BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PROJECT	HP 14-001 APPLICANT'S RESPONSE TO INTERVENORS' JOINT MOTION TO DISMISS

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On November 9, 2015, all of the Intervenors jointly moved to dismiss the petition for certification and to revoke the siting permit issued in Docket HP09-001. The motion is based on the Department of State's denial of Keystone's application for a Presidential Permit under Executive Order 13337. Applicant TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that the motion be denied.

1. Background

As the record reflects, Keystone first submitted an application for a Presidential Permit on September 19, 2008, over seven years ago. That initial permit application was denied due to the Department of State's inability to complete its review by a Congressionally-mandated deadline. Keystone refiled a revised application on May 4, 2012. The Department of State issued a Final Supplemental Environmental Impact Statement on January 31, 2014.

On November 6, 2015, the Department of State denied Keystone's revised application. (Record of Decision at 3.)[1] The basis for the decision was that, even though "the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States," the

[1] The Record of Decision is available at http://www.keystonepipeline-xl.state.gov/documents/organization/249450.pdf

Project "would undermine U.S. climate change leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement." (*Id*. at 29, 31.)

TransCanada's President and Chief Executive Officer issued a statement on November 6, 2015, that "TransCanada and its shippers remain absolutely committed to building this important energy infrastructure project."

Keystone filed its application for a siting permit under SDCL Ch. 49-41B with the Commission on March 12, 2009. Pre-hearing activities were undertaken in the manner prescribed by South Dakota law and the Commission's rules. Intervention petitions were granted, allowing 15 persons and entities to intervene and be parties in the proceedings. After considerable pre-hearing activity, a hearing was held before the Commission on November 2-4, 2009. The Commission issued an Amended Final Decision & Order on June 29, 2010, granting Keystone a permit. Fifty conditions were incorporated into the permit, many of which were prospective in nature, including the requirement that Keystone obtain a Presidential Permit before beginning construction.

More than four years passed and construction had not begun, because a Presidential Permit was still under consideration. Per statutory requirements, Keystone filed its certification petition under SDCL § 49-41B-27 *in this docket* on September 15, 2014. Forty two persons and organizations sought intervention, including some but not all of the Intervenors in the 2009 docket. All were admitted as parties. After extensive motion practice and written discovery, the Commission held a ten-day evidentiary hearing from July 27 to August 5, 2015. After the hearing, the parties submitted two rounds of post-hearing briefs.

Per the teaching of SDCL§ 49-41B-27, the 2010 permit has not lapsed or expired, which the Intervenors *in this docket* recognize, by virtue of their motion to revoke it. Nothing remains to be done in the docket except for the Commission to decide the pending joint motion to dismiss, and to act on Keystone's certification petition.

2. The motion to revoke the permit is procedurally improper.

The Commission granted Keystone's 2010 permit in Docket HP09-001. The Commission chose to consider Keystone's certification in a new docket, resulting in the proceedings in HP14-001. The Commission allowed intervention in this docket, which resulted in different interveners than in HP09-001. The interveners in HP09-001 who are not parties to this docket have received no notice of the motion to revoke the permit.

The Commission has the authority under SDCL § 49-41B-33(2) to revoke a permit for failure to comply with the terms or conditions of the permit. Although Keystone disputes that the recent denial of Keystone's last application for a presidential permit establishes *that it has failed to comply with any condition in the permit*, that issue is not properly before the Commission in this docket. The Intervenors cite no authority other than SDCL § 49-41B-27 in support of their motion. There is no precedent for the revocation that the Intervenors seek in their motion, either by statute, regulation or case. The Commission has never revoked a permit in a certification proceeding, for the obvious reason that revocation is not authorized under the certification statute, SDCL § 49-41B-27.

To the contrary, the Commission's jurisdiction in this certification proceeding is limited to acting on Keystone's certification petition. Keystone has previously argued that the Commission can accept or reject the petition, but the statute does not expressly say even that. Rather, SDCL § 49-41B-27 simply requires that Keystone "certify" that its project continues to

meet the conditions on which the permit was issued. The statute clearly does not say that the Commission can revoke the permit. Having treated Keystone's certification petition as a matter requiring the opening of a new docket and having allowed new intervenors, the Commission would act inconsistently and without statutory authority if it revoked the permit granted in HP09-001 in this docket. If the Intervenors want the permit revoked, those who have standing must petition to have HP09-001 reopened, file their motion in that docket, notice the parties to that docket, and then proceed to hearing on the motion.

3. The motion to dismiss is without merit.

Regardless of the procedural defect in the request to revoke the permit, the motion to dismiss this Certification proceeding is without merit. As Keystone argued at length in the post-hearing briefing, many of the permit conditions are prospective in nature. Condition 2 is an example, requiring that "Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State" before it begins construction of the project. Condition 2 is clearly prospective. Keystone must obtain all applicable permits and thereafter comply with them. The condition does not impose a deadline for obtaining any of the permits. Logically, the permits must be obtained before Keystone can begin construction and operation of the Keystone XL Pipeline. With respect to the certification under SDCL § 49-41B-27, there is nothing in the statute that requires that Keystone have complied with all permit conditions at the time of certification.

If it is possible that Keystone can obtain a Presidential Permit to comply with Condition 2, then there is no basis for the Commission to deny certification. The Commission granted the 2010 permit without Keystone having obtained a Presidential Permit. Keystone has filed two

Presidential Permit applications with the Department of State. Nothing prevents Keystone from filing another application and yet obtaining a Presidential Permit. Keystone, as TransCanada CEO Russ Girling has publicly stated, remains "absolutely committed" to this project. Nothing in the record establishes that Keystone will abandon the project. There is nothing in the Record of Decision or the governing Executive Order that precludes Keystone from re-applying for a Presidential Permit at some point in the future.

Because Condition 2 is prospective, Keystone must comply with the condition before beginning construction and operation. If Keystone were never able to satisfy the condition, then it obviously could never begin construction and operation of the Keystone XL Pipeline. Assuming that the Commission grants Keystone's petition and accepts the certification, the certification, like the permit, would be moot if Keystone never receives a Presidential Permit. By contrast, if the Commission were to reject the certification based on the recent Presidential Permit denial, the entirety of the proceedings in this docket would have been for naught. Nothing in statute or regulation requires such a result. Requiring an entirely new certification proceeding would be logically inconsistent with SDCL § 49-41B-22.1, which, as Commissioner Hanson has noted on the record, would require an applicant whose permit had been denied to prove only "those criteria upon which the original permit was denied." The Commission can and should recognize that Keystone does not presently have a Presidential Permit, but that Keystone can still comply with all permit conditions before beginning construction and operation of the Keystone XL Pipeline.

Conclusion

The joint motion is opportunistic. It is not based on any clear statutory, regulatory, or case authority. Condition 2 is prospective. Keystone will comply with all of the permit

conditions, and it can still comply with Condition 2. The Commission can and should accept Keystone's certification. If Keystone fails in the future to acquire all applicable permits, then it will be unable to construct and operate the Keystone XL Pipeline. Keystone respectfully requests that the joint motion be denied.

Dated this 8th day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Response to Intervenors' Joint Motion to Dismiss, to the following:

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