



Kristie Fiegen, Chairperson
Gary Hanson, Vice Chairman
Chris Nelson, Commissioner



PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
<https://puc.sd.gov>

(605) 773-3201

Consumer Hotline
1-800-332-1782

Email
puc@state.sd.us

May 24, 2024

Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

RE: EL 10-016

Ms. Van Gerpen,

Staff submits this Letter in response to the April 9, 2024 filing for the Certification of Northern States Power Company d/b/a Xcel Energy for the Brookings County – Lyon County and Helena – Hampton Second-Circuit Project in Docket No. EL10-016.

Northern States Power Company, a Minnesota corporation, doing business as Xcel Energy (“NSP” and also referred to as “Xcel Energy” or “the Company” in the Original Permit proceeding) as the lead utility for itself and on behalf of other CapX2020 Brookings Owners as co-Applicants (collectively, with Xcel Energy, “Applicants”), submitted a Certification to the South Dakota Public Utilities Commission (Commission) for the Brookings County – Lyon County and Helena – Hampton Second-Circuit Project (Project) in accordance with SDCL § 49-41B-27.

SDCL § 49-41B-27 states:

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

The South Dakota Supreme Court (SDSC) has provided guidance on how to interpret this statute and also what Commission action, if any, is prompted by this statute.¹ In this case, the SDSC addressed an appeal from several intervenors in PUC Docket No. HP14-001 regarding the PUC’s Order Finding Certification Valid and Accepting Certification (Order).² This Order was the result of an extensive proceeding which involved 42

¹ *In re Keystone XL Pipeline*, 2018 SD 44, 914 N.W.2d 550.

² *Id.* ¶ 1, 914 N.W.2d at 552.

intervenors and a nine-day hearing to determine whether the Project continued to meet the conditions upon which the permit was issued.³

Ultimately, the SDSC dismissed the appeal and vacated the decision of the circuit court.⁴ In its decision, the SDSC made several relevant findings. First, a certification proceeding pursuant to SDCL § 49-41B-27 is not a “permit issuance proceeding” for which SDCL § 49-41B-30 provides the right to judicial review.⁵ Second, a certification proceeding pursuant to SDCL § 49-41B-27 is not a “contested case” for which SDCL § 1-26-30 and SDCL § 1-26-30.2 provide the right to judicial review and appeals to the circuit court.⁶ Third, the Commission is not required by statute to issue an order accepting such a certification. Rather, such certifications are administrative acts that do not “involve the quasi-judicial adjudication of [a party’s] liberty and property interests.”⁷ Fourth, SDCL § 49-41B-27 does not provide the Commission with means to question the sufficiency of a utility’s certification. Rather, other statutes in chapter 49-41B provide vehicles by which the Commission can suspend, revoke, and penalize an entity who is noncompliant with permit conditions.⁸ Fifth, such certifications are important administrative acts which “put the Commission and the State on notice that a utility intends to continue working on a project, sometimes many years after the grant of a permit. The Commission may then inquire into whether the utility actually remains in compliance.”⁹

Therefore, Staff interprets SDCL § 49-41B-27 and the SDSC opinion discussed above to mean that such certifications are informational statements to the Commission rather than requests for approval by the Commission. While nothing in law prevents the Commission from holding a hearing or issuing an order addressing such a certification,¹⁰ Staff interprets the relevant case law to mean that Commission action accepting or rejecting the certification would have no legal effect.

³ *Id.* ¶¶ 8-9, 914 N.W.2d at 554.

⁴ *Id.* ¶ 1, 914 N.W.2d at 552.

⁵ *Id.* ¶ 13, 914 N.W.2d at 555. SDCL § 49-41B-30 states “[a]ny party to a permit issuance proceeding aggrieved by the final decision of the . . . Commission on an application for a permit, may obtain judicial review of that decision[.]”

⁶ *Keystone*, ¶¶ 14-15, 914 N.W.2d at 556. SDCL § 1-26-30 provides “[a] person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review[.]” SDCL § 1-26-30.2 provides that “[a]n appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency.”

⁷ *Keystone*, ¶ 22, 914 N.W.2d at 558.

⁸ *Id.* ¶¶ 23-24, 914 N.W.2d at 559. SDCL § 49-41B-33 states:

A permit may be revoked or suspended by the Public Utilities Commission for:

- (1) Any misstatement of a material fact in the application or in accompanying statements or studies required of the applicant, if a correct statement would have caused the commission to refuse to grant a permit; or
- (2) Failure to comply with the terms or conditions of the permit; or
- (3) Violation of any material provision of this chapter or the rules promulgated thereunder.

SDCL § 49-41B-34 states:

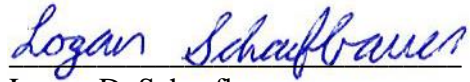
Any person required by this chapter to have a permit who begins construction of a facility without previously securing a permit as prescribed by this chapter, or who constructs, operates, or maintains a facility other than in compliance with the permit and any terms, conditions, and modifications contained therein is guilty of a Class 1 misdemeanor and is subject to a civil penalty of not more than ten thousand dollars. Each day of violation shall constitute a separate offense. The civil penalty provided for in this section shall be recoverable by suit filed by the Public Utilities Commission and shall be deposited into the permanent school fund.

⁹ *Keystone*, ¶ 23, 914 N.W.2d at 559, n.6.

¹⁰ *See id.* ¶ 24 (“That is not to say the Commission erred by holding an evidentiary hearing . . . Nevertheless, SDCL 49-41B-27 by its terms does not direct the Commission to act either by holding a hearing or by accepting or rejecting certification.”).

In conclusion, Staff believes the Applicants have complied with SDCL § 49-41B-27 with their April 9, 2024 filing, and that no Commission action is required by this statute. Staff will continue to monitor the Project to ensure that it adheres to all conditions upon which the original permit was granted.

Dated this 24th day of May, 2024



Logan D. Schaeffbauer
Logan D. Schaeffbauer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605) 773-3201
Logan.Schaeffbauer@state.sd.us