

-----Original Message-----

From: Johnson, Dustin (PUC)
Sent: Wednesday, October 17, 2007 10:10 PM
To: 'Steve Collins'
Subject: RE: Canadian company's eminent domain efforts

Steve,

Thanks for your comments. I wanted to clarify a few things:

1. Emails in the record -- I know that you didn't ask for your email to be entered in the record, but because I am acting in a judicial capacity in this proceeding, under state law I am not allowed to discuss the merits of the Keystone application with anyone. Once I read your email it could have been argued that I was legally obligated to disclose that ex parte communication, and so I did so. I just wanted you to know where I was coming from.

2. Regulatory Gap -- Eminent domain is a judicial proceeding that is handled in state court. I do not have any authority to order a judge to render any decision on eminent domain cases. I have the exact same legal standing, power, and authority as you do in this instance. I don't know that I would describe this as a "regulatory gap," though. A judge will look at the issues in any eminent domain case, and will make a ruling based on the facts and the law. It appears that the role you hoped that the PUC was playing with regard to eminent domain is being filed, just by a different entity in government (the circuit court).

3. Eminent Domain -- Unfortunately, I don't have any information to help you on this issue. I am not an attorney and have not read, reviewed, or studied any eminent domain cases. I do have some expertise in rate-making and telecommunications, natural gas, and electric policy (because that is what the PUC does), but none in eminent domain. You ask if South Dakotans should be concerned about the use of eminent domain. I don't know what South Dakotans should think, but I can tell you that I do have some concerns.

4. Political Cost -- I'll state again that I am not "allowing" TransCanada to exercise eminent domain any more than you are. It is simply an area where the PUC, for better or worse, does not have any authority.

Steve, I hope that you will understand how much I care about these issues -- I wouldn't take the time to write these emails if that wasn't the case. I can certainly tell from what you've written how much you care. Thanks for the exchange of ideas and concerns.

Sincerely,
Dusty

Dustin "Dusty" Johnson
Public Utilities Commissioner
605-773-3201

-----Original Message-----

From: Steve Collins
Sent: Wednesday, October 17, 2007 6:25 PM
To: Johnson, Dustin (PUC)
Subject: Re: Canadian company's eminent domain efforts

Mr. Johnson,

Thank you very much for your personal response. I was unaware that the PUC did not have authority to grant or deny eminent domain powers to foreign (or any) companies. Thanks for the clarification. As you can tell from my initial email, I did not intend my email to be a part of any proceeding or record. If you do so, please add this email to it as well as your response to me.

My perception that the PUC and/or State Government seemed to be "caving in" on the project was based on media coverage as well as conversations with others. Media coverage has given me the impression that neither the PUC nor the State Government seem to think they have the any ability to stop a foreign company from exercising eminent domain powers vs. South Dakota property owners. That would indicate a regulatory gap in South Dakota law which needs to be remedied. I've attached a link which highlights the dangers to US assets posed by foreign interests who can buy up many American assets due to the falling dollar. If the dollar continues to fall, this danger will steadily increase.

If the oil pipeline company is chartered and headquartered in a foreign country, then it is a foreign company regardless of where it's stock is traded or who owns the stock. Eminent domain has been a power reserved to governmental units in the USA, and I know of no case where a private, foreign company has been able to exercise eminent domain rights within the USA. If your view is otherwise, I would appreciate knowing what state statute permits such a thing (so I can contact my legislators to have it changed). Foreign companies can certainly be good employers, but that has nothing to do with the concerns I expressed. My concern is directed specifically to how foreign companies can utilize eminent domain to take any property access in our nation and state. Media coverage has indicated the Canadian company might initiate eminent domain takings on the oil pipeline route. Is the media coverage wrong? Is your response meant to indicate that private foreign entities cannot use eminent domain to gain right-of-way access, and that this is not a possibility about which South Dakotans should be concerned?

It is also my strong view that if the Canadian company imposes right-of-way access on South Dakota properties via eminent domain proceedings, there will be a political cost to the current incumbents in state offices who allowed it. If one Canadian company can use eminent domain rights in South Dakota, what will stop other foreign companies from doing the same thing? This is a legitimate concern for all South Dakotans.

Steven Collins
Sioux Falls, SD

http://www.newsmax.com/newsfront/foreign_US_buyouts/2007/10/16/41254.html

----- Original Message -----

From: Johnson, Dustin (PUC)

To: Steve Collins

Sent: Wednesday, October 17, 2007 2:54 PM

Subject: RE: Canadian company's eminent domain efforts

Steve,

Thanks for the email. I am happy to respond to your email, but because of ex parte concerns won't be addressing any of the merits of the Keystone application. Luckily, I think your email addresses almost completely broader policy issues. I will make sure that your email and my response get entered into the record of the proceeding, however.

First, I am quite intrigued by the statement that the "PUC is widely-perceived to be "caving in" very easily to the Canadian company's desire to force its pipeline down the throats of unwilling

South Dakota farmers and ranchers." To be honest, I'm not sure I understand how that can be the case. The hearing is scheduled for December and any substantive commission decision on the siting the pipeline will not be made until the hearing has been held and the record is complete. I am not aware of instances where the Commission has "caved-in" to TransCanada.

As for eminent domain, I want to make it very clear that the PUC doesn't have anything to do with that at all. You can read all of the statutes that deal with condemnation for oil companies or railroads, and to my knowledge the PUC isn't mentioned once. Eminent domain is a process that the circuit courts handle. That's not to say that I'm not concerned about what is going on (quite to the contrary, I am concerned), but I do want to make it clear that I don't have any in-depth legal or policy understanding of those statutes.

I do want to make a note about your categorization of TransCanada as a "foreign-owned" company. I don't know how true that is. They are traded on the NY stock exchange just as thousands of other companies are, and I presume that thousands of Americans own their stock. I'd guess, in fact, that more Americans have a direct ownership interest in TransCanada than have a direct ownership interest in MidAmerican Energy, the company out of Iowa that supplies much of Sioux Falls with natural gas. I presume that any company that is traded publicly on a stock exchange (Ford, Daktronics, GE, etc.) has many foreign owners, as well as domestic. It is the nature of modern business. I do, however, understand the concern that some might have with a company that, even if it is owned in part by Americans, chooses to run at least a portion of their company out of Canada. To me, though, I care less about what zip code the vice-president of a company lives in and a lot more about how his or her company treats people. The good news is that our laws in South Dakota are focused on just that -- what a company of any ownership or management structure can and can't do to our people and land. It may be that the laws need to be changed, but then I would want them changed to better protect us from ALL types of companies. I wonder if it isn't possible for there to be as many "bad" Texas companies as there are "bad" Canadian companies. I want our state protected appropriately in either case.

You also stated, and I quote: "If the PUC hasn't found legal or regulatory barriers to a foreign company using eminent domain powers in this state, it better go back and try harder to find some." To begin with, that is not how we, and I hope any other governmental agency, do business or treat the laws established by our legislature and Congress. Even if the Commission did have something to do with eminent domain, we have to follow the law, regardless of our own personal opinions. There is a legal procedure that needs to be followed. We are but one part of it. Ultimately the courts could be making eminent domain decisions, decisions which we are simply not empowered to make. There has been some misperception of our authority although we have made every effort to make our authority clear to all interested parties. We shall continue that effort.

Thanks for taking the time to write, Steven. I think you and I can both agree that this is an important proceeding before the PUC, and we will need to work hard to make sure that we perform all of the due diligence necessary and appropriate.

Sincerely,
Dusty

Dustin "Dusty" Johnson
Public Utilities Commissioner
605-773-3201

-----Original Message-----

From: Steve Collins

Sent: Wednesday, October 17, 2007 12:42 PM

To: Johnson, Dustin (PUC)

Subject: Canadian company's eminent domain efforts

Dear Commissioner Johnson:

I've followed with interest the story about the efforts of a Canadian oil pipeline company to use eminent domain to build its pipeline through South Dakota whether property owners want it or not. This makes no sense whatsoever either to the man-on-the-street in the city in urban areas or to farmers and ranchers in rural areas.

Recently, the DME Railroad, an American company HQ'd in South Dakota, wanted to build railroad right-of-ways through various parts of South Dakota and it has met all kinds of legal and statutory obstacles to its efforts. However, a *foreign-owned* company wants to build an oil pipeline right-of-way through South Dakota and there appears to be no legal or statutory obstacles at all to it using eminent domain to accomplish its purposes. It just "waltzes right in and takes whatever it wants." This is bizarre. How come a domestic railroad can't use eminent domain powers, but a *foreign* company seems to have unimpeded powers to use eminent domain? I thought eminent domain powers were only for American governmental entities to use.

As I'm sure you know, farmers and ranchers are very protective of their land and their land rights. The PUC is widely-perceived to be "caving in" very easily to the Canadian company's desire to force its pipeline down the throats of unwilling South Dakota farmers and ranchers. Every other farmer and rancher sees what is going on and wonders if their property will be targeted in the future by some foreign company's desire to seize property or property-access rights in this state. Such voters are all going to be disgusted with the State Government, in general, and the PUC, in particular, if they allow this Canadian company to use eminent domain powers to impose its will on South Dakota property owners.

South Dakota State Government and the PUC are now run by Republicans, so Republicans will be blamed by the voters who worry about foreign companies taking their property via eminent domain. If the GOP State Government and GOP PUC cannot find any legal or regulatory reasons to stop a foreign company from running roughshod over South Dakota property owners via eminent domain, I'll bet many traditionally-GOP rural voters will vote for Democratic candidates who promise to find or erect barriers to such uses of eminent domain in this state. If the PUC hasn't found legal or regulatory barriers to a foreign company using eminent domain powers in this state, it better go back and try harder to find some. Tens of thousands of rural voters usually favor GOP candidates, but if the GOP office-holders can't or won't stop foreigners from seizing South Dakota's property rights, these voters will turn to Democrat candidates who will safeguard their property rights.

Unless the PUC wants to be perceived as an ally of the foreign companies, it should propose legislation or a constitutional amendment for the next election to prevent ANY foreign company from using eminent domain powers in this state under ANY conditions. You can be sure the voters will approve such an amendment.

Sincerely,

Steven Collins
Sioux Falls, SD