

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 14-001

IN THE MATTER OF THE APPLICATION	:	
BY TRANSCANADA KEYSTONE		
PIPELINE, LP FOR A PERMIT UNDER THE	:	
SOUTH DAKOTA ENERGY CONVERSION	:	
AND TRANSMISSION FACILITIES ACT TO	:	KEYSTONE’S MOTION TO
CONSTRUCT THE KEYSTONE XL	:	EXCLUDE TESTIMONY OF
PROJECT,	:	RICHARD KUPREWICZ
	:	
	:	

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Applicant TransCanada Keystone Pipeline, LP (“Keystone”) moves that the Commission exclude most of the testimony of Richard Kuprewicz, one of the expert witnesses disclosed by the Rosebud Sioux Tribe. Kuprewicz’s report, attached to his prefiled testimony as Exhibit 9, addresses issues of pipeline safety that are preempted by federal law, within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA), and statutorily beyond the scope of the Commission’s jurisdiction. Specifically, Kuprewicz’s opinions about (1) the sufficiency of Keystone’s risk assessment; (2) the adequacy of the number and placement of valves and (3) the safety of the pipeline due to its routing in areas of high landslide potential, should be excluded. Thus, Keystone moves to exclude all of Kuprewicz’s testimony except for his opinion on pages 2-3 of Exhibit 9 that the Keystone XL Pipeline does not pose a substantial risk to the Rosebud Sioux Tribe’s water supply.

1. Kuprewicz’s prefiled testimony addresses routing, valves, and Keystone’s risk assessment

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The Rosebud Sioux Tribe submitted prefiled testimony for Kuprewicz. His report dated April 23, 2015, is attached to his prefiled testimony as Exhibit 9. In his report, Kuprewicz challenges the safety of the proposed Keystone XL Pipeline in South Dakota because in the Final Supplemental Environmental Impact Statement (“FSEIS”), the Department of State identified areas in South Dakota as being at a high risk of landslide. (RST Ex. 9 at 1.) Based on his concern about high landslide risk in South Dakota, Kuprewicz’s report focuses on three issues:

- Kuprewicz proposes that the landslide risk identified in the FSEIS “should be verified in South Dakota; if confirmed, the pipeline should be rerouted to avoid areas with high risk of landslide or additional valving installed to reduce draindown volume in the event of a rupture in these high-risk locations.” (*Id.* at 1-2.)
- Kuprewicz identifies the number and location of valves on the Keystone XL Pipeline as an issue. On page 6, his report states that it is clear “that the proposed TC valving is seriously inadequate for a high throughput large diameter pipeline in a location of considerable elevation changes.” (*Id.* at 6.) His report also states that “proposed TC valving as suggested from Special Condition Recommended by PHMSA No. 32 is inadequate in certain downsloping segments of this proposed large diameter pipeline located in high-risk landslide hazard areas.” (*Id.*)
- Kuprewicz also proposes that the Commission should require Keystone to “perform a true risk assessment on a specific pipeline,” not the sort of “looking backward” risk assessment that was done in connection with the Presidential Permit application and submitted to the Department of State.

All of these issues are either matters of pipeline safety and preempted by federal law. In addition, they are statutorily beyond the Commission’s jurisdiction and authority. As such, Keystone respectfully requests that Kuprewicz’s testimony as to them be excluded.

2. Matters of pipeline safety are preempted by federal law

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 (8th Cir. 2004); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir. 1983); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987).

The Commission in the Amended Final Decision and Order in HP09-001 acknowledged that pipeline safety issues are governed by federal law and within the jurisdiction of PHMSA. In Conclusion of Law 12, the Commission cites the Pipeline Safety Act and states: “PHMSA is delegated exclusive authority over the establishment and enforcement of safety-oriented design and operational standards for hazardous materials pipelines. 49 U.S.C. § 60101, et seq.” In addition, the first condition in the Amended Permit Conditions requires that Keystone comply with all applicable laws and regulations, including “the various 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.

3. The issues that Kuprewicz addresses concern pipeline safety and are governed by federal law or are otherwise outside the Commission’s jurisdiction.

a. The route and safety due to landslide risk

First, Kuprewicz addresses the safety of the pipeline based on his assertion that its route through South Dakota passes through areas that he characterizes as at a high risk of landslide. Notably, Kuprewicz does not conclude that the pipeline is unsafe because of its route, but that it may be, in part because of insufficient oversight by PHMSA. He proposes: (a) that “the high risk of landslide identified in the [FSEIS] should be verified in South Dakota”; (b) that “further

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information is warranted to clarify how much of this terrain identified as High Landslide Hazard Area is really at risk to such massive abnormal loading forces”; and (c) that “if the high risk of landslide . . . is confirmed with accompanying risk of a massive oil spill, the pipeline should be rerouted to avoid areas with high risk of landslide.” (RST Ex. 9 at 1, 9.)

Not only is the issue of safety due to landslide risk a matter of federal concern, but it is an issue, as Kuprewicz recognizes, outside the Commission’s authority. By statute, the provisions of SDCL Chapter 49-41B “shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility.” SDCL § 49-41B-36. The Commission recognized this in Conclusion of Law 13 in the Amended Final Decision & Order. Kuprewicz recognizes this clear obstacle and suggests that the Commission sidestep it: “If the PUC does not have the authority to reroute the Project, then it should deny the current Petition. If a new permit application is needed, TC should consider mitigating the landslide risks by rerouting the Project.” (RST Ex. at 9.) This is mere slight of hand, however, as the Commission previously recognized in the Amended Final Decision & Order. The Commission concluded that it lacked the authority either to compel Keystone to select an alternative route or to “base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission might itself select.” (Amended Final Decision & Order, Conclusion of Law 13.)

Thus, Kuprewicz has not formed or supported an opinion that the proposed project is unsafe because of its route, only that it may be unsafe. Even if he had provided an opinion that the project is unsafe, however, the Commission lacks the authority to compel his proposed resolutions: either to require a different route or to deny the permit on the basis of the selected

route. Finally, Kuprewicz’s testimony addresses a matter of pipeline safety that is within the jurisdiction of the Pipeline Safety Act and PHMSA.

b. The adequacy of Keystone’s mainline valves

Second, the location, design, and number of valves on the Keystone XL Pipeline is a matter for PHMSA. As Kuprewicz recognizes, Condition 32 of the 59 Special Conditions required by PHMSA, which are found in Appendix Z to the FSEIS, requires that Keystone design and install mainline block valves and check valves based on the worst-case discharge as calculated by 49 CFR 194.105, and must locate the valves in accordance with 49 CFR 195.260 and “by taking into consideration elevation, population, and environmentally sensitive locations to minimize the consequences of a release from the pipeline.” (Appendix Z, Condition 32.) Based on this requirement, “[m]ainline valves must be placed based on the analysis above or no more than 20 miles apart, whichever is less.” (*Id.*) Kuprewicz states in his report that this requirement is insufficient to mitigate the risk of rupture due to a landslide: “As outlined in the next section, proposed TC valving as suggested from Special Condition Recommended by PHMSA No. 32 is inadequate in certain down sloping segments of this proposed large diameter pipeline located in high-risk landslide hazard areas.” (RST Ex. 9. at 6.) He proposes that “[a]dditional valves could be added at certain downhill locations,” but then rejects this option in favor of changing the pipeline route. (*Id.*)

This testimony is irrelevant. Kuprewicz may disagree with PHMSA’s requirements for the location of mainline valves, but, due to federal preemption, his disagreement is not a basis for the Commission to require something different. Having recognized this, his report therefore proposes that the route be changed as a better alternative. For the reasons already explained, however, the Commission lacks the authority to address the route.

c. Keystone's risk assessment testimony

Finally, Kuprewicz states that Keystone should have performed “a true risk assessment.” (Ex. 9 at 5.) His report discusses the reasons that he thinks a risk assessment based on historical databases (which Keystone was required to prepare as part of the NEPA analysis done by the Department of State) fails to “actually capture risks associated with pipeline operation, especially a specific pipeline.” (*Id.* at 4.) Instead of this kind of “looking backward” approach, Kuprewicz thinks that Keystone should have performed “a true risk assessment.” (*Id.* at 5.) What he proposes, however, is essentially the specific integrity analysis that is required by 49 CFR Part 195.452 within the first year *after* the pipeline is placed in operation. *See* 49 CFR Part 195.452(a)(3)(b)(i); *id.* 195.452(c); *id.* 195.452(e)(i); and 49 CFR Part 195.452 App. C. This assessment is reviewed by PHMSA and is subject to audit by PHMSA to ensure compliance with federal regulations. Again, this is an issue of compliance with federal law that is within the jurisdiction of PHMSA and is therefore preempted. Moreover, the Commission has already conditioned its 2010 permit on the requirement that Keystone comply with federal law. Kuprewicz should not be heard to testify either that Keystone should not have submitted the kind of risk assessment required by the Department or State, or that it should accelerate the integrity analysis required by PHMSA.

Conclusion

Kuprewicz's primary concern is the risk of rupture due to a landslide. This issue, like the ancillary issues of valve placement and risk assessment, are matters of pipeline safety and therefore are within the jurisdiction of PHMSA. In addition, the issue of routing is by statute outside the Commission's jurisdiction. Keystone respectfully requests that its motion to exclude Kuprewicz's testimony on these issues be granted.

Dated this 26th day of May, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Motion to Exclude Testimony of Richard Kuprewicz, to the following:

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