

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION	:	
BY TRANSCANADA KEYSTONE	:	HP 14-001
PIPELINE, LP FOR A PERMIT UNDER	:	
THE SOUTH DAKOTA ENERGY	:	
CONVERSION AND TRANSMISSION	:	KEYSTONE'S MOTION TO
FACILITIES ACT TO CONSTRUCT THE	:	DEFINE THE SCOPE OF
KEYSTONE XL PROJECT	:	DISCOVERY UNDER
	:	SDCL § 49-41B-27
	:	
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Under SDCL § 49-41B-27, Petitioner TransCanada Keystone Pipeline, LP, moves that the Commission enter an order limiting the scope of discovery to issues related to whether “the project continues to meet the conditions on which the permit was granted.” SDCL § 49-41B-27.

On March 12, 2009, Keystone filed an application for a permit to operate and construct the Keystone XL Pipeline (“the Project”). After a hearing, the Commission entered a Final Decision and Order, and later an Amended Final Decision and Order dated June 29, 2010, to which 50 conditions are attached. The Amended Final Decision and Order marked the conclusion of a contested case under SDCL § 1-26-1(2). The

Amended Final Decision and Order was appealable under SDCL §§ 49-41B-30 and 49-1-19. The Amended Final Decision and Order was not appealed.

1. A certification proceeding is not a reconsideration of the permit.

An unappealed order is final and entitled to preclusive effect. *Jundt v. Fuller*, 2007 S.D. 62, ¶ 12, 736 N.W.2d 508, 513. The Commission's administrative rules do not provide for reconsideration of a final order, and the South Dakota Supreme Court has held that an agency may not reconsider a final decision in a contested case. "Nothing in South Dakota's Administrative Procedures Act authorizes an administrative agency to reconsider a decision in a contested case." *Id.* ¶ 7, 736 N.W.2d at 512. While the Commission has the inherent authority to correct a decision that appears to be erroneous, that authority ends when the appeal time has run. "Once an agency's adjudication has become final it is no longer subject to reconsideration." *Id.* Thus, a proceeding under SDCL § 49-49B-27 is not a substitute for an appeal, and it is not an opportunity for the Intervenors to ask the Commission to reopen the permit, including the 50 conditions, or to reconsider its decision granting Keystone a permit to construct and operate the Project. Every Intervenor in this docket could have applied for party status in HP09-001. This docket is not an opportunity for those who did not previously intervene – or those that did - to relitigate the issues in HP 09-001.

2. The certification statute is narrowly drawn.

The certification statute requires that Keystone certify that the Project “continues to meet the conditions on which the permit was issued.” SDCL § 49-41B-27.

Significantly, the statute does not provide that after four years the permit expires. It is inaccurate for some Intervenors to refer to “reissuance of the permit,” or to question whether the permit should be “regranted.” There is no statutory basis to suggest that the permit is invalid or has expired. To the contrary, a permit may be revoked or suspended by the Commission only for certain enumerated conditions, including misstatements of material fact in the application, failure to comply with the terms or conditions of the permit, or violation of any material provision of Chapter 49-41B. SDCL § 49-41B-33. Nor has the Commission adopted an administrative rule providing that a permit expires after four years if construction has not started. Rather, the statute requires only that Keystone certify that the Project continues to meet the conditions on which the permit was issued if construction commences more than four years after the permit was issued. SDCL § 49-41B-27.

Because the permit has not expired and the Amended Final Decision and Order was not appealed and is entitled to preclusive effect, the scope of this proceeding is necessarily narrower than whether the permit should have been granted in the first place. Keystone previously met its burden of proof under SDCL § 49-41B-22. The certification

statute does not authorize a proceeding under which Keystone must again prove that the Project satisfies the criteria in SDCL § 49-41B-22.

3. The certification statute defines the scope of discovery.

The scope of discovery must be limited to the issues identified in the statute, namely whether “such facility continues to meet the conditions upon which the permit was issued.” SDCL § 49-41B-27. The statute is not broad enough to allow the Intervenor to relitigate issuance of the permit and does not authorize Intervenor to inject new issues into the PUC’s review of the Certification that were not fundamental to the PUC’s decision in the original permit proceeding. Thus, the following issues that have been raised by various Intervenor in applications for party status are beyond the scope of this proceeding: the effects of the Project on the soils of the Sandhills; the effects of the Project on the Ogallala Aquifer and other streams, river, and waterbodies; whether the Project is in the national interest; whether the Department of State conducted sufficient consultation with interested Tribes under Section 106 of the National Historic Preservation Act; whether Keystone is entitled to exercise the right of eminent domain; and whether development of the oil sands in Canada harms the environment and contributes to levels of CO₂ in the atmosphere. As stated in Keystone’s certification, Keystone can and will comply with the 50 conditions attached to the Final Decision and Order during construction, operation, and maintenance of the Project. The scope of

discovery must be limited to a challenge to Keystone's certification. The scope of discovery cannot be whether the Permit should have been granted in the first place.

Thus, Keystone request that the Commission enter an order that:

All discovery must be limited to: (1) whether the proposed Keystone XL Pipeline continues to meet the 50 Amended Permit Conditions stated in Exhibit A to the Amended Final Permit and Order dated June 29, 2010; or (2) the changes to the Findings of Fact in the Amended Final Permit and Order identified in Keystone's Tracking Table of Changes attached as Exhibit C to Keystone's Petition for Order Accepting Certification Under SDCL § 49-41B-27. Each discovery request must identify by number the Amended Permit Condition or the Finding to which it is addressed.

Conclusion

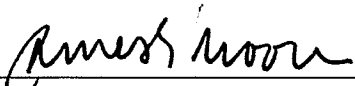
As has already been mentioned in the proceedings, the issues presented in this docket are narrow. Entering an order limiting the scope of discovery will assist all parties in conducting discovery and will avoid unnecessary motion practice before the Commission related to the relevance of requested discovery. A clear definition of the scope of discovery will also facilitate a timely decision in this docket, which should take significantly less time than was allowed for the Commission's consideration of the permit under SDCL § 49-41B-24. Keystone respectfully requests that the Commission enter an appropriate order.

Case Number: HP 14-001

Name of Document: Keystone's Motion to Define the Scope of Discovery Under SDCL § 49-41B-27

Dated this 30th day of October, 2014.

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