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 REPLY IN SUPPORT OF MOTION TO LIMIT TESTIMONY OF RICHARD KUPREWICZ

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Applicant TransCanada Keystone Pipeline, LP ("Keystone") moved to exclude proposed testimony of Richard Kuprewicz as preempted by federal law and outside the Commission's jurisdiction. Keystone offers this reply brief to respond to arguments in opposition made by the Rosebud Sioux Tribe and the Yankton Sioux Tribe.

1. PHMSA's letter dated May 28, 2014, supports Keystone's motion.

The Rosebud Sioux Tribe attaches to its opposition a letter from PHMSA's Associate Administrator for Pipeline Safety dated May 28, 2014, and argues that the letter refutes Keystone's argument. To the contrary, the letter supports Keystone's position on federal preemption. PHMSA's letter states that "[f]ederal preemption of pipeline safety means that neither state nor local governments have any independent authority to regulate pipeline safety but must derive any such authority from federal law. In the case of local governments not subject to federal delegation, they may exercise other powers granted to them under state law but

none affecting pipeline safety for those pipelines subject to federal jurisdiction." (RST Opposition, Ex. 4, at 2.) This statement of the law, as demonstrated by the cases cited in the footnote in the letter, is consistent with the language of the Pipeline Safety Act in 49 U.S.C. § 60104(c) that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." The Rosebud Sioux Tribe acknowledges this clear statutory language, but dismisses it because the statute also provides that a state authority may adopt safety standards for *intrastate* pipelines, even though it admits that the Keystone XL Pipeline project is not within the scope of this exception. (RST Opposition at 8-9.) The operative statutory language for purposes of Keystone's motion is not the inapplicable exception, but the clear statement that safety standards are the province of PHMSA.

The statement in PHMSA's letter that states, not the federal government, have jurisdiction to issue siting permits does not contradict Keystone's motion. The Commission obviously has the authority granted to it under SDCL Ch. 49-41B and exercised it with respect to the Keystone XL Pipeline in Docket HP 09-001 by considering facts relevant to Keystone's burden in that docket under SDCL § 49-41B-22. Nothing about the fact of the Commission's jurisdiction alters the limits imposed by 49 U.S.C. § 60104(c). Thus, whether Kuprewicz's proposed testimony in this docket addresses issues within PHMSA's jurisdiction cannot be resolved by mere reference to the fact that the Commission has statutory jurisdiction over issues that are not preempted by federal law.

As evidence that the PHMSA letter is not contrary to Keystone's argument, it includes a list on page 3 of various ways in which local governments have addressed pipeline safety without violating the statutory preemption found in 49 U.S.C. § 60104(c). Kuprewicz's testimony related to pipeline safety due to landslide risk based on the proposed route, the

sufficiency of Keystone's risk assessment, and the adequacy and the number of valves does not fit within this list. Rather, the list illustrates that Kuprewicz's proposed testimony addresses matters of federal concern.

2. Kuprewicz's testimony addresses issues within the jurisdiction of PHMSA.

Keystone has not raised an abstract matter of jurisdiction, but a specific challenge to particular testimony in areas preempted by federal law, within the federal jurisdiction of PHMSA, and outside the Commission's jurisdiction. The issues Kuprewicz intends to address are Keystone's risk assessment, valves, and pipeline safety due to routing in areas of landslide risk. More specifically: (1) the number and location of mainline valves is a matter dictated by Condition 32 of the 59 Special Conditions required by PHMSA; (2) the risk assessment that Kuprewicz criticizes was required under federal law, and the one that he favors instead is actually required in the first year *after* the pipeline is placed in operation and is subject to audit by PHMSA; and (3) the risk of landslide can be mitigated only by moving the route, even though the Commission lacks the statutory authority to require a route change. The Rosebud Sioux Tribe's brief is 18 pages long but contains no substantive discussion of these issues. The Commission cannot decide Keystone's motion without considering the substance of Kuprewicz's testimony, which the Rosebud Sioux Tribe ignores and which clearly demonstrates that it is preempted.

3. The Commission lacks jurisdiction to change the route or to deny certification based on the route previously approved.

By statute, SDCL Ch. 49-41B shall not be construed as "a delegation to the commission of the authority to route a transmission facility, AC/DC conversion facility, or wind energy facility, or to designate or mandate location of an energy conversion facility." SDCL § 49-41B-36. In the Amended Final Decision and Order in Docket HP 09-001, the Commission explicitly

recognized that it does not have the authority 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.) The Rosebud Sioux Tribe ignores both the statute and the Conclusion of Law. The Yankton Sioux Tribe acknowledges the statute, but contends that it does not mean what it says based on a South Dakota Supreme Court decision involving a proposed 120-foot variance from the proposed centerline for the MANDAN power line, which was a trans-state transmission facility as defined in SDCL § 49-41B-2(11). *In re Nebraska Public Power Distr.*, 354 N.W.2d 713 (S.D. 1984).

In concluding that the Commission had the authority to grant a "120 foot general variance from the precise centerline of the route," the South Dakota Supreme Court did not consider the terms of SDCL § 49-41B-36 and did not cite the statute. The statutes cited in the opinion, SDCL §§ 49-41B-22.1 through 49-41B-22.2, are not particular to routing, and address instead the applicant's burden of proof in a second proceeding after a permit has been denied. Moreover, the proposed MANDAN line was a "trans-state transmission facility," which is not included within the reach of SDCL § 49-41B-36. The proposed Keystone XL Pipeline, by contrast, is a "transmission facility" as defined in SDCL § 49-41B-2.1, to which SDCL § 49-41B-36 expressly applies. The *Nebraska Public Power* case is inapplicable here and cannot be read, contrary to the terms of SDCL § 49-41B-36, to support an argument that the Commission should address in a certification proceeding the safety of the pipeline due to its route.

4. The proceeding is not about Keystone's burden of proof under SDCL § 49-41B-22, so testimony addressed to those issues is not relevant.

Finally, the Rosebud Sioux Tribe, joined by Dakota Rural Action, argues that Kuprewicz's testimony is necessary to help the Commission determine whether Keystone "has met its burden of proof" under SDCL § 49-41B-22. (DRA Opposition at 2; RST Opposition at

2-3.) As Keystone has argued before, the standard in this certification proceeding does not allow the parties to relitigate the permit; Keystone does not have to meet its original burden of proof and prove again that the project satisfies the standards of SDCL § 49-41B-22. Rather, Keystone must certify under SDCL § 49-41B-27 that it can "continue to meet the conditions on which the permit was granted." The Rosebud Sioux Tribe's entire response is predicated on a misunderstanding of the statute and burden of proof. The Tribe states that this proceeding "is a case to determine if the facts underlying the conditions upon which Keystone's permit was granted remain the same" (RST Opposition at 9), and that "the applicant must prove that the facts underlying the conditions upon which the permit was granted are the same today as they were when the permit issued." (*Id.* at 12.) These statements are incorrect. It is presumed that some facts may have changed in four years. At issue is whether Keystone can continue to meet the permit conditions based on the facts today.

As Staff has pointed out, Kuprewicz's testimony is not directed to any particular permit conditions. In its opposition, the Rosebud Sioux Tribe does not identify any permit conditions implicated by Kuprewicz's testimony, but instead states that "[t]he findings of the Kuprewicz report directly relate to three of four elements of proof ((2), (3) and (4)) under SDCL 49-41B-22, which is part of the PUC's jurisdiction." (RST Opposition at 3.) Keystone does not deny that the issues before the Commission in Docket HP09-001 required a determination whether Keystone had satisfied its burden of proof under SDCL § 49-41B-22, but a reference to Keystone's burden of proof in the underlying pipeline docket is neither a justification for Kuprewicz's proposed testimony in this case nor an effective response to the jurisdictional issues that Keystone has raised based on federal preemption and SDCL § 49-41B-36.

Conclusion

Having applied for and obtained a siting permit under SDCL Ch. 49-41B, Keystone is sensible of the significant and important role that the Commission plays in the overall regulatory oversight of the proposed Keystone XL Pipeline. Recognition of the Commission's role under SDCL Ch. 49-41B, however, is not an effective response to Keystone's challenge to Kuprewicz's proposed testimony in the context of this proceeding under SDCL § 49-41B-22. Keystone respectfully requests that its motion be granted.

Dated this 8th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Reply in Support of Motion to Limit Testimony of Richard Kuprewicz, to the following:

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