

RECEIVED

FAX

MAY 15 2008

PUBLIC SERVICE COMMISSION

TO:	Derrick Braaten	Jana Linderman	Thomas Kelsch	William Binek
FAX:	221-5842	866-484-2373	663-9810	328-2410

FROM: Ronda Colby  
 DATE: 5/15/08  
 SUBJECT: Order

Dakota Resource Council, et al. vs. PSC, et al. Case No. 08-C-814

PHONE: 701-222-6682 ext 116  
 FAX: 701-222-6689

PAGES: 7

Comments: Please note faxed order.

Please feel free to call me if you have any questions. Thanks.

450 PU-06-421 Filed: 5/15/2008 Pages: 7  
 APPEAL: Fax of Order re Motion & Stay PSC's  
 November 21, 2007 Order

Burleigh County District Court

Ronda Colby

**STATE OF NORTH DAKOTA**

**IN DISTRICT COURT**

**COUNTY OF BURLEIGH**

**CASE NO. 08-C-00814**

Dakota Resource Council, Janie and John  
Capp, Ramona Klein, Linette and Merle  
Kratochvil, and Mark Novak,

Appellants,

vs.

Public Service Commission and  
TransCanada Keystone Pipeline, LP,

Appellees.

**ORDER**

On November 21, 2007, the North Dakota Public Service Commission (Commission) issued findings of fact, conclusions of law and order, granting TransCanada Keystone Pipeline, LP (Keystone) a Certificate of Public Convenience and Necessity in Case No. PU-07-152. The Commission found the pipeline to be a public necessity based on the United States' growing demand for petroleum products, the potential to decrease the United States' dependence on crude oil from less stable parts of the world, and the potential for increased North Dakota crude oil production. The decision was not appealed and the time for its appeal has expired.

This action was brought by the Dakota Resource Council to appeal the Commission's Findings of Fact, Conclusions of Law and Order, issued on February 21, 2008, for Case No. PU-06-421. Under the order, the Commission issued Keystone a certificate of corridor compatibility and route permit to construct and operate a 218-mile, 30-inch crude oil pipeline in Cavalier to Sargent Counties, North Dakota.

In addition to appealing the decision of the Commission, the Dakota Resource Council filed a motion to stay the order pending appeal, alleging it would suffer irreparable injury if the stay were not granted. Rule 62 of the North Dakota Rules of Civil Procedure governs a stay of proceedings to enforce a judgment. Under Rule 62(l), a court may “stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”

In order for this Court to issue a stay, the Dakota Resource Council, as the moving party must: (1) make a strong showing that they are likely to succeed on appeal; (2) show that they will suffer irreparable injury if the stay is not granted; (3) show that no party will be substantially harmed by reason of the stay; and (4) show that the public interest will not be substantially harmed if the stay is granted. **Cass County Elec. Coop. v. Wold Prop., Inc.**, 253 N.W.2d 323, 326 (N.D. 1977).

On appeal, the North Dakota Supreme Court will review the decision of the Commission, and not the decision of this Court. **See Matter of Boschee**, 347 N.W.2d 331, 334 (N.D. 1984). The Supreme Court is required to affirm the decision of the Commission unless any of the factors under N.D.C.C. § 28-32-46 are met. **Leno v. North Dakota Dep't of Transp.**, 2008 ND 10, ¶ 6, 743 N.W.2d 794, 796. Specifically, section 28-32-46 provides:

A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

N.D.C.C. § 28-32-46. Under the Administrative Agencies Practice Act, the record constitutes the entire basis for the administrative action and the Court may only look to the record to make its determination. **See *Bland v. Comm'n on Med. Competency***, 557 N.W.2d 379, 383-84 (N.D. 1996). The Supreme Court does not make independent findings or substitute its judgment for that of the agency; instead it decides "only whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence in the entire record." ***Martin v. Stutsman Co. Soc. Services***, 2005 ND 117, ¶ 8, 698 N.W.2d 278, 281 (citations omitted).

Based on my preliminary review of the file in this matter, I would conclude Keystone is likely to prevail in its appeal of the Commission's decision.

First, based on my preliminary review of the record, it would seem a reasoning mind could reasonably have determined that the findings are supported by the weight of the evidence. The Commission made one hundred twenty-five (125) detailed findings of fact regarding the location of, the environmental impacts of, and the construction of the pipeline along the proposed Keystone Pipeline route. Specifically, the Commission addressed: (1) pipeline integrity; (2) exclusion and avoidance areas; (3) aquifers; (4) public water systems; (5) private water systems; (6) Lake Ashtabula/Sheyenne River area; (7) stream and river crossings; (8) trees and shrubs; (9) noxious weeds; (10) noise; (11) third-party inspector; and (12) other considerations. Jim Horner of the North Dakota Department of Health testified that the likely contamination to the Lake Ashtabula/Sheyenne River area, the public water supply, and private wells located further than five hundred (500) feet from the pipeline route would be minimal. Additionally, Heidi Tillquist, a risk assessment specialist for ENSR, testified that the extent of contamination to aquifers and the Lake Ashtabula/Sheyenne River area would likely be small. The North Dakota Game and Fish Department, in a letter dated May 4, 2006, believed the Keystone Pipeline route would have no significant effect on wildlife or wildlife habitats.

Second, it is likely the Court will conclude the conclusions of law are supported by the findings of fact. The Commission made eight (8) conclusions of law based on the findings. In its conclusions, the Commission determined that the location, construction, and operation of the pipeline along the proposed route would produce minimal adverse human and environmental impact. In response, the Dakota Resource Council argues that the conclusions fail to support the findings:

[T]he Commission's findings of fact do not support a conclusion that

alternatives were adequately examined or considered, that the safest available route was identified and approved, that the full range of impacts to private wells and other water resources were adequately identified or taken into account, or that environmentally sensitive avoidance areas were properly identified and found to be necessary to the approved route.

However, the Dakota Resource Council misunderstands North Dakota statutory law. No North Dakota statute requires the Commission to accept only the safest available route. Instead, N.D.C.C. § 49-22-02 mandates only that the sites and routes of transmission facilities be chosen to minimize adverse human and environmental impact. As a result, the conclusions seem to support the testimony of Jim Horner and Heidi Tillquist.

Third, the order appears to have been issued in accordance with North Dakota statutory law. The Commission provided Keystone with thirty-four (34) ordering provisions regarding the construction of the pipeline route; restoration of disturbed property, roads, and trees and shrubs; preparation of an emergency response plan and management program; and mitigation plans for discovery of historic, cultural, paleontological, or archeological resources. Section 49-22-02 provides that sites and routes for transmission facilities "shall be chosen which minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion." N.D.C.C. § 49-22-02. The siting of the pipeline route is supported by statements given from Heidi Tillquist, Jim Horner, and the North Dakota Game and Fish Department.

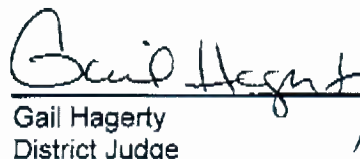
Additionally, under § 49-22-09, the Commission considered various factors in

evaluating the location of the siting, including alternatives to the proposed site; adverse direct and indirect environmental effects; irreversible and irretrievable commitments of natural resources; and the effect of the route on scenic areas, historic sites and structures, and paleontological or archaeological sites. Keystone likely showed that there are no alternatives to siting within the Sheyenne River avoidance areas because the proposed alternative would have resulted in the pipeline passing through more aquifers and wetland areas.

Based on my preliminary review of the record, it is likely I will find the findings of fact are supported by a preponderance of the evidence, the conclusions of law are supported by the findings, and the order is in accordance with statutory law. Because the Dakota Resource Council has failed to satisfy the four factors under **Cass County Elec. Coop.**, the motion to stay pending appeal is denied.

Dated May 14<sup>5</sup>, 2008.

BY THE COURT:

  
Gail Hagerty  
District Judge