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 14-001 KEYSTONE'S REPLY IN SUPPORT OF ITS MOTION TO DEFINE THE SCOPE OF DISCOVERY

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TransCanada Keystone Pipeline, LP ("Keystone") in its original motion, contended that "the scope of discovery must be limited to a challenge to Keystone's certification. The scope of discovery cannot be whether the Permit should have been granted in the first place." (Keystone Motion at 4-5.) Although some of the Intervenors argue for the broadest possible discovery, they do not explain what that means in the context of a certification under SDCL § 49-41B-27. Keystone asks only that discovery be tailored to the scope of the proceeding.

1. Keystone's motion arises from SDCL § 49-41B-27.

The certification statute requires that the Project continue ". . . to meet the conditions on which the permit was issued." SDCL § 49-41B-27.[1] Clearly, the statute requires Keystone to certify that conditions governing the permit have not materially changed since 2009, and the Commission's inquiry to be limited to whether or not the certification is accurate and correct. Some Intervenors seem to contend the legislature intended the PUC review *conditions* across the entire spectrum of the human endeavor---social, political, climatic, economic---whether extant in Canada, South Dakota, Montana, or Nebraska. The original permit proceedings did not require that type of review. Accordingly, it is specious to contend post-permit certification should be broader than the original permit proceedings.

Only two of the responding Intervenors addressed the statute's meaning. The Cheyenne River Sioux Tribe argues that *conditions* is ambiguous, and must be construed to mean *circumstances*. The Oxford English Dictionary says *conditions* is a synonym for *circumstances* and vice versa. If *conditions* is ambiguous, then its synonym *circumstances* must also be ambiguous. The truth is, neither *conditions* nor *circumstances* is ambiguous in this setting. Black's Law Dictionary says *circumstances* means *attendant facts.* If we adopt the Tribe's favored word, the statute requires that the Project continue

[1]The South Dakota Supreme Court hasn't been asked to construe the statute, and the Commission hasn't published guidance on the statute's construction.

to meet the *attendant facts on which the permit was issued.* The Tribe and Keystone hardly differ in what they think the Commission's statutory inquiry should be, and accordingly the scope of discovery, namely, are there circumstances or conditions or facts attendant to the issuance of the permit which have changed since the permit was issued?

Nancy Hildring suggests that *conditions* as used in § 49-41B-27 means not only the permit conditions, but also the 24 pages of findings of fact and conclusions of law that are part of the permit. Her suggestion differs from Keystone's proposal only in that Keystone believes discovery (and trial) must be limited to *what has changed* relevant to construction of the pipeline, if anything, since 2009. If, as Hildring argues, the statutory reference to *conditions* meant everything contained in the Commission's 2009 decision, then the certification statute would require a new permit proceeding. That is inconsistent with the statutory language and the undeniable fact that nothing in SDCL Ch. 49-41B provides that the permit has expired.

Ultimately, SDCL § 49-41B-27 provides the Commission with the opportunity to review material changes occurring since the permit was granted and nothing more, Keystone requests only that the scope of discovery be consistent with this understanding.

2. TransCanada's proposed scope of discovery is broad, but within statutory limits.

The Intervenors dismiss TransCanada's motion as an effort to deny them due process and to unreasonably restrict the scope of discovery. But Keystone's proposal is grounded in the language of the statute and does not attempt to limit discovery to just whether the project continues to meet the 50 amended permit conditions. It also includes changes that affect the findings of fact as identified by Keystone in its certification petition. Some of the Intervenors argue that this is too narrow. In so objecting, they ignore two things: (1) Keystone's certification satisfies its initial burden of proof under the statute; and (2) discovery must relate to what has changed since the permit was granted. Discovery (or any other part of this proceeding) is not a retrial opportunity or a forum to consider issues and objections to the project that were not presented in the underlying 2009 permit proceeding.

3. The Commission can define the scope of this proceeding.

Many Intervenors have argued that Keystone is prematurely seeking a protective order for which there is no basis. But Keystone's motion is ultimately about the scope of a certification proceeding under SDCL § 49-41B-27. The Commission, directed by the legislature to conduct proceedings under SDCL Chapter § 49-41B, has the inherent power to determine the scope and limits of such a proceeding. Nothing in the administrative rules or the South Dakota Code restricts the Commission's authority to determine how a hearing will be conducted and to determine the proper extent of such a proceeding. To

the contrary, every court and administrative body has the inherent power to govern the conduct of proceedings before it.

Further, the Commission cannot enter a procedural or scheduling order without drawing some conclusions about the proper scope of the proceeding. Keystone understands that there will likely be disputes related to particular discovery requests whether or not the Commission enters an order like the one Keystone has requested, but surely some guidance from the Commission as to its understanding of the scope of this proceeding is appropriate and would be helpful to all parties in conducting discovery.

Conclusion

Keystone's motion is not extreme, draconian, or baseless, as the Intervenors suggest. It is a request for guidance at the outset of this proceeding, in the hope that entry of an appropriate and limited order will make the proceeding more manageable for all involved. Keystone respectfully requests that its motion be granted.

Dated this 4th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2014, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Reply in Support of its Motion to Define the Scope of Discovery, to the following:

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