

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

IN THE MATTER OF THE PETITION OF)	
TRANSCANADA KEYSTONE PIPELINE,)	Docket 14-001
LP FOR ORDER ACCEPTING)	
CERTIFICATION OF PERMIT ISSUED IN)	DAKOTA RURAL ACTION'S
DOCKET HP09-001 TO CONSTRUCT THE)	JOINDER OF ROSEBUD SIOUX
KEYSTONE XL PIPELINE)	TRIBE'S RESPONSE TO
)	TRANSCANADA'S MOTION TO
)	EXCLUDE TESTIMONY OF
)	RICHARD KUPREWICZ
)	

Dakota Rural Action (“**DRA**”), by and through its Counsel, hereby joins the arguments, authority, and merits of the Rosebud Sioux Tribe’s Response to TransCanada Keystone Pipeline LP’s (“**TransCanada**”) Motion to Exclude Testimony of Richard Kuprewicz. DRA notes that Kuprewicz’s findings are relevant to three of the four elements of proof required to be met by TransCanada under SDCL §49-41B-22 with respect to permitting its proposed pipeline project. Hence, Kuprewicz’s testimony directly addresses a portion of the subject matter that lies within the Public Utilities Commission’s (“**PUC**”) jurisdiction and authority to consider.

TransCanada’s motion constitutes a continuation of its efforts to unreasonably limit the authority of the PUC in construction permit recertification proceedings, despite their being contrary to State law. DRA therefore joins the Rosebud Sioux Tribe’s characterization of TransCanada’s arguments as specious. In short, TransCanada contends that Kuprewicz’s testimony and report should be precluded since the issues raised are preempted by federal law and, hence, within the exclusive jurisdiction of the Pipeline and Hazardous Material Safety Administration (“**PHMSA**”), or are statutorily beyond the scope of the PUC’s jurisdiction.

As the Response from the Rosebud Sioux Tribe notes, TransCanada’s unfounded assertion that the PUC’s authority on these and increasingly other issues are federally preempted, has been

expressly rejected by PHMSA. Last year PHMSA specifically advised TransCanada in writing that federal law recognizes the authority of state agencies such as the PUC to not only explicitly adopt federal standards, but also to inspect, regulate, and take enforcement actions against hazardous pipeline operators such as TransCanada, as well as determine whether proposed siting of such a transportation facility is appropriate to protect the health and safety of the environment and its inhabitants.¹ See, SDCL §49-41B-22(1)-(4).

DRA understands why TransCanada wants to keep the PUC and the public from hearing Kuprewicz's testimony that the proposed route of the pipeline, as currently proposed and conditioned, is problematic. TransCanada is concerned that such expert opinion as to the remaining threat to the environment and its inhabitants, and its cause, might cause the PUC to reject the pending recertification application due to the realistic danger of a pipeline breach due to a slope-slide under SDCL §49-41B-22.

The Rosebud Sioux Tribe in its Response, reminds the PUC that Kuprewicz's testimony specifically addresses SDCL §49-41B-22(2)-(4) and is therefore relevant and admissible to assist the PUC in determining whether TransCanada has met its burden of proof and therefore the propriety of whether the PUC should recertify the construction permit previously issued to TransCanada, a foreign company engaged in transportation of hazardous materials across South Dakota's land and water.

For example, under Amended Condition 1, the PUC imposed on Trans-Canada a requirement that it must comply with all applicable laws and rules. The Amended Condition would be meaningless if the PUC was, as TransCanada suggests, stripped of the responsibility and

¹ Letter to Trans-Canada from PHMSA is attached as Exhibit 2 to the Rosebud Sioux Tribe's Response to Trans-Canada's Motion to Exclude Testimony of Richard Kuprewicz, and is hereby incorporated by DRA into this Memorandum.

authority to ensure TransCanada's compliance with such laws and rules within South Dakota and the PUC's jurisdiction. DRA supposes that from the standpoint of a foreign company transporting hazardous materials, divesting its regulators of any authority is a perfectly fine thing, but that is not the law in South Dakota, nor does TransCanada's position comport with the position taken by PHMSA.

DRA suggests that because PHMSA has expressly rejected TransCanada's assertion of federal agency preemption and has, in fact, expressly advised the contrary, the PUC should summarily deny TransCanada's specious Motion.

Based upon the authority, exhibits, and argument contained in the Rosebud Sioux Tribe's Response to TransCanada's Motion to exclude the testimony of Kuprewicz and this Joinder, together with arguments to be presented at the scheduled June 11, 2015, hearing on this matter, should therefore be denied.

Dated: June 2, 2015

Respectfully submitted,

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