

Memorandum

To: Commissioners

From: Justin Kraske

Date: February 1, 2010

Re: Montana Public Service Commission jurisdiction over the Keystone XL Pipeline

Background:

The proposed Keystone XL Pipeline is a 2,000 mile, 36 inch crude oil pipeline from Hardisty, Alberta to Port Arthur and Houston, Texas. The pipeline is being developed by TransCanada which develops and operates natural gas pipelines, power generation, gas storage facilities, and projects related to oil pipelines throughout North America. The planned pipeline route will cross 282.3 miles of Montana. This includes 42.6 miles of Federal BLM land, 19.1 miles of Montana DNRC land, and 220.6 miles of private land. Siting of the Keystone XL Pipeline is currently being conducted in Montana by the Montana Department of Environmental Quality. The estimated cost of the pipeline segment from Montana to Nebraska is \$3.2 billion dollars.

Legal Analysis:

1. Does the Keystone XL Pipeline meet the definition of a common carrier under § 69-13-101, MCA?

A common carrier in Montana is defined in Section 69-13-101(1), MCA, which provides:

A person, firm, corporation, limited partnership, joint-stock association, or association is a common carrier if it engages in:

(a) owning, operating, or managing any pipeline or any part of any pipeline within the state for the transportation of crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels to or for the public for hire or engaging in the business of transporting crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels by pipelines;

(b) owning, operating, or managing any pipeline or any part of any pipeline for the transportation of crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels to or for the public for hire when the pipeline is constructed or maintained upon, along, over, or under any public road or highway;

(c) owning, operating, or managing any pipeline or any part of any pipeline for

transportation to or for the public for hire of crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels when the pipeline is or may be constructed, operated, or maintained across, upon, along, over, or under the right-of-way of any railroad, corporation, or other common carrier required by law to transport crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels as a common carrier;

(d) owning, operating, or managing or participating in ownership, operation, or management, under lease, contract of purchase, agreement to buy or sell, or other agreement or arrangement of any kind whatsoever, any pipeline or any part of any pipeline for the transportation from any oil field, coal mine or field, or place of production within this state to any distributing, refining, or marketing center or reshipping point within this state of crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels bought from others; or

(e) made a common carrier by or under the terms of contract with or in pursuance of the law of the United States.

TransCanada, a corporation, will be owning, operating, and managing a part of the Keystone XL Pipeline in Montana and engaging in the business of transporting crude petroleum by pipeline. The interstate pipeline will run from the Canadian border down to Texas, with a section of the pipeline located in Montana. TransCanada will be constructing and maintaining the Keystone XL Pipeline along and under public roads and highways in Montana. The pipeline will cross Interstate Highway 94, US Highways 2 and 12, Montana Highways 24, 117, 13, 200, 200S, and 7. It would run parallel to Montana State Highways 24 and 200S for several miles each. The pipeline would therefore use the State of Montana right-of-way for portions of the route. This requires approval of the Montana Department of Transportation.

There are two limitations to these common carrier provisions, but neither of these limitations apply here. Section 69-13-101(2), MCA, provides that:

The provisions of this chapter do not apply to:

(a) pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of any common carrier; or

(b) any property of a common carrier that is not a part of or necessarily incident to its pipeline transportation system.

A business may not be using a pipeline as defined in § 69-13-101(1), MCA to transport crude petroleum unless that pipeline is a common carrier within the purview of this chapter and subject to the jurisdiction conferred upon the Montana Public Service Commission (PSC). § 69-13-102 (1), MCA. In Montana, a pipeline company may acquire the right to construct pipelines over any public road or highway by filing with the PSC and accepting the provisions of the common carrier statutes. § 69-13-103 (2), MCA. If a pipeline company does not agree to become a common carrier pipeline it does not acquire the right to construct pipelines across or along public roads in Montana.

Section 69-13-101(2), MCA, provides that:

(2) Any person, firm, limited partnership, joint-stock association, or corporation may acquire the right to construct pipelines and such incidental telephone and telegraph lines along, across, or over any public road or highway in this state by filing with the commission an acceptance of the provisions of this law, expressly agreeing in writing that in consideration of the right so acquired, it shall be and become a common carrier pipeline, subject to the duties and obligations conferred or imposed in this chapter. In the exercise of the privileges herein conferred, such pipelines shall compensate the county for any damage done to such public road in the laying of pipelines or telegraph or telephone lines along or across the same. Nothing herein shall be construed to grant any pipeline company the right to use any public street or alley in any incorporated city or town except by express permission from the city or governing authority thereof.

In Montana, the PSC currently regulates intrastate rates on the interstate Yellowstone Pipeline. A neighboring state has previously determined that another TransCanada interstate pipeline is a common carrier under state law. The North Dakota Public Service Commission determined in Case No. PU-07-152, that the original Keystone interstate pipeline was a common carrier in North Dakota and subject to the Public Service Commission's regulation as a common carrier. North Dakota has similar statutes regarding common carriers and their obligations. North Dakota Century Code § 49-19-101.

Based upon the above analysis, I determine that the Keystone XL Pipeline is a common carrier pipeline as defined by Montana law.

2. Is the Montana Public Service Commission pre-empted by federal law from regulating the Keystone XL Pipeline as a common carrier under § 69-13-101, MCA?

Federal regulation of interstate oil pipelines was initiated under the Hepburn Act of 1906 (Act). This Act brought oil pipelines under the Interstate Commerce Act of 1887 (ICA) which originally applied only to railroads. The Act made interstate oil pipelines common carriers subject to rate regulation by the Interstate Commerce Commission. The ICA applies to the transportation of oil and oil products from one state to any other state and from a foreign country to any place in the United States. The ICA leaves unregulated the construction and abandonment of oil pipelines, sales and leases, securities transactions, and provision of non-transportation services.

The responsibility for regulating oil pipeline rates was vested in the ICC until 1977, when the Department of Energy Organization Act was enacted. That Act transferred jurisdiction over oil pipeline regulation from the ICC to the new Department of Energy and the Federal Power Commission, the predecessor of the Federal Energy Regulatory Commission (FERC). 49 U.S.C. Sections 7155, 7172(b). The FERC now regulates oil pipelines rates and tariffs. Under the Code of Federal Regulations Title 18, FERC's jurisdiction over oil pipelines is limited primarily to interstate pipeline rates. Under Title 18, common carrier pipelines are required to file an annual report with FERC. The FERC does not have jurisdiction over oil pipeline entry, construction, commencement of new services, or abandonment. *Farmers Union Central Exchange v. FERC*, 584 F.2d 408 (D.C. Cir. 1979); *Arco Alaska v. FERC*, 89 F.3d 878 (D.C.Cir. 1996). Oil

pipelines have a unique regulatory model with a sharing of federal and state jurisdiction. “There are numerous references to State regulatory jurisdiction over various aspects over oil pipeline transportation. For example, the common carrier requirement subjects them to whatever regulation exists by federal or state statute with respect to common carriers and that the owners and operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline.” 7 FERC P 63049, 65228, 1979 WL 20738. Federal law does not preclude states from regulating common carriers pursuant to state law.

Eminent Domain

Congress has on several occasions delegated its power of eminent domain to entities outside of the federal government. These delegations have primarily been to Amtrak, hydroelectric facilities, interstate highways, and entities involved in the movement of electricity, gas, and petroleum. The Cole Act of 1941 granted eminent domain to pipeline companies building interstate petroleum pipelines determined by the president to be necessary for the national defense. However, that authority expired on June 30, 1946 and federal eminent domain for oil pipelines no longer exists. Unlike natural gas pipelines, oil pipelines lack the federal eminent domain authority and federal preemptive rights that accompany the FERC natural gas certificate process. Therefore eminent domain for oil pipelines "is subject to a patchwork quilt of differing state laws." *Growing Pains*, *Energy Law Journal*, Vol. 28:43. In July of 2009, the Illinois Commerce Commission denied Enbridge, a Canada pipeline developer, authorization to use eminent domain for the construction of an interstate oil pipeline.

In Montana, eminent domain is defined as the right of the state to take private property for public use. § 70-30-101, MCA. A common carrier pipeline is one of the permissible public uses under § 70-30-102 (20), MCA. The state is authorized to allow other private parties to acquire title to property for public use under § 70-1-205, MCA. In Montana an oil pipeline is only granted eminent domain through the common carrier provisions under § 69-13-101, MCA. Every person, firm, corporation, limited partnership, joint-stock association, or association of any kind mentioned in this chapter that has filed with the commission its acceptance of the provisions of this chapter has the power of eminent domain. § 69-13-104, MCA. To use the power of eminent domain in Montana, the Keystone XL Pipeline will need to be classified as common carrier pipeline by the PSC. The PSC is not pre-empted by federal law from regulating the Keystone XL Pipeline as a common carrier.

3. Can the Montana Public Service Commission impose requirements on the operator of a proposed oil pipeline as a common carrier?

Section 69-13-302, MCA, provides that:

(1) Each common carrier shall exchange crude petroleum tonnage, coal tonnage, petroleum or coal products tonnage, or carbon dioxide volume with each similar common carrier. The commission may require connections and facilities for the interchange of the tonnage and volume to be made at every locality reached by both pipelines whenever a necessity for the connections and facilities exists, subject to rates and regulations that may be made by the commission. Any common carrier under similar rules must be

required to install and maintain facilities for the receipt and delivery of crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels of patrons at all points on the pipeline.

(2) A carrier may not be required to receive or transport any crude petroleum, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels except as may be marketable under rules prescribed by the commission. The commission shall make rules for the ascertainment of the amount of water and other foreign matter in crude oil, coal, the products of crude petroleum or coal, or carbon dioxide produced in the combustion or gasification of fossil fuels tendered for transportation, for deduction for water and foreign matter, and for the amount of deduction to be made for temperature, leakage, and evaporation.

(3) The particular powers delegated to the commission in this section may not be construed to limit the general powers conferred by this chapter.

If a pipeline is considered a common carrier in Montana, the PSC may require connections and facilities for the interchange of oil whenever a necessity for the connections and facilities exist, subject to PSC rates and regulations. A common carrier must provide transportation service on a non-discriminatory basis.