
**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF TRANSCANADA
KEYSTONE PIPELINE, LP
FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

**ROSEBUD SIOUX TRIBE'S
SUPPLEMENTAL RESPONSE TO
MOTION TO EXCLUDE TESTIMONY
OF RICHARD KUPREWICZ**

HP14-001

The Rosebud Sioux Tribe, by and through counsel of record, files its supplemental response in response to Keystone's Motion to Exclude Portions of Richard Kuprewicz's testimony. In support herein the following is stated.

By filing this supplemental response Rosebud in no way alters or amends its previous response, but rather submits information relevant to the determination of the matter presently before the PUC. In addition, to the following information, Rosebud again asserts that the motion to exclude expert testimony is not properly before the PUC because it is not presented in a manner that conforms with the Rules of Civil Procedure and the South Dakota Rules of Evidence as they apply to the determination of the admissibility of expert testimony. Rosebud asserts that the motion is not properly before the PUC and accordingly must be denied.

Both Keystone and the PUC Staff find difficulties in assessing the relevancy of the testimony sought to be excluded. The Report states that it addresses Keystone's ability to comply with Special Condition No. 32 of the PHMSA Special Permit Conditions as those requirements are made applicable to the proceedings by virtue of Amended Permit Conditions 1 and 3. Amended Permit Condition 3 requires compliance with the Final Environmental Impact Statement when completed by the U.S. Department of State. Appendix Z to the Final Supplemental Environmental Impact Statement imposes 59 Special Conditions for this project

and specifically replaces Keystone's request for a Special Permit. Satisfying the requirements of Appendix Z is referenced numerous times within the testimony submitted by Keystone. It should be noted that although the permit conditions make compliance with these requirements mandatory, this proceeding is the first time that Keystone must demonstrate the actual ability to comply with some of the conditions.

Kuprewicz's testimony and report analyzes Keystone's ability to comply with Special Condition 32 and draws expert conclusions and opinions based on that analysis. Special Condition 32 addresses Mainline and Check Valve Controls and requires Keystone to design and install mainline block valves and check valves on the Keystone XL system based on the worst case discharge as calculated by 49 C.F.R. 194.105. It also requires Keystone to locate valves in accordance with 49 C.F.R. 195.260 by taking into consideration elevation, population and environmentally sensitive locations to minimize the consequences of a release from the pipeline, amongst other requirements.

49 C.F.R. 194.105 requires each operator to determine the worst case discharge for each of its response zones and provide the methodology, including calculations, used to arrive at the volume. The same part also provides a formula requirement for use in making this determination. 49 C.F.R. 194.105 is attached as Exhibit 1 and incorporated by reference.

C.F.R. 194.105 (b) provides several methods to determine the worst case scenario discharge, which are based on either historical data or in the absence of historical data, the operators best estimate. Keystone chose to perform its requirements under this part based on historical data, rather than on its best estimate. Kuprewicz's testimony attacks the methodology used by Keystone to make a worst case-scenario discharge determination under the requirements

of C.F.R. 194.105(b). It calls into question Keystone's ability to comply with Special Condition 32 and the associated requirements of the PUC permit – Conditions 1 and 3. The information and opinions offered are relevant to a determination regarding Keystone's certification petition and the requirements of the law.

49 C.F.R. 195.260 one of the conditions within Special Condition 32, addresses the location of valves and where they must be installed. It is attached as Exhibit 2 and incorporated by reference. It provides in part that a valve must be installed at each of the following locations (c) "on each mainline at locations along the pipeline system that will minimize damage or pollution from accidental hazardous liquid discharge, *as appropriate for the terrain in open country*, for offshore areas or for populated areas." The area designated as High Landslide Risk Areas are considered terrain in open country, consistent with and Keystones valve placement should be appropriate for that area. (emphasis added) The report opines at page 6 that:

Assuming that the pump stations have bypass arrangements with check valves and remotely operated valving, the pump stations are situated approximately every 50 miles, and mainline valving appears to have been placed to meet Special Condition PHMSA Recommendation No. 32, placing mainline valves at less than (although not much less than) 20 miles to isolate segments of the pipeline. While there is no exact science to valve placement on a pipeline, the elevation profile plays a major role in such valving decisions. When LSHR High Risk areas associated with possible landslide are incorporated as shown in figure 1, and worst case rupture scenarios calculated, it becomes clear that the proposed TC valving is seriously inadequate for a high throughput large diameter pipeline in a location of considerable elevation changes.

This is evidence that is relevant to the issue before the PUC regarding certification and the ability to comply with permit requirements. It is helpful to the finder of fact in reaching a decision on this ultimate issue. This evidence happens to conflict with statements made by and the miniscule evidence offered by Keystone regarding compliance with the same permit

condition. Keystone has put forth no specific evidence or testimony that is demonstrative of their ability to comply with the requirements of Special Condition 32.

The report opines that a worst case discharge scenario would produce a release of slightly over 60,000 barrels of oil, subject to a variety of factors detailed in the report. This represents a vastly different worst case discharge scenario than that is presented by Keystone.

While many of Keystone's witnesses put forward direct testimony that Keystone will comply with the 59 Special Permit Conditions required by PHMSA, the same witnesses rarely put forward any evidence to support the assertion that they intend to comply with those conditions. Furthermore, no witness has stated with any degree of particularity how Keystone intends on complying with Special Permit Condition 32 and each of its requirements.

Amended permit conditions 1 and 3 specifically require that Keystone comply with all of the requirements as contained in the PHMSA Special Conditions, which also includes continued compliance with SDCL 49-41B-22. It necessarily follows that Keystone is required to put on evidence to establish compliance with all of the permit conditions as a matter of law in order to satisfy its burden of proof under the certification proceeding. The existing permit creates a presumption that Keystone can comply with its requirements, including requirements of the Pipeline Safety Act. At the evidentiary hearing, Keystone must carry its burden of proof by demonstrating that this condition has not changed. As an intervening party, the Rosebud Sioux Tribe has the right and the opportunity to present relevant evidence to this end. The testimony and evidence offered by Richard Kuprewicz satisfies this standard and should be considered by the PUC in this case.

The testimony and evidence provided by Kuprewicz is directly relevant to Keystone's ability to comply with the requirements of Special Condition No.32 as it relates to the pipeline route. The report mentions rerouting the pipeline. We acknowledge that the PUC does not have the authority to do that and are not suggesting that it do so. However, Keystone chose this route and the PUC approved it subject to conditions. Keystone cannot now be permitted to divorce their chosen route from the dangers associated with the route along with the requirements of the law. Kuprewicz's report reaches the conclusion that no level of mitigation efforts or requirements could adequately account for the inherent dangers associated with the placement of a pipeline of this size and magnitude in areas designated as High Risk for Landslide Potential. This opinion provides relevant information to inform the fact finder in reaching their conclusion regarding the applicant's ability to meet their burden of proof. It is relevant to the matter before the condition and it is helpful to the finder of fact in reaching a decision.

The PUC considered each and every requirement of the Pipeline Safety Act in assessing the ability of Keystone to comply with the requirements of the law, when it issued the amended permit and condition to construct the project. In order to reach the conclusion that Keystone can comply, the PUC must have considered evidence and testimony on the same subjects that Keystone now desires to exclude. It is a logical conclusion that in the certification proceeding the PUC will hear evidence presented by Keystone regarding satisfying the condition that they maintain the ability to comply with the requirements of the permit and the law, regardless of the source or origin of that law.

Based on the above and foregoing, the motion to exclude testimony of Richard Kuprewicz should be denied.

Dated this 9th day of June, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I certify that on the 10th day of June, 2015, on behalf of the Rosebud Sioux Tribe, the original Supplemental Response to Motion to Exclude Testimony of Richard Kuperewicz, RST Exhibits 1, 2 and 3 in Case Number HP-14-001 was filed with the Public Utilities Commission of the State of South Dakota e-filing website and also that on this day a true and correct copy was sent via email and/or U.S. Mail first class postage prepaid to the following persons, as designated:

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