BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	:	HP 09-001 APPLICANT'S BRIEF IN RESPONSE TO INITIAL POST-HEARING BRIEF OF DAKOTA RURAL ACTION

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Intervenor Dakota Rural Action ("DRA") argues in its initial post-hearing brief that TransCanada Keystone Pipeline, LP ("Keystone"), has failed to meet its burden of proof under SDCL § 49-41B-22 because it has not proved compliance with applicable federal law, namely the obligations to prepare and file an Emergency Response Plan (ERP) and an Integrity Management Program (IMP). DRA's legal argument, made without a single citation to the record, can be reduced to this: (1) Keystone must prove not that it *will comply* with applicable laws and regulations, but that it *is in compliance*; and (2) the Commission must independently verify Keystone's compliance with federal law without deference to federal agencies charged with enforcing it. The first proposition is contrary to South Dakota statute and common sense. The second is contrary to the doctrine of federal preemption. DRA's legal argument is therefore without merit.

1. Keystone's burden is to prove that it will comply with applicable law.

DRA's initial error is grammatical and procedural. Keystone's burden of proof is phrased in future terms, which makes sense given that a facility not yet permitted cannot yet be in compliance with applicable laws and rules. Keystone therefore must prove that the proposed facility "will comply with all applicable laws and rules." SDCL § 49-41B-22. Each subsection of SDCL § 49-41B-22 includes "will." DRA argues, by contrast, that "the Commission must find that Applicant is in compliance with federal ERP requirements" and that "Applicant is in compliance with the Pipeline Safety Act and Regulations." (DRA Brief at 6, 7.) Given the prospective nature of the project, the Commission must make many determinations about future compliance.

As a consequence, however, it need not blindly and irrevocably trust Keystone's mere "intent to comply with law." (DRA Brief at 9.) While true that "statements of intent do not ensure actual compliance with law" (*id.* at 8), DRA erects a strawman, given the record evidence submitted by Keystone and Staff of regulatory and legal compliance. For example, John Hayes testified that approximately 80% of the ERP for Keystone XL would be based on the ERP for the Keystone pipeline with project-specific changes. (Tr. at 99; TC-11, ¶ 13.) That fact is a substantial step toward demonstrating compliance, because PHMSA has approved the ERP for the Keystone pipeline. (Tr. at 118-19; TC-11, ¶ 13.) In addition, Keystone has been working with the South Dakota Department of

Energy and Natural Resources in creating the ERP for Keystone XL, has made changes requested by DENR, and is working to incorporate best operational practices into the new ERP. (*Id.* at 111-12.) This example illustrates the fallacy in DRA's suggestion that the Commission could approve Keystone's application only by relying on Keystone's intent.

DRA also ignores the procedural tool–a permit condition–that obviates reliance on intent to prove future compliance. The Commission can and should condition a permit on Keystone's actually-demonstrated compliance. Absent compliance "with the terms or conditions of the permit," South Dakota law provides that a "permit may be revoked or suspended." SDCL § 49-41B-33(2). Were this not possible, DRA's argument would not allow Keystone to obtain a permit under SDCL Ch. 49-41B without first obtaining every other required permit, whether it be, for example, the Presidential Permit from the United States Department of State, temporary discharge permits pursuant to SDCL § 46-5-40.1, or any necessary road encroachment permits.

Thus, when DRA argues that Keystone prematurely filed its application because its ERP and IMP have not yet been completed (DRA Brief at 10-11), leaving the Commission with the options of either denying the permit or blindly trusting Keystone's intent, DRA creates a false choice by ignoring the mechanism the Commission used in granting the Keystone permit. The Commission required that Keystone prepare an ERP and an IMP, file them with PHMSA, and "also file such documents with the

Commission." (Keystone Final Decision & Order, Condition 44.) Ultimately, the Commission need not trust Keystone's intentions because Keystone's compliance with federal law, as determined by the federal agencies given that authority, will be demonstrated and a matter of record.

2. DRA's argument contradicts well-established rules of preemption.

The only substantive issues DRA addresses, Keystone's ERP and IMP, concern pipeline safety. DRA admits that the area is entirely preempted by federal law. (DRA Brief at 5 ("federal law preempts state crude oil pipeline safety law"); *id.* at 7 ("federal law preempts all state and local pipeline safety laws intended to prevent pipeline spills").) Despite preemption, DRA argues that the Commission should not only oversee, but potentially substitute its judgment for, the federal agencies responsible for pipeline safety. The height of DRA's argument is its suggestion, without citation to any evidence, that "there is reasonable doubt that PHMSA has fully complied with its legal obligations in its approval of the Keystone I ERP. The Commission should not trust federal agency action." (DRA Brief at 8.) The argument directly contradicts 49 U.S.C. § 60104(c): "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." One can only wonder what would remain of federal preemption law if the Commission concluded that Keystone's ERP violated federal law after PHMSA approved it.

Conclusion

Of the four statutory criteria establishing Keystone's burden of proof, DRA addresses only the first, and without reliance on any facts or evidence. DRA's legal argument is contrary to South Dakota law, federal law, and common sense. It offers the Commission no basis to deny Keystone a permit.

Dated this 2 day of February, 2010.

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