

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF PUC DOCKET
HP 14-001, ORDER ACCEPTING
CERTIFICATE OF PERMIT ISSUED
IN DOCKET HP 09-001 TO
CONSTRUCT THE KEYSTONE XL
PIPELINE

Appeal No. 28331, 28332
and 28333

**COMMISSION'S RESPONSE
TO THE COURT'S APRIL 6,
2018, LETTER**

The South Dakota Public Utilities Commission, by and through its undersigned counsel, hereby submits its response to the Court's April 6, 2018, letter.

BACKGROUND

The Commission's response to the Court's April 6, 2018, letter regarding appellate jurisdiction to consider this appeal under SDCL 49-41B-30 is that the circuit court and this Court are affirmatively without appellate jurisdiction to consider these appeals.

STATEMENT OF LEGAL ISSUES

Issue A. Whether SDCL 49-41B-30 provides appellate jurisdiction to review this matter?

SDCL 49-41B-30 does not provide appellate jurisdiction to review a certification under SDCL 49-41B-27 because this is not an original permit proceeding.

Issue B. Whether there is appellate jurisdiction to consider this appeal under SDCL 1-26-30.02?

There is no appellate jurisdiction under SDCL 1-26-30.02 to review a certification under SDCL 49-41B-27 because the attestation requirement in SDCL 49-41B-27 cannot give rise to a contested case.

ARGUMENT

STANDARD OF REVIEW

The Commission's administrative actions upon receiving Keystone's certification were done without statutory authority. Therefore, they are neither quasi-judicial nor non-quasi-judicial administrative actions nor are they the product of formal adjudication or informal adjudication. Spurred by the receipt of Keystone's certification, the Commission's entire administrative record before the Court amounts to public input given and received in a formal fashion. As such, the correctness of the Commission's decision may not be reviewed.

ISSUE A.

WHETHER SDCL 49-41B-30 PROVIDES APPELLATE JURISDICTION TO REVIEW THIS MATTER?

SDCL 49-41B-30 does not provide appellate jurisdiction to review a Commission determination under SDCL 49-41B-27 because SDCL 49-41B-30 is specific to the original permit proceeding:

Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.

(Emphasis added.)

On June 29, 2010, concluding a permit issuance proceeding on an application for a permit, the Commission entered an Amended Final Decision and Order in Docket HP09-001. No party appealed that decision and judicial review of the original permit proceeding under SDCL 49-41B-30 became an impossibility. See *Jundt v. Fuller*, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. Instead, SDCL 49-41B-27 involves only a certification

by the utility long after the original permit was granted. Docket HP14-001, considering the certification was not a “permit issuance proceeding” in which the Commission ruled “on an application for a permit.” Therefore, SDCL 49-41B-30 does not provide the circuit court or this Court appellate jurisdiction to review a Commission determination under SDCL 49-41B-27 and any appellate jurisdiction must arise from the right to appeal a contested case under the Administrative Procedures Act. *SDCL 1-26-30.02*.

ISSUE B.

WHETHER THERE IS APPELLATE JURISDICTION TO CONSIDER THIS APPEAL UNDER SDCL 1-26-30.02?

A certification given pursuant to SDCL 49-41B-27 is not contestable. As required by law, once the utility certifies, the statute’s requirements are complete and the Commission is not required nor given any discretion to further act. The legislature is the branch of government constitutionally entrusted to decide what a permit holder must do after four years. The legislature could have, but thus far has chosen not to, revise the statute. Until then, the Commission’s further treatment of the certification was without statutory authority and does not meet the definition of a contested case.

SDCL 1-26-1 (2) defines a contested case:

(2) "Contested case," 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 relating 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[.]

(Emphasis added.)

Upon certification, further action from the Commission is not "required by law [...] after an opportunity for hearing." *Id.* In fact, the statute doesn’t direct the Commission to act

upon the certification at all. The conclusive language of the statute, “the utility must certify” confirms that a hearing is not required. It is this absence of legislative instruction to further determine the legal rights, duties, or privileges of a party after an opportunity for hearing, that distinguishes this matter from a contested case.

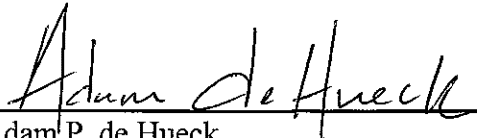
No party ever presented a scintilla of doubt or voiced a concern that the Commission’s further action upon the certification was improper. Regardless, with or without further action of the Commission, SDCL 49-41B-27 gives the utility the absolute right to certify. Therefore, the Commission’s final order accepting the certification wasn’t necessary or issued with statutory authority, and as such, it certainly does not harm any party involved. In short, the post-certification proceedings took the shape of a contested case and everyone deemed their participation to be formally handled as such, all the while acting under a purely administrative statute dealing with a ministerial certification under SDCL 49-41B-27. The fact is, none of the parties ever challenged the continuation of the certification, but at least, the Commission cautiously navigated its authority and provided the opportunity for all parties to be heard on the matter. Regardless of the Commission’s actions and treatment of the docket, the controlling factor before the Court is the statute itself. SDCL 49-41B-27 cannot be transformed into more than it is. The outcome of these proceedings is a voluminous record improperly before the Court which amounts to nothing more than a comprehensive public debate about pipelines.

CONCLUSION

The Commission prays that the Court dismiss the appeal in its entirety for lack of jurisdiction. Or, alternatively, the Commission prays that this Court uphold the Order accepting the certification.

Dated this 13th day of April 2018

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION



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