

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

**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 PIPELINE**

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**STAFF’S RESPONSE TO JOINT
MOTION TO DISMISS

HP14-001**

COMES NOW Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this Response to Joint Motion to Dismiss. On November 9, 2015, the Commission received a Motion to Dismiss from several intervenors. In the Motion, Movants request first that the current certification proceeding be dismissed, and second, that that permit issued in HP09-001 be revoked. Staff first addresses the request for revocation, as the request for dismissal would be moot should the permit be revoked.

I. Request for Revocation of Permit

A. The request to revoke is not properly before the Commission.

Movants request the Commission revoke the permit pursuant to SDCL 49-41B-33. However, the permit was not issued in this docket; therefore, a request to revoke the permit is not appropriately before the Commission. The service list for HP09-001 is noticeably different from that for the current docket. Thus, very few of the parties to the permitting docket received proper notice of the request for revocation. While there is no precedent, as the Commission has never before been asked to revoke a permit, it stands to reason that a motion to revoke could only be brought in the docket in which the permit was granted.

B. Even if the Commission chooses to address revocation in this docket, revocation is not merited.

Movants urge the Commission to revoke the permit for the Keystone XL pipeline based solely on the fact that the Presidential Permit was denied. Staff acknowledges that the Presidential Permit was denied on November 6, 2015. Staff also acknowledges that the Applicant is required under Condition 3 to obtain a Presidential Permit. However, the November 6 denial does not render Keystone incapable of complying with Condition 3. The most telling evidence of this is the fact that this is the second time the Presidential Permit has been denied. Nowhere in the conditions did the Commission specify when the Presidential Permit must be obtained or prohibit the Applicant from making numerous attempts to obtain such a permit. The Commission simply ordered that construction may not begin until a Presidential Permit is obtained.

With that in mind, no harm can come from denying the request to revoke the permit at this time. Because the Applicant has not obtained a Presidential Permit, construction may not begin. On the other hand, a great deal of prejudice would be suffered if the permit was to be revoked and the Applicant later obtained a Presidential Permit. Parties to HP09-001 participated in several months of preparation and three days of hearings. The Commission drafted a thirty-nine page order. In this docket, parties participated in dozens of motions and nine days of hearings. Thousands of pages of discovery were shared. To now revoke the permit and run the risk of having to go through the entire process again is highly prejudicial to those who have put so much time into this process.

It is also important to note that no complaint has been filed against TransCanada with respect to the Keystone XL permit. In fact, in the nearly eight years that TransCanada has been active in South Dakota¹, no formal complaints have been filed with the Commission against the company.

Certainly, while the second denial of a Presidential Permit might make compliance with the conditions less likely, it does not make compliance impossible. Moreover, unless and until the Applicant attempts to construct or operate the Keystone XL pipeline in South Dakota without a Presidential Permit, the Applicant has not violated the condition that it obtain a Presidential Permit.

II. Motion to Dismiss Certification Proceeding

When the intervenors filed their Motion for Stay in April of 2015, they argued that it was “purely judicial economy.” Transcript (hereafter “ST”) 10:15, 11:14-16, 15:11-12, 16:17-18. This also is purely an issue of judicial economy. In that hearing, the intervenors went on to caution the Commission to take “a careful look at how we’re spending other people’s money.” ST 11:16-17.

Well over a year has gone into this docket. As Staff discussed above, Keystone could ultimately obtain a Presidential Permit. It would be nonsensical to go through another year, spending the time and money to litigate the same issues should that permit be granted in the future. The risk of having to go through a second proceeding does nothing to aid judicial economy and, in fact, risks harm to those who may not have the financial means to relitigate this proceeding. It is entirely possible that Staff would not have the means to hire expert witnesses

¹ TransCanada also owns the Keystone I pipeline, upon which it began construction in 2008. This information is available in Docket No. HP07-001.

should this matter be dismissed and refiled. Staff relies on a filing fee set by statute to process these types of dockets.² Staff would be greatly prejudiced should that fee be depleted and Staff be unable to seek outside assistance.

When it ruled to deny the Motion for Stay, the Commission stated that “we have a responsibility again to go through the process.” ST 28:15-16. The Commission went on to state that the docket would proceed “[regardless] of what the federal government may or may not be doing on this particular account.” ST 29:24-25, 30:1. These statements are no less true than they were in April.

In the interest of judicial economy and to avoid prejudice, Staff recommends the Motion to Dismiss be denied.

Dated this 8th day of December, 2015.



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² See Order Assessing Filing Fee dated October 1, 2014.