

**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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**CORRECTED
STAFF’S BRIEF IN RESPONSE
TO APPLICANT’S MOTION TO
EXCLUDE TESTIMONY OF
RICHARD KUPREWICZ**

HP14-001

COMES NOW, Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this brief in response to Applicant’s Motion to Exclude Testimony of Richard Kuprewicz (Motion), filed by TransCanada Keystone Pipeline, LP (“Keystone”). In its Motion, Keystone requests that the Commission “exclude all of Kuprewicz’s testimony except for his opinion on pages 2-3 of Exhibit 9 that Keystone XL Pipeline does not pose a substantial risk to the Rosebud Sioux Tribe’s water supply.” (Motion at 1.)

BACKGROUND

On April 24, 2015, Rosebud Sioux Tribe (“RST”) filed testimony of Richard Kuprewicz, which included RST Exhibits 8, 9, and 10. Kuprewicz’s testimony relies mainly on RST Exhibit 9 and consists of a letter submitted to RST titled as “Accufacts Expert Observations on Certain Aspects in the Matter of the TransCanada Keystone XL Pipeline Before the Public Utilities Commission of the State of South Dakota (“PUC”).” In brief, RST Exhibit 9 provides Kuprewicz’s professional opinion on the Keystone XL pipeline for three areas of concern that mainly arise from the project route traversing areas of high risk for landslides. These areas of concern include: 1) risk assessment approaches, 2) oil spill response plans, and 3) related worst-

case scenarios. (RST Exhibit 9 at 1.) Kuprewicz’s testimony further sets forth that he has concerns with the Keystone XL pipeline due to the high risk for landslides and that the valve locations currently proposed don’t properly mitigate this risk. Moreover, Kuprewicz claims that Keystone’s spill risk assessment did not properly take into account the high risk for landslides since the risk assessment was conducted using a “looking-backward” approach, which was based on the Pipeline and Hazardous Material Safety Administration’s spill database. Finally, Kuprewicz suggests that should the Commission confirm there is a high risk of landslides as identified in the Final Supplemental Environmental Impact Statement (“FSEIS”), then Keystone should be required to reroute the pipeline through either Commission order or denial of Keystone’s Petition for Certification (“Petition”).

In its motion, Keystone argues that Kuprewicz’s testimony and RST Exhibit 9 “addresses issues of pipeline safety that are preempted by federal law, within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA), and statutorily beyond the scope of the Commission’s jurisdiction.” (Motion at 1.) In essence, Keystone argues that Kuprewicz’s testimony is not relevant to this proceeding. In this brief, Staff provides its analysis on the relevancy of the issues brought forth in Kuprewicz’s testimony.

ANALYSIS

Can the PUC Reroute the Pipeline as Proposed in Kuprewicz’s Testimony?

One of Kuprewicz’s main conclusions in his testimony is that “if the high risk of landslide identified in the Final Supplemental Environmental Impact Statement (“FSEIS”) is confirmed with accompanying risk of a massive oil spill, the pipeline should be rerouted to avoid areas with high risk of landslide.” (RST Exhibit 9 at 9.) Kuprewicz further concludes that,

should the high risk for landslides as identified in the FSEIS be confirmed, “[i]f the PUC does not have the authority to reroute the Project, then it should deny the current Petition” (*Id.*) and Keystone “should consider mitigating the landslide risks by rerouting the Project” (*Id.*) if a new permit application is needed.

As the Commission is aware, SDCL 49-41B-36 expressly states that “[a]uthority to route or locate facilities not delegated to commission.” Therefore, based on this law and according to Kuprewicz’s testimony, should the Commission decide Kuprewicz’s testimony on this issue is relevant and should the Commission confirm that a high risk for landslides exists along the currently approved route that warrants a reroute, then Kuprewicz suggests that the Commission should deny the Petition for Certification. If this is the case, Keystone would then need to file a new application for a permit to construct the pipeline after mitigating the landslide risk issue through a reroute.

What Permit Conditions Does Kuprewicz’s Testimony Apply To?

Keystone filed its Petition for Certification pursuant to SDCL 49-41B-27, which requires the company to “certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.” Kuprewicz’s testimony does not directly identify what permit conditions his professional opinions conclude that Keystone can no longer meet. Given this, Staff reviewed the fifty conditions set forth in the Amended Final Decision and Order (“Permit”) issued by the Commission on June 29, 2010, in order to determine if Kuprewicz’s testimony is relevant to any of the permit conditions. The conditions Staff found Kuprewicz’s testimony may be in the least bit related to are as follows:

Condition 1: Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include,

but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 601 01 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01 :32 through 74:02:01 :34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.

Condition 2: Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.

Condition 3: Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State [...].

Condition 6: The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information [...].

Condition 31: Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein.

Condition 34: In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas. Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan. In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.

Condition 36: Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission [...].

Is Kuprewicz's Testimony Relevant to this Proceeding?

In its Motion, Keystone essentially argues that Kuprewicz's testimony is irrelevant to the proceeding. In support of its position, Keystone focuses its arguments on the fact that the issues presented by Kuprewicz can be categorized as pipeline safety and fall under PHMSA's jurisdiction. Moreover, Keystone states that "Commission has already conditioned its 2010 permit on the requirement that Keystone comply with federal law." (Motion at 6).

While Staff agrees with Keystone's argument that pipeline safety falls under federal jurisdiction and states are preempted from adopting pipeline safety standards for interstate pipeline (see 19 U.S.C § 60104(c)), Staff also believes that Kuprewicz's testimony would be relevant to the proceeding if it provides an opinion, or argument, that Keystone can no longer comply with any of the Permit Conditions identified in the previous section. After reviewing

Kuprewicz's testimony and RST Exhibits 8, 9, and 10, it is Staff's opinion that Kuprewicz provides neither a professional opinion nor argument that challenges Keystone's ability to comply with the Permit Conditions provided in the previous section. However, this does not necessarily mean Kuprewicz's entire testimony is irrelevant. Staff provides the following observations for Commission consideration:

- 1) *Spill Risk Assessment*: Kuprewicz challenges Keystone on the fact that a spill risk assessment should have included a more detailed analysis specific to areas that were identified as having a high risk for landslides in the FSEIS. Keystone's response to Kuprewicz's opinion was, "[w]hat he proposes, however, is essentially the specific integrity analysis that is required by 49 CFR Part 195.452 within the first year *after* the pipeline is placed in operation. *See* 49 CFR Part 195.452(a)(3)(b)(i); *id.* 195.452(c); *id.* 195.452(e)(i); and 49 CFR Part 195.452 App. C." (Motion at 6). It is Staff's opinion that since a risk assessment similar to the one proposed by Kuprewicz is required to be completed within the first year after the pipeline is placed in operation (as attested to by Keystone), then Kuprewicz's testimony does not show that Keystone cannot comply with the potentially relevant conditions. Further, since the risk assessment falls under PHMSA's jurisdiction, PHMSA is the appropriate regulatory agency to determine if the risk assessment complies with federal regulation. Kuprewicz does not opine that the spill risk assessment completed by Keystone for the FSEIS is not in compliance with any specific law, regulation, or permit. Finally, Staff did not find any conditions in the Permit that requires a spill risk assessment be completed specifically for South Dakota and had trouble identifying under what Permit Conditions the Commission could actually require a

spill risk assessment more stringent than what is required by federal law be completed as proposed by Kuprewicz. Therefore, Staff calls into question the relevancy of Kuprewicz's testimony on spill risk assessments.

- 2) *Location of Mainline Valves:* Kuprewicz provides an opinion that Keystone's mainline valve placement are inadequate as summarized in the following statement: "[w]hen LSHR [landscape hazard ranking system] high risk areas associated with possible landslide are incorporated as shown in Figure 1, and worstcase 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." (RST Exhibit 9 at 6). However, in the same paragraph Kuprewicz identifies that "mainline valving appears to have been placed to meet Special Condition PHMSA Recommendation No. 32, placing mainline valves at less than (though not much less than) 20 miles to isolate segments of the pipeline." (*Id.*). Based on this statement, it is Staff's opinion that Kuprewicz provides a professional opinion that Keystone complies with PHMSA's recommendations and, therefore, Keystone also complies with the potentially relevant Permit Conditions that require the pipeline be designed, operated, and maintained pursuant to PHMSA regulation (*see Conditions 1, 2, and 3 in previous section*). Given this, Staff believes that Kuprewicz's testimony could be relevant as it addresses that Keystone appears to comply with PHMSA recommendations included in the FSEIS. On the other hand, it is also Staff's opinion that any testimony suggesting that mainline valve locations be more stringent than what is required by PHMSA regulation is irrelevant. Staff bases this opinion on the federal preemption set forth in 19 U.S.C § 60104(c).

- 3) *Oil Spill Response Plan:* In his testimony Kuprewicz concludes “[w]hile priority is usually not focused on Oil Spill Response planning in great detail for a pipeline that has not been authorized, such plans should eventually incorporate the considerable amount of oil that would be released in this unique and challenging terrain.” (RST Exhibit 9 at 10). It is Staff’s opinion that certain parts of Kuprewicz’s testimony on the oil spill response plan could be argued as being relevant as it pertains to Permit Conditions 34 and 36. Specifically, if there are any high consequence areas along the portion of the route within areas of high risk of landslides then Kuprewicz’s testimony may be relevant to Permit Condition 34 since the condition requires Keystone to “[...] seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials” (Permit Condition 34) when completing its continuing assessment and evaluation of environmentally sensitive and high consequence areas. On the other hand, it is also Staff’s opinion that any of Kuprewicz’s testimony suggesting that worst-case release scenarios for planning purposes be more stringent than what is required by federal or state law is irrelevant since Staff could not find any permit conditions that require Keystone’s spill response planning be more restrictive than the applicable federal or state law.
- 4) *Rerouting of the Pipeline:* Throughout his testimony, Kuprewicz suggests that the Keystone pipeline be rerouted in order to properly mitigate the risks associated with the route crossing areas of high risk for landslides and inadequate mainline valve locations. It is Staff’s opinion that any of Kuprewicz’s testimony on this matter is irrelevant. This opinion is based on the facts that Keystone is required to comply

with PHMSA regulations per existing Permit Conditions, information on the route crossing areas of high risk for landslides is not new to the Commission, and the Commission does not have the authority to route the pipeline (per SDCL 49-41B-36). Should Kuprewicz have provided an opinion that the current route does not comply with PHMSA regulation, the FSEIS and associated recommendations, federal law, state law, or a specific Permit Condition, then Staff would likely have come to the conclusion that Kuprewicz's testimony may be relevant. However, based on Staff's reading of Kuprewicz's testimony it is apparent that this is not the case.

It should be noted that Permit Condition 6 states "Keystone will continue to develop route adjustments throughout the pre-construction design phase... route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information." Staff reads this condition as giving Keystone the flexibility to make minor route changes on a specific tract of land should environmental features found during a survey of that specific tract of land require the pipeline to be moved slightly. It is Staff's opinion that Permit Condition 6 does not require Keystone to move the pipeline route out of areas of high risk for landslides.

Finally, Kuprewicz's testimony on areas of high risk for landslides along the route is not new to the Commission. Keystone informed the Commission of the high susceptibility to landslides along certain areas of the route in docket HP09-001. (see Exhibit TC-1 of Docket HP09-001 at 44 and Permit Finding of Fact 40.) Keystone does not propose any material changes to the route in its Petition for Certification. Further, the scope of this proceeding is limited per SDCL 49-41B-27 to Keystone

certifying to the Commission that it can still meet the conditions upon which the Permit was issued. Staff could not find any language in SDCL 49-41B-27 that identifies the Commission must reconsider the location of the route. Based on this, it is Staff's opinion that Kuprewicz's testimony on rerouting the pipeline is irrelevant.

CONCLUSION

Upon review of Keystone's Motion and Kuprewicz's testimony, it is Staff's opinion that parts of Kuprewicz's may be relevant. However, it is also Staff's opinion that Kuprewicz's main conclusions on inadequate mainline valve locations and rerouting the project out of high risk of landslide areas appear to be irrelevant. Conditions attached to the Permit issued by the Commission in docket HP09-001 require Keystone to comply with all applicable federal laws, state laws, and permits. Staff did not find any Permit Conditions that are more restrictive than the applicable federal laws, state laws, and permits. Therefore, Staff concludes that any of Kuprewicz's testimony suggesting the pipeline design, spill risk assessment, and oil spill response plans be more stringent than what is required by law or permit is clearly irrelevant.

In addition, Keystone does not propose any material changes to the route in its Petition for Certification and SDCL 49-41B-27 only triggers review of Keystone's ability to meet the conditions upon which the permit was issued (not the route itself). Staff also notes that Kuprewicz provides no opinion, or argument, that Keystone cannot comply with the conditions upon which the Permit was issued in docket HP09-001.

Should the Commission agree with Staff that parts of Kuprewicz's testimony may be relevant, then the Commission could either approve in part Keystone's Motion or deny

Keystone's Motion and take on the issue during the evidentiary hearing when the irrelevant parts of Kuprewicz's testimony could be objected to by either Keystone or any other party.

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