply to this proceeding. Of particular importance is ARDS 20:10:01:15.01 “Burden in contested cases.” This rule provides that “in any contested proceeding, the complainant, counterclaimant, *applicant* or petitioner *has the burden of going forward with presentation of evidence unless otherwise ordered by the commission.* The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.” (*Emphasis added*)

The identified codified laws, administrative rules, and orders of the Commission form the backdrop upon which Keystone’s claim must be examined.

Argument

Throughout the pendency of these proceedings the Commission heard numerous motions of the parties, one of which was the Motion to Dismiss filed by the Rosebud Sioux Tribe and the Yankton Sioux Tribe. The Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe Dakota

Rural Action, the Indigenous Environmental Network, the Rosebud Sioux Tribe Tribal Utilities Commission and the Intertribal Council on Utility Policy joined Yankton's Motion to Dismiss.

By Order dated January 8, 2015, the Commission denied all of these motions. Regarding the Petition, the Commission stated "the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and a thorough opportunity to investigate the facts and proceed to evidentiary hearing if necessary." PUC Order Granting to Motion to Join and Denying Motions to Dismiss, page 1, dated January 8, 2015. The language used by the Commission in this Order indicates that Keystone had not met its burden with the filing of its Petition for Certification. This language further shows that the Commission understood that the only way for it to determine if Keystone had satisfied its burden of proof was in an evidentiary hearing. Following the Commission's Order, that is exactly what took place. The evidentiary hearing occurred between July 27 and August 5 following months of contentious discovery, motions, and fact finding.

Both Keystone and Staff provided the procedural history of the case to the Commission. Keystone's section is brief and provides a quick summary from the initial filing of its Petition to the conclusion of the evidentiary hearing. Keystone does not mention the Motion to Dismiss or the language used in the Order dated January 8, 2015. Staff provides a much more detailed accounting of the procedural history and at least mentions that the Motions to Dismiss were filed and denied by the Commission.

What is left out of the procedural histories submitted by Keystone and Staff, however, referenced above. This language indicates that the Commission understood at that time that the only way to reach a conclusion on the Petition was to have a trial on the matter. Equally

important is the Commission's understanding that Keystone did not satisfy its burden when it filed its Petition. Had the Commission determined that the burden was satisfied upon the filing of the Petition, the Commission would have stated as such. The fact remains that it did not. Had the Commission possessed the discretion to alter the burden of proof, it could have done that early in the proceedings. Instead the Commission waited until the last hour to shift the burden of proof from Keystone to the interveners. Placing the burden of proof on the interveners in contradiction to the statutory assignment of the burden of proof constitutes a misapplication of law and an abuse of discretion on the part of the Commission.

PUC Staff Arguments

Staff argues that a plain reading of SDCL 49-41B-27 is all that is required in order to reach the conclusion that Keystone satisfied its burden upon filing the Petition. If the Commission had decided to take that approach then the only way they could have done so would have been to issue an order approving the Petition when it was filed. The Commission did not do that. Instead, as previously stated, the Commission chose to treat the Petition as a contested case, which triggered the procedural protection and due process protections of the South Dakota Administrative Procedures Act and the requirements of SDCL 1-26-1, 1-26-16, 1-26-17, 1-26-17.1, 1-26-18 and Administrative Rule 20:10:01:15.1. From that point forward, nothing short of a full evidentiary hearing would satisfy the requirements of the Administrative Procedures Act.

Additionally, Staff cites to SDCL 49-41B-24, 49-41B-25, 49-41B-22.1 or 49-41B-22.2 to support its position stating that the State Legislature never intended for certifications to be denied by the Commission. While it is true that there is nothing in those statutes that prohibits an applicant from reapplying for a permit that was previously denied, that is not relevant to the matter before the Commission. This Certification proceeding was treated by the Commission as

a contested case because SDCL 1-26-1 “definition of terms” requires it. A contested case is “a proceeding, including rate making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings related to rule making other than rate making, proceedings related to inmate disciplinary matters as defined in 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents.” By definition, the Certification statute is a contested case because it is not a type of case specifically excluded by statute.

Keystone’s Characterization of Antoine’s Testimony

Keystone mischaracterizes the point of Antoine’s rebuttal testimony as testimony that is aimed at showing conditions of the permit that Keystone could not continue to satisfy. This position is consistent with Keystone’s assertion that the burden lies with the interveners. As previously stated, there is no foundation in law to support that position and it should be rejected accordingly. What the rebuttal testimony shows is that Keystone failed to produce any evidence related to its ability to comply with new Department of Transportation PHMSA permit requirements that were not considered at the time the original permit was granted. It shows that Keystone offered no evidence related to the socioeconomic requirements of SDCL 49-41B-22 and its continuing ability to satisfy those requirements. Where Keystone has offered no evidence on a subject it is impossible for the Commission to determine whether conditions of the permit have changed and whether Keystone possesses the ability to continue to satisfy those conditions.

Conclusion

Based on the above and foregoing the Rosebud Sioux Tribe requests that the Commission reject the arguments put forth by Keystone and Staff in support of the proposition that Keystone satisfied its burden under SDCL 49-41B-27 at the time the Petition was filed. The record is clear that the Commission treated this case from the onset as a contested case as that term is defined under the laws of the State of South Dakota. The reason for that is simple: this is a contested case. The law does not permit Keystone to satisfy their burden in a contested case by merely filing a petition. Accordingly, the arguments supporting the same must be rejected and the Commission should deny Keystone's Petition in its entirety.

Dated this 30th day of October, 2015.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he cause a true and correct copy of the foregoing Rosebud Sioux Tribe Reply Brief to be served to the people on the South Dakota Public Utilities Commission Service List for Docket HP14-001 as maintained by the South Dakota Public Utilities Commission.

Dated this 30th day of October, 2015.

/s/ Matthew L. Rappold
Matthew L. Rappold