

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

IN THE MATTER OF THE)	
APPLICATION BY TRANSCANADA)	
KEYSTONE PIPELINE, LLP FOR A)	POST HEARING
PERMIT UNDER THE SOUTH DAKOTA)	COMMISSION STAFF REPLY
ENERGY CONVERSION AND)	BRIEF
TRANSMISSION FACILITIES ACT TO)	HP 09-001
CONSTRUCT THE KEYSTONE XL)	
PROJECT)	

Pursuant to the briefing schedule set forth in this proceeding, Commission Staff (“Staff”) hereby submit its brief to support previously submitted recommendations. Staff disagrees with the legal argument presented by Dakota Rural Action (“DRA”) in its post-hearing brief. DRA argues the application submitted by TransCanada Keystone Pipeline, LLP (“Applicant”), be denied by the Public Utilities Commission (“PUC”) based on two legal theories. First, DRA argues the permit should not be granted until PUC has enough information to determine whether the Applicant followed all laws that could ever exist. Second, DRA argues PUC should provide a public venue for all people to review and comment on all laws and all agencies affecting the Applicant that could ever exist. Neither argument is legally sound, let alone reasonable.

I. THE LAW DOES NOT REQUIRE, NOR IS IT PHYSICALLY POSSIBLE FOR THE PUC TO DETERMINE WHETHER THE APPLICANT IS IN CURRENT COMPLIANCE WITH ALL LAWS THAT MAY AFFECT IT.

DRA argues, “a determination of compliance with law should be based on a detailed review of an applicant’s actual efforts to comply with law . . .” (DRA Initial

Post-Hearing Brief, page 3, paragraph 2). DRA believes PUC should provide a “detailed review” of the federally regulated Emergency Response and Integrity Management Plan. If DRA believes PUC should specifically investigate and examine the Applicant for actual compliance with those listed non-PUC laws, DRA must then believe all non-PUC laws are subject to explicit review by the PUC. DRA cannot make its argument regarding specific regulations in isolation.

DRA’s argument centers on “the proposed facility will comply with all applicable laws and rules,” SDCL 49-41B-22 (1). Applicant representatives testified all laws and rules will be followed and all materials submitted by the Applicant throughout the application process demonstrate qualification and competence. PUC, as a creation of the legislature through state statutes, has only the authority conferred upon it by the same. Just as PUC does not have jurisdiction through SDCL Chapter 49 to determine and prosecute traffic infractions, it does not have jurisdiction to preside over the federal pipelines safety operational laws with regard to interstate hazardous liquid. The PUC does not have the legal ability or procedures to enforce regulations outside its statutory jurisdiction. Staff, therefore, stands by the jurisdiction argument made in its initial brief.

The Applicant must comply with many laws and regulations, from contract negotiations, to traffic laws, employment laws, and taxes. Agencies, from local law enforcement to the state, have a process for the regulated activities and the civil court system handles the remainder. Therefore, DRA’s argument the PUC should make a detailed review of actual compliance with all laws is not only practically impossible, but legally as well.

Many non-PUC laws affect the pipeline at various stages of its construction and operating life, PUC's purpose is siting. Since siting occurs before facilities are built, it is impossible to test the Applicant for compliance beyond "knowledge of the law and intent to comply," if a legal obligation does not yet exist. As stated before, although DRA did not individually list all laws potentially at issue, it must not intend to select only a few. In order for DRA's argument to have merit, DRA cannot suggest non-PUC laws only of most interest to it are those that should be examined for actual compliance. Compliance obligations do not arise, and are impossible to test, until the regulated action itself occurs.

Non-PUC laws will "regulate" the Applicant's employment practices, contract practices, construction safety practices, environmental practices, tax practices, and pipeline operations practices, only to name a few. If the Applicant is not currently employing, contracting, building, or operating legal obligations attached to such activities do not exist. The Applicant cannot build its pipeline until it is permitted, and cannot operate its pipeline until it is built. As a result, even if the PUC had jurisdiction, it is impossible to test the Applicant for actual compliance with non-PUC operational laws, since the facilities are not yet operational. As a result, DRA's argument simply makes no legal or practical sense.

II. THE LAW DOES NOT REQUIRE IT, NOR IS IT POSSIBLE FOR THE PUC TO PROVIDE A PUBLIC FORUM FOR COMMENT ON AND EXAMINATION OF ALL LAWS AND AGENCIES THAT MAY AFFECT A SITING PROJECT.

DRA argues PUC should provide an opportunity for "public review of Applicant's compliance with federal law" (DRA Initial Brief, page 3, paragraph 4).

DRA's argument then goes on to state without documents showing actual compliance, the PUC places undue trust in PHMSA. *Id.* Page 8. Furthermore, DRA argues, "the public deserves the opportunity to comment on and confirm that Applicant and PHMSA have complied with federal law." *Id.* Page 9. The assumption is DRA's reference to "federal law" and "PHMSA" is for argument purposes only. If DRA truly intends to deal with those particulars in isolation, because they are of most interest to DRA, its argument is discredited. Many regulations apply to this proposed project, therefore many state and federal agencies play a role.

It is assumed from its initial brief, DRA desires PUC to provide a public forum for all laws and for all agencies. It could also be said DRA believes PUC should provide a public forum in circumstances where DRA finds a proper forum does not otherwise exist. If that is the case, Staff questions why DRA decides whether other agency processes are adequate. Staff also questions why PUC is the agency of choice to then provide the public process. The PUC has no more jurisdiction over PHMSA than the South Dakota Departments of Environment and Natural Resources, Revenue and Regulation or Education.

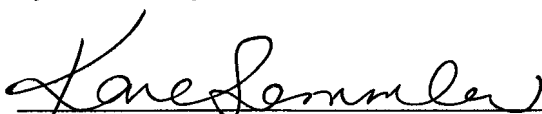
DRA does not point to any law to give the PUC the legal ability to investigate other agency process, "supervise" other agency process, or enforce laws outside SDCL 49-41B. Nonetheless, PUC works hard to maintain an open forum where any interested person can express concerns. Neither testimony nor evidence, regardless of legal relevancy, was offered at the hearing to show other agency processes are inadequate.

CONCLUSION

As Staff wrote in the initial brief, pipeline safety is a complex sharing of jurisdiction and regulation. From manufacturing, to farming, to the local lunch counter, segments of most businesses throughout our economy are regulated at multiple levels. Staff appreciate crude oil and associated regulations are foreign to the landowners of South Dakota. However, DRA cannot show the Applicant is or will be in violation of any regulation as it pertains to the pipeline; and absent such showing, the Applicant has a right to a permit. Staff subject matter experts and Staff's review of the application found it complete. The application was not only complete, but the Applicant met its burden, and with added mitigation measures interests in the project area are protected.

It is impractical to expect the PUC to serve as an all encompassing forum to administer all regulations imposed by any agency. Furthermore, it is impossible to examine actual compliance, since a legal duty regarding many regulations does not yet exist. Finally, the idea of PUC taking responsibility for all other agencies with any role in any project subject to the PUC's siting authority is not legally viable. DRA limited its argument to the agency and regulations of most interest to it. It is impossible, however, to restrict the argument to areas of DRAs interest. For DRAs argument to retain credibility it must be consistently applied across all areas of regulations. Staff stand by the original argument and recommendations presented in the initial brief.

Signed and dated this 2nd day of February, 2010.



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