

# Supreme Court of South Dakota

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**APR 09 2018**

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April 6, 2018

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Re: #28331, #28332, #28333, In the Matter of PUC Docket  
HP 14-0001, Order Accepting Certification of Permit  
Issued in Docket HP 09-001 to Construct the Keystone  
XL Pipeline. (CIV 16-33)

Dear Counsel:

These appeals have been taken from a decision of the Public Utilities Commission in an administrative proceeding. The record indicates that in 2010, following contested case proceedings, the Commission issued TransCanada Keystone Pipeline LP a permit to construct the Keystone XL Pipeline. No appeal was taken. In September 2014, TransCanada filed with the Commission a "Certification" together with a "Petition for construction on a facility for more than four years from the time the permit to build the facility was issued. The Commission subsequently opened Docket HP14-001 for

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#28331, #28332, #28333,

consideration of the Certification and Petition. Following lengthy administrative proceedings, the Commission entered a final decision on January 21, 2016, ordering "that Keystone's Certification under SDCL § 49-41B-27 is accepted by the Commission and found to be valid and Keystone is authorized to proceed with the construction and operation of the Keystone XL Pipeline" under its 2010 permit. These appeals were taken from that 2016 order.

The circuit court's and this Court's appellate jurisdiction to review such decisions is provided by statute. SDCL 49-41B-30's authorization is limited:

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.)

It appears that Appellants may not have been parties to a "permit issuance proceeding" in which the Commission ruled "on an application for a permit." Instead, the proceedings below appear to have been conducted under SDCL 49-41B-27, which only involves certification that the utility continues to meet the conditions imposed on a previously issued permit.

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

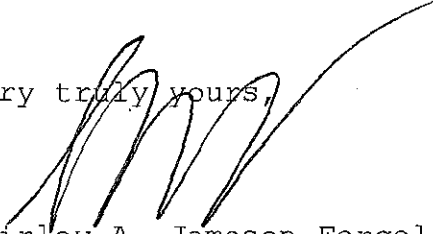
It appears that the proceeding below was a certification proceeding involving authorization to proceed on an existing permit rather than a "permit issuance proceeding." Therefore,

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it does not affirmatively appear there is appellate jurisdiction to consider this appeal under SDCL 49-41B-30. In light of the foregoing, the parties should be prepared to address at oral argument the question whether the circuit court and this Court are without appellate jurisdiction to consider these appeals. Written submissions may also be submitted if filed by 5:00 PM, Friday, April 13, 2018.

Very truly yours,

  
Shirley A. Jameson-Fergel

SAJ:ms