STATE OF SOUTH DAKOTA	**)**	**IN THE CIRCUIT COURT**
	) ss.	
COUNTY OF HUGHES	**)**	**SIXTH JUDICIAL CIRCUIT**

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	)	Case No. 32CIV16-33 **JOINT MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE**

In support of their Joint Motion for Leave to Present Additional Evidence and for a Stay of Proceedings, Appellants Dakota Rural Action, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Intertribal Council on Utility Policy, Joyce Braun, Dallas Gold Tooth, Paul Seamans, Terry and Cheri Frisch, Bruce Boettcher, Arthur Tanderup, Elizabeth Lone Eagle, Chastity S. Jewett, John Harter, Wrexie Lainson Bardaglio, and Gary Dorr (collectively, the "**Appellants**") present the following memorandum of law.

Introduction

The Appellants have sought leave of this Court and moved for an Order, pursuant to SDCL §1-26-34, to remand this appeal to the South Dakota Public Utilities Commission ("**PUC**") with instructions to permit Appellants (i) an opportunity to discover documents pertaining to the unfolding investigation and mitigation of an approximate 400-barrel spill of hazardous liquids from the Keystone Pipeline near Freeman, South Dakota, which was reported on April 2, 2016 (the "**Freeman Spill**"), (ii) to present additional evidence in the above-

captioned proceeding before the PUC, and to permit the PUC to analyze the new and additional evidence in light of the existing record to determine whether such additional evidence requires a modification of Final Decision and Order Finding Certification Valid and Accepting Certification (the "**Order**") entered by the PUC on January 21, 2016.

Appellants have also moved for a stay of these judicial proceedings pending further action on remand to the PUC. Due to the recent denial of the Presidential Permit[1], TransCanada's withdrawal of its permit application before the Nebraska Public Service Commission, and the fact that TransCanada has not yet submitted for approval any new application for a permit from either the United States government or the State of Nebraska (a permitting process that has previously taken several years to work through), TransCanada would not be prejudiced by granting a stay of these proceedings pending remand to the PUC to consider new and additional evidence showing that TransCanada continues its practice of non-compliance with respect to regulatory agency safety regulations and conditions or specifications, as is required by conditions of the Original Permit[2].

Standard for Decision

SDCL §1-26-34 authorizes the Circuit Court, prior to the conducting of a hearing on the merits of an administrative appeal[3] or disposition by the Court[4], to temporarily remand the matter to the administrative agency to take additional evidence. Remand can occur upon motion or

[1] Denial of the Presidential Permit for construction of the proposed Keystone XL Pipeline has been discussed extensively in various briefs filed by the Appellants.

[2] PUC's Amended Final Decision and Order of June 29, 2010 (hereinafter, the "**Original Permit**").

[3] *Vilhauer v. Dixie Bake Shop*, 453 NW2d 842 (S.D. 1990). There is no time limit on the application for additional evidence other than that it be made before the scheduled date of the hearing (*citing*, *State Div. of Human Rights v. Miller*, 349 NW2d 42 (S.D. 1984)).

application of a party[5] and a finding by the Court that the motion shows the "materiality" of the proposed additional evidence and the "good reasons" why it was not presented at the time of the hearing. *See e.g., Lee v. SD Board of Pardons and Paroles*, 2005 S.D. 103, ¶¶10, 13; *Cavender v. Bodily, Inc*., 1996 S.D. 74, ¶25, 550 N.W.2d 85 (citations omitted).

Whether to remand an administrative appeal to the agency for admission and review of additional evidence is within the discretion of the Circuit Court. *Vilhauer v. Dixie Bake Shop*, *supra*, at 84. The showing required for a remand to present additional evidence of materiality, and good reason for a prior failure to present evidence, requires more than mere conclusory statements. It requires an offer of proof. *Beville v. Univ. of South Dakota*, 420 N.W.2d 9, 13 (S.D. 1988).

In this case, Appellants could not have presented the additional evidence at the time of the hearing before the PUC, or even before issuance of the Order by the PUC, because the Freeman Spill occurred subsequent to the filing of this appeal. Federal and State agencies are still investigating the nature, cause and extent of the Freeman Spill, and as of this date have issued only preliminary reports.

Materiality is shown by the relevance of the proposed evidence to the issues before the administrative agency, and not as to any new issue. *Vilhauer v. Dixie Bake Shop*, *supra*, at 84. In *Vilhauer*, the issue involved the level of disability and related compensation to be paid a permanently injured person in a workers' compensation case. The Supreme Court affirmed the Circuit Court's remand to the agency upon plaintiff's proffered new evidence, which consisted of

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[4] *Day v. J. Morrell & Co.*, 490 N.W.2d 720 (S.D. 1992).

[5] "[F]ailure to ask the court's permission to present additional evidence precludes our consideration of the matter". *Lee v. SD Board of Pardons and Paroles*, 2005 S.D. 103, ¶13, 705 N.W.2d 609 (S.D. 2005).

recent recognition by the Mayo Clinic and a local physician of the plaintiff's increased psychological problems. The Court found such evidence "material" to the plaintiff's condition "as a result of the injury, not any new injury." *Id*.

In this case, Appellants seek to remand this matter to the PUC to hear and consider still-developing evidence of the recent, post-Order Freeman Spill. The Appellants' Motion is necessitated by and premised upon the April 9, 2016 Corrective Action Order ("**CAO**") and attachment issued by the U.S. Pipeline and Hazardous Materials Safety Administration ("**PHMSA**") to TransCanada regarding the Freeman Spill. A copy of the CAO is attached hereto as **Exhibit A**.

Appellants submit that such evidence, and evidence sought to be obtained related to the Freeman Spill, will not raise new issues, but will provide new, additional, and material evidence concerning matters that were before and decided upon by the PUC in relation to the Order. Appellants have further requested that upon remand, discovery be permitted, albeit limited to acquiring all documents and other evidence available from TransCanada and the PUC staff, pertaining to the nature, cause(s), mitigation, and prognosis of environmental damage associated with the Freeman Spill. Appellants contend that the new and additional evidence possessed and being developed is relevant and material as part TransCanada's history and continuing pattern and practice[6] of non-compliance with PHMSA hazardous pipeline construction and operational requirements, permit conditions, and specifications in the record. Evidence related to potentially new such failures of compliance, would be material evidence contrary to TransCanada being able

[6] *See*, SDCL §19-19-406, which states: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

to meet its burden of proof that it "continues to meet the conditions upon which the permit was issued," as is required under SDCL §49-41B-27.

The currently-known and possessed new and additional evidence regarding the Freeman Spill, attached hereto as exhibits and submitted as part of Appellants' offer of proof, include PHMSA documents obtained via the federal Freedom of Information Act. Appellants' proffer further consists of affidavits and photographs from eye-witnesses to part of TransCanada's response to the Freeman Spill.

The *Vilhauer* court, in affirming a Circuit Court's remand to the administrative agency, additionally found that a remand movant "merely" has to show that "good reasons" existed for plaintiff's failure to present the new diagnoses and which "also included a new determination by the Social Security Administration concluding that Vilhauer was totally disabled," which therefore was "evidence developed after the conclusion of the 1983 hearing." *Id*.

As detailed and more fully explained in this Memorandum of Law, the additional evidence Appellants wish to present, including pending TransCanada, DENR and PHMSA reports on the Freeman Spill, is both material to the lawfulness and propriety of the PUC's Order certifying TransCanada's continued compliance with the conditions of the Original Permit, which is the subject of this appeal, and consists of evidence that was unavailable to present to the PUC prior its Order issued on January 21, 2016.

Argument

1. **TransCanada Reports and PHMSA Analysis and Findings Regarding Freeman Spill are Previously Unavailable Material Evidence of Continued Inability to Comply with Federal Regulations and Permit Conditions, Contrary to Continuing Compliance with PUC Original Permit Conditions 1 and 31.**

Attached to the proffered PHMSA CAO, was a March 24, 2010, PHMSA Advisory Bulletin in the Code of Federal Regulations (CFR) for recently constructed large diameter hazardous pipeline owners and operators "of potential for girth weld failures due to welding quality issues." Federal Register, Vol. 75, No. 56, March 24, 2010, p. 14243 (attached to CAO), CPF No.3-2016-5002H, attached hereto as **Exhibit A**.

PHMSA noted that it reviewed several recent projects constructed in 2008 and 2009, indicating that metallurgical testing results failed girth welds in pipe wall thickness transitions have found pipe segments with line pipe weld misalignment, improper bevel and wall thickness transitions, and other improper welding practices that occurred during construction. *Id*.

It should be noted that in its 2010 Advisory, PHMSA specifically instructed owners and operators: "To Ensure the integrity of the pipeline, field personnel that weld line pipe, fittings, bends and other appurtenances must be qualified, follow qualified procedures..." Operators were to "verify" that field practices conformed to regulatory requirements. Federal Register, *supra*, p. 14244-14245. The PHMSA advisory noted incidents additionally involving "in-service leaks" and found that many of the integrity issues which arose involved transition girth welds on pipelines "being constructed in hilly terrain and high stress concentration locations such as at crossings, streams, and sloping hillsides with unstable soils." *Id*., at p. 14244.

At the evidentiary hearing, the PUC heard evidence from a number of witnesses and examined maps showing that the proposed KXL Pipeline would cross numerous streams and rivers, and that a significant number of pipeline segments would traverse highly unstable areas prone to landslides. *See*, Dakota Rural Action's Appellant's Brief, pp. 13-14. Rather than accepting TransCanada's platitudes as a self-professed leader with respect to pipeline safety, the

PUC hearing record of TransCanada's construction and inspection practices could make the company a poster-child for continued failure to comply with regulations and permit conditions. The Freeman Spill provides previously unavailable, additional, and material evidence directly relating to issues raised before the PUC.

The PHMSA CFR Advisory instructed owners and operators of hazardous liquid pipelines, such as TransCanada, some six years ago, to "evaluate these lines for potential girth weld failures" and to conduct "engineering reviews as necessary." *Id.*[7] Before the PUC, as discussed below, PHMSA findings of regulatory and permit condition violations by TransCanada involving welding anomalies were raised and explored to the extent permitted. However, neither TransCanada nor PUC staff witnesses made any reference to PHMSA's instructions to companies like TransCanada to conduct safety inspections and review. Nor was there disclosure of potential girth weld failures being found by inspections or other studies, and corrected on the Keystone Pipeline segment near Freeman, South Dakota, or for that matter, the majority of the Keystone Pipeline system TransCanada wants to construct and connect to after traversing South Dakota.

Some six years after construction, the Freeman Spill was initially reported to the National Response Center ("**NRC**"). *See*, **Exhibit A**. The Freeman Spill was not discovered by TransCanada's detection system. Instead, it was found by a local landowner who happened to pass by a field containing the pipeline and observed oil-like seepage from the ground near the adjacent road. He contacted TransCanada's "One-Call Center." *See*, **Exhibit A**, "Purpose and Background," p.2. This leak was initially determined to have occurred in a "rural agricultural

[7] On remand, limited discovery requiring TransCanada to produce any engineering studies or, conversely, documents pertaining to decisions to not conduct studies for any segment

area alongside County Road 437, about 35 miles southwest of Sioux Falls. *See*, **Exhibit A**, "Preliminary Findings", p. 3.

TransCanada initiated a shutdown of the entire Keystone pipeline shortly after receiving notification of the Freeman Spill. **Exhibit A**, *supra*, pp. 2-3. At this time, it is unknown how long it took to complete the shut-down process, or how much hazardous material leaked from the pipeline in the interim. What is reported is that less than three hours after learning of the Freeman Spill, TransCanada reported that the volume released into the environment was estimated to be "4.5 barrel[s] (187 gallon[s])." *Id.* Following excavation of the farmland contaminated by the Freeman Spill, TransCanada significantly increased this estimate to approximately "400 barrels" or some "16,800 gallons". *Id.*

On April 7, 2016, excavation of the pipeline revealed a "small weld anomaly at the 6:00 position on a girth weld." *Id*. A temporary "leak repair clamp" was installed, pending repair of the "failed girth weld." **Exhibit A**, "Preliminary Findings", p. 4. "The cause" of the weld anomaly "is still under investigation and unknown at this time." *Supra*, p. 3. "It is not known how long the pipeline had been leaking." *Id*.

PHMSA preliminarily found that the weld anomaly resulting in this spill may have violated federal regulations and permit conditions. It noted that under the special PHMSA conditions the Keystone Pipeline was to be constructed and operated, TransCanada was required "to provide a level of safety equal to, or greater than, the regulations in effect at the time," which required it "to more closely inspect and monitor" its system.[8] *See*, **Exhibit A**, "Preliminary

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of the Keystone I Pipeline, will be necessary and appropriate.

[8] "Keystone will use a series of complimentary and overlapping SCADA-based leak detection systems and methods … including … (iv) computer-based, non-real-time, accumulated gain/(loss) volume trending to assist in identifying low rate or seepage releases …" Finding of

Findings", p. 4. After this spill, TransCanada has been ordered by PHMSA to conduct additional patrolling of the "Affected Segment," at least through removal of the temporary "leak repair clamp" and removal of the failed girth weld. *Id*.

Nevertheless, perhaps reflective of the low bar set by PHMSA to safeguard the interests of the South Dakota people, their property, and the environment, TransCanada was permitted to re-start Keystone operations on or about April 8, 2016. PHMSA simply required TransCanada to submit a Return-to-Service Plan, which was apparently submitted and approved since operations were permitted, including the plan "for repairing the leaking weld by installing a leak repair claim on the pipeline." *See*, **Exhibit A**, "2. Required Corrective Actions: Return-to-Service Plan", p. 4.

One day after TransCanada re-started Keystone operations, PHMSA sent the CAO to TransCanada, upon a finding that "continued operation...of Keystone Mainline #2" in the area of the leak, "is or would be hazardous to life, property, and the environment without immediate corrective actions," designed "to protect the public, property, and the environment" from the leak's impacts. *See*, **Exhibit A**, Cover Letter; "Preliminary Findings," p. 2. The CAO was issued pursuant to federal statute, 49 U.S.C. §60112. It requires such actions and protections be immediately undertaken due to protect the public, property, and environment "from potential hazards associated with a release from its 30 inch" pipeline. **Exhibit A**, "Preliminary Findings," p. 2.

A. TransCanada Spill Reports Due Within 90 Days of the PHMSA CAO.

Fact 94, Final Decision and Order, HP 09-001.

The PHMSA CAO ordered TransCanada to "develop and submit" to the Director of PHMSA for approval, "a plan to remove the failed pipeline girth weld and complete an independent third-party mechanical and metallurgical failure analysis of the weld," within 90 days (or until on or about July 9, 2016)[9]. **Exhibit A**, "Required Corrective Actions: "3. Testing of Failed Pipeline Section," p. 4. The plan is to be "detailed." *Id*. Perhaps reflecting PHMSA concerns due to TransCanada's history of safety violations during construction and involving inspection practices, TransCanada's plan must include chain of custody of all physical evidence, testing protocol(s), and the name of the lab TransCanada proposes to conduct tests on the failed girth weld. PHMSA also wants at least one of its inspectors to be present during and witness any testing done, with draft and final reports ("including all media" reports) created from the test analysis to be disclosed to PHMSA's Director at the same time as to TransCanada. **Exhibit A**, "Required Corrective Actions: 3(A)-(E). Testing of Failed Pipeline Section", p. 4-5.

TransCanada was similarly ordered, within 90 days, to submit to the PHMSA Director a completed "root cause failure analysis (RCFA)" to "document the decision-making process and all factors contributing to the failure." **Exhibit A**, "Required Corrective Actions: "5. Root Cause Failure Analysis," p. 5. In seeming conflict with TransCanada's hearing evidence, and the PUC's findings relating to TransCanada's compliance with PHMSA and PUC safety conditions and regulations, TransCanada was also ordered to submit a plan to "improve the leak detection capability" of the affected segment of the Keystone pipeline. Suggesting continued design, construction, monitoring, detection, and operational deficiencies and potential PHMSA and PUC permit conditions and regulation violations to date, PHMSA further ordered that the plan include

[9] The April 9, 2016 Cover Letter indicates the CAO was transmitted to TransCanada on that date via facsimile.

"additional instrumentation, updated hardware or software, installation of a computational pipeline monitoring system and associated software, additional surveillance, pipeline control staffing, ongoing leak surveys and other appropriate measures." **Exhibit A**, "Required Corrective Actions: 6. Leak Detection Plan," p. 5.

Finally, the CAO required that on or about July 9, 2016, TransCanada was to "review and assess the effectiveness of its emergency response plan with regards to the failure," including "on-scene response and support, coordination, and communication with emergency responders and public officials." **Exhibit A**, "Required Corrective Actions: 7. Emergency Response Plan and Training Review," p. 5-6. Among other things, these issues directly relate to TransCanada's ability to comply with Conditions 1 and 7 of the Original Permit.

B. TransCanada Integrity Verification and Remedial Work Plan Due within 120 days of the PHMSA CAO.

PHMSA's CAO also ordered that within 120 days (on or about August 9, 2016), that TransCanada submit an Integrity Verification and Remedial Work Plan for approval. The Plan is to provide for verification of the integrity of the entire Affected Segment and "must address all factors known or suspected in the leak." **Exhibit A**, "Required Corrective Actions: 4. Integrity Verification and Remedial Work Plan", p. 5. Appellants submit that the reports PHMSA ordered TransCanada to submit by July and August of this year regarding the Freeman Spill, together with the PHMSA analysis reports thereof, should be disclosed to Appellants and analyzed by the PUC after discovery and presentation of additional evidence. This report and PHMSA's analysis thereof will be relevant to Conditions 1 and 2 of the Original Permit.

C. Quarterly Reports Required of TransCanada

The PHMSA CAO also instructed TransCanada to submit quarterly reports, together with "all available data and results of testing and evaluations required by this Order," along with a description of the "progress of the repairs or other remedial action." **Exhibit A**, "Required Corrective Actions: 10. Quarterly Reports", p. 6. The Appellants submit that the contents of TransCanada's response to these instructions in the various reviews and reports ordered to be prepared and submitted, together with PHMSA's analysis, will be relevant and material to evidence in the record, and will provide new, additional evidence of TransCanada's continued failure to comply with PHMSA conditions and regulations, as required by Condition Nos. 1 and 31 of the Original Permit. Appellants also contend further additional and relevant evidence appears to be forthcoming, based upon recent reports of sections of the Keystone pipeline being excavated because they were found not to meet federal strength standards and "could potentially deform under stress causing a leak."[10]

Appellants contend that evidence regarding the Freeman Spill, and apparent further violations of PHMSA regulations by TransCanada which threatened the integrity and therefore safety of the Keystone Pipeline, would be new and additional evidence further negating TransCanada's contentions and the PUC's findings of continued compliance with PHMSA regulations and the conditions of the Original Permit. Such proof would constitute additional evidence of a general pattern of non-compliance by TransCanada with regulations and permit conditions. Such violations would demonstrate non-compliance with Original Permit conditions 1 and 31, which require compliance with all applicable laws and regulations.

[10] Lincoln Journal Star, "*TransCanada to replace sections of Keystone*", May 14, 2016. http://journalstar.com/news/state-and-regional/nebraska/transcanada-to-replace-sections-of-keystone/article_4974f746-aef0-5078-8a82-dbe1920e932c.html

2. The New and Additional Evidence is Relevant and Material to the History of PHMSA Violations Involving Pipeline Integrity and Welding Deficiencies in the Record Before the PUC.

As discussed above, to properly obtain recertification of its construction permit from the PUC, TransCanada had to show, and the PUC determined, that it had continued to comply with the Amended Conditions in the original permit. *See*, Order. Condition 1 of the Original Permit requires TransCanada to "comply with all applicable laws and regulations." Condition 2 requires TransCanada to comply with PHMSA permit conditions.[11] Appellants contend, as they did below, that TransCanada's history of non-compliance in its hazardous pipeline operations is material to whether the PUC correctly found that TransCanada presented substantive evidence of compliance with such applicable laws, regulations and permit conditions based upon essentially nothing more than its promise to do so.

A. TransCanada's Bison Pipeline Project.

TransCanada's Bison Project was a gas pipeline connecting to extraction operations near Dickenson, North Dakota (EH:2273)[12]. During the evidentiary hearing, the PUC admitted Dakota Rural Action ("**DRA**") Exhibit 66, which was a March 2011 Warning Letter from PHMSA advising TransCanada of violations of safety regulations and permit conditions relating to the Bison Project, particularly including girth welds.[13] The warning followed a PHMSA inspection of the project. *See*, March 21, 2011, PHMSA Warning Letter to Vern Meier,

[11] "The Keystone pipeline will be designed, constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195 ..." Finding of Fact 90, Final Decision and Order, HP 09-001.

[12] References to "EH" refer to the transcript of the Evidentiary Hearing before the PUC, which is part of the record on appeal in these proceedings.

[13] Girth welds "are the field welds that are made to the pipes to join them together."

TransCanada's Vice President for US Pipeline Operations, attached hereto as **Exhibit B**. A TransCanada witness, Dan King, acknowledged the issuance of the warning letter from PHMSA (EH:2290). King testified that had the inspection system found the defects prior to operation, the cost of repair would have been around $100,000, as opposed to the cost for damages occurring which was in the millions (EH:2275).

The warning provided evidence that PHMSA inspectors found that TransCanada's hazardous materials construction operations "need[ed] improvements in the quality assurance plane, including personnel qualification." **Exhibit B**, p. 1. PHMSA found that prior to its inspection and findings of the construction of the Bison pipeline to that date, TransCanada failed to have a quality assurance plan which addressed "pipe inspection, ... welding, non-destructive examination of girth welds, applying and testing field applied coating ... and hydrostatic testing," whereby it "committed probable violation" of 49 CFR §192.328(a)(1) ("Quality assurance"). **Exhibit B**, p. 2.

Despite TransCanada becoming "aware" of PHMSA establishing regulatory standards for "holiday detection of coatings" during construction, the company "continued to perform holiday detection at lower than recommended voltages" for months.[14] **Exhibit B**, p. 3. (*See*, related testimony of TransCanada whistle-blower Evan Vokes at EH:1617-1625). Vokes worked on the Bison Project (EH:1583). The Bison Pipeline eventually exploded (EH:1626, 1628). TransCanada's engineering supervisor King could not explain why the defects in the pipeline were not found prior to start of operation (EH:2329-2330). The Court is asked to note that Condition 66 of the Original Permit, requires TransCanada to examine "all pipe welds "around

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EH:1194.

[14] Holiday detection is "a process that's used during the construction to validate the

100 percent off their circumferences using ultrasonic or radiographic inspection." The pending analysis reports of the cause of the failed weld in the Freeman Spill will present further evidence of TransCanada's compliance with such inspection requirements in construction of its hazardous pipelines.

PHMSA specifically found that since TransCanada wanted to use a "alternative maximum allowable operating pressure," its construction and inspection practices "committed probable violation of" 49 CFR §192.328(a)(2). Of particular relevance to the Appellant's Motion to Remand, PHMSA found the "probable violation" included TransCanada's failure to comply with 49 CFR §192.328(a)(2)(ii) which required that workers who applied and tested field coating to girth welds, had "the knowledge, skills, and ability to assure effective coating application." **Exhibit B**, p. 2. There was a similar "probable violation" of 49 CFR §192.807 regarding record keeping of the qualifications of workers and records obtained from TransCanada showed "there were discrepancies between those individuals who may have performed covered tasks to those individuals qualified to perform covered tasks." **Exhibit B**, p. 3.

While defects were allegedly remedied prior to the pipeline becoming operational (**Exhibit B**, p. 1), the evidence reflected a pattern and practice by TransCanada of casual non-compliance with safety regulations and permit conditions. It further tended to provide corroborative evidence of what TransCanada whistle-blower Vokes testified to observing as unsafe construction and inspection practices in violation of regulatory standards. *See*, DRA Appellant's Brief, pp. 17-18.

B. Gulf Coast Pipeline

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integrity of the coating prior to the pipeline being lowered in to the ditch." EH:1190.

Similar non-compliance with PHMSA safety regulations regarding critical welding construction protocols were found by PHMSA to still be occurring, this time involving a TransCanada heavy crude pipeline. During the evidentiary hearing before the PUC, Appellants attempted to introduce PHMSA documents marked as DRA Exhibit No. 69 (a PHMSA Evaluation Report of Liquid Pipeline Construction, finding systematic violations of welding-related regulations and permit conditions on what was originally the Gulf Coast segment of the Keystone Pipeline, attached hereto as **Exhibit C**) and DRA Exhibit No. 70 (a September 10, 2013 PHMSA Warning Letter to TransCanada, attached hereto as **Exhibit D**). *See*, EH:188, 288, 515. In hearing testimony, TransCanada whistleblower Evan Vokes noted that the non-destructive welding inspection contractor used by TransCanada on the Gulf Coast Pipeline had previously been discharged from service due to serious performance deficiencies (EH:1755-1759). This was corroborated by TransCanada's own witness, Daniel King (EH:2276).

Exhibits C and **D** were excluded by the PUC as an extreme sanction for the "late" disclosure to TransCanada of PHMSA documents that were actually provided by TransCanada itself in response to discovery requests made by the Appellants, with their exclusion based on the rationale that it was somehow unfair to TransCanada to let the company know that its own documents were going to be introduced as evidence three weeks in advance of the commencement of the evidentiary hearing before the PUC. Appellants have appealed the evidentiary exclusion rulings to this Court.

Despite the erroneous denial of the admission of **Exhibits C** and **D**, safety issues surrounding non-compliance with PHMSA regulations and conditions in the construction of the Gulf Coast Pipeline arose at the PUC hearing. TransCanada's President for the Keystone pipeline

system, Corey Goulet, testified that he was involved in the construction of that project (EH:198, 508). He further acknowledged that he was in charge of environmental compliance on the part of TransCanada (EH:611-612). He described his responsibilities as including ensuring that there were "proper personnel, processes and systems" in place (EH:508). Goulet stated that he was "accountable" for ensuring construction in compliance with TransCanada plans and agency regulations and conditions (EH:198, 508).

For purposes of this proffer, Appellants submit that as part of their showing of the relevancy and materiality of the new and additional evidence of the Freeman Spill, potentially resulting from a failed weld, remand is warranted in light of **Exhibits C** and **D**. Goulet testified he was aware of the two PHMSA Warning Letters, recalling that one was about welding and the other involved "coating" (EH:340, 344).

Exhibit C is the PHMSA Evaluation Report of Liquid Pipeline Construction regarding TransCanada's Gulf Coast pipeline, and which describes a PHMSA Warning Letter issued on September 26, 2013, finding, again, TransCanada's "non-compliance" with federal regulations designed to provide safe pipeline operation, in the construction of the Gulf Coast Pipeline.[15] Specifically, TransCanada violated PHMSA regulations when it "fail[ed] to perform welding on Spread 3 in accordance with a procedure qualified according to §5 of API 1104," welders performed "unqualified revisions to essential variables" of required welding procedures, failed "to properly qualify welders on Spread 3 in accordance with §6 of API 1104," and used welders to perform the revisions of the essential variables, for "which the welders were not qualified to perform." As to the last two failures to comply with requirements, and to the contrary, Goulet

[15] Goulet, to the contrary, testified: "PHMSA does not consider those to be, you know, compliance letters." EH:344.

testified: "We were using qualified and approved welding procedure" and that "all" of the welders "passed a welding qualification test." The "concern PHMSA had ... was ... that the welders did not have the skill to be able to perform that welding in a productive manner on a continuous basis."[16] *See*, EH:390.

Yet, as Goulet acknowledged: "we had a high incidence of weld failures" (EH:346). Of the 425 welds made on the Gulf Coast Pipeline segment that were in issue, 205 were defective and required repairs after the PHMSA inspection[17] (*see*, **Exhibit C**, p. 2, 5-8, and Appendix A: Construction Summary Report, p. 15). PHMSA also found there was a failure to properly inspect "all external pipe coating ... just prior to lowering the pipe into the ditch." *Id*., p. 8.

Proffered **Exhibit D** is a PHMSA Warning Letter to TransCanada dated September 10, 2013, generated "as a result of the inspection" by PHMSA which found violations of PHMSA construction regulations during construction of the Gulf Coast Pipeline segment. This Warning Letter stated that "TransCanada did not assure that its Keystone Pipeline was installed in the ditch in a manner that minimizes the possibility of damage to the pipe …", specifically referencing dents "that appear to be caused by secondary stresses on the pipe." **Exhibit D**, p. 1. Additionally, "[i]n reviewing the submitted anomaly reports and PHMSA inspections, it demonstrates that TransCanada is not following their Construction Specifications ... protecting

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[16] To the contrary, as the excluded Evaluation Report would resolve, PHMSA gave TransCanada "unsatisfactory" ratings for violations of PHMSA regulations requiring that: "Welding must be performed by qualified welders using qualified welding procedures;" "Welding procedures are qualified in accordance with §5 of API 1104;" "Welding procedures must be qualified by destructive testing;" "Each welding must be accorded in detail, ...;" "Welders must be qualified...;" "Welders may not weld with a particular welding process unless within the proceeding 6 calendar months, the welder has - (1) engaged in welding in that process and (2) had one weld tested and found acceptable under §9 of API 1104." *Id.*, p. 7 of 9.

[17] Goulet testified that the failure rate was "10% to 20%." EH:345. The PHMSA Construction Summary Report indicated the weld failure rate requiring repairs was 26.8% one

existing coating from damage due to welding," particularly "weld splatter." **Exhibit C**, p. 2; Appendix A, p. 17.

Remand would permit the PUC to reconsider its decision to deny admission of the proposed exhibits, especially in light of what appear to be similar weld issues with the Freeman Spill. Remand would afford consideration of these crucial issues in the context of new and developing evidence coming to light from the Freeman Spill.

The proffered new evidence, including the CAO, coupled with the 2010 PHMSA notice of weld-related defects, quality control and inspection issues, appears to raise post-hearing weld-related non-compliance with federal regulations, which appears to have played a role in the hazardous spill and environmental damage resulting from the Freeman Spill. Thus, additional evidence negating any ultimate finding by the PUC of TransCanada's alleged continued compliance with all laws and regulations, including PHMSA regulations, would warrant remand to the PUC. Additional evidence contained in the above-described reports for filings shortly due from TransCanada to PHMSA for analysis will be highly relevant to the issues raised before the PUC.

3. The Additional Evidence is Relevant and Material to the General History of PHMSA Violations by TransCanada, in that it Demonstrates a Continued Pattern and Practice of Regulatory and Permit Condition Non-Compliance.

In testimony before the PUC to obtain the Original Permit for the South Dakota segment of the Keystone Pipeline, TransCanada's chief engineer for the Keystone project, Meera Kothari, characterized a pipeline spill involving up to but "less than 20 gallons" as "serious." A leak involving 100 gallons was "critical." *See*, Written Testimony of Meera Kothari, HP 07-001,

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week, 32.0% the second week, 72.2% the third week, and 45% the fourth week. *Id.*, p. 15.

Ques. 19, p. 6. The threshold where a spill is "reportable" to the US Department of Transportation/PHMSA is where "5 barrels or 158 gallons" have leaked. *Id*., at p. 5.

At the PUC's evidentiary hearing in these proceedings, TransCanada's contracted "risk analyst" Heidi Tillquist agreed that TransCanada used a figure of 3 barrels for a typical spill in its analyses (EH:844). *See*, 2014 FSEIS, Appendix B, supra, 3.0, 13(b), p. 33. Tillquist opined that hazardous spills were expected to be few in size and number over the lifetime of the KXL's proposed lifetime (*see*, DRA Appellant's Brief, pp. 3-6). In seemingly clear conflict, TransCanada's Goulet [EH:355] and Kothari [EH:1195-1196] testified there were 14 spills during the Keystone pipeline's first year of operation, alone.

While the 14 spills did not involve failed welds, in each, agency investigations resulted in findings that TransCanada failed to comply with safety regulations and conditions. Goulet [EH:355] and Kothari [EH:1005, 1006] told the PUC that all 14 spills were "minor". Yet, one of the 14 hazardous crude spills was substantial. It was of the magnitude only repeated in the recent Freeman Spill.

TransCanada's witness King was familiar with the 2011 Ludden Pump Station spill of 400 barrels of tar sands crude (EH:2293-2294). Contrary to the PHMSA Accident Report (DRA Hearing Exhibit 172), King claimed there had been no land or water contaminated by the spill (EH:2294-2295). The PHMSA report indicated the Ludden spill contaminated an adjacent wetland, including both surface and subsurface (*see*, PHMSA Accident Report, DRA Exhibit 172, Part D). Significantly, during the PUC's evidentiary hearing, TransCanada's Kothari was unwilling guarantee that a 400 barrel or larger spill would not occur on the proposed KXL pipeline through South Dakota (EH:1198-1199). Indeed, some 8 months later, the Freeman Spill

occurred, releasing a similar amount of toxic tar sands crude into the environment.

With respect to the Ludden spill, according to King, the failure was caused by "a 3/4 inch threaded pipefitting that was ... not supported correctly, and broke off." (EH:2296). Goulet described it as "associated with small diameter fittings and seals." (EH:355). Kothari described it simply as a "threaded fitting," which leaked (EH:1058). King acknowledged that this was not a minor failure and caused TransCanada to shut down the pipeline (EH:2296). King characterized the fitting as involving a "design problem" and TransCanada had to replace "every one" of the similar fittings at the pipeline's other pump stations (EH:2297).

As described in the attached affidavits of Cindy Myers and Paul Seamans, within two days of the Freeman Spill being reported, they observed that the spill may have contaminated water resources in the immediate area, affecting domestic and other usages. *See*, Affidavit of Cindy Meyers and appended photographs, attached hereto as **Exhibit E**, and Affidavit of Paul Seamans, attached hereto as **Exhibit F**. The affidavits and corresponding photographs, which were taken days after the report of the Freeman Spill, together with potential water contamination issues, suggest possible violations of TransCanada's Emergency Response Plan, which would be evidence of a violation federal regulations and therefore Conditions No. 1 and 36 of the Original Permit.

The previously unavailable additional evidence of the recent 400-barrel Freeman Spill and its apparent violation of PHMSA regulations and conditions is therefore relevant and material as to TransCanada's pattern and practice of failing to comply with regulations and conditions, including Original Permit Conditions Nos. 1 and 36, therefore making it appropriate for remand to the PUC for further proceedings.

4. The Additional Evidence is Relevant and Material to TransCanada's History of Non-Compliance with Safety Regulations and Permit Conditions in the Record, Including the "Near Miss" on the Keystone Pipeline Near St. Louis.

During the evidentiary hearing, the PUC heard testimony concerning the "near miss" of a spill near St. Louis, Missouri, in close proximity to the Mississippi River on the Keystone Pipeline. This incident was not part of the recently and administratively separated "Gulf Coast" pipeline, but was part of the original "Phase 1 of the Keystone Project" (EH:199). In testimony supporting issuance of the Original Permit, Kothari testified that as of that time, TransCanada had already experienced 20 "near misses." *See*, Written Testimony of Meera Kothari, HP 07-001, Ques. 19, p. 6.

The "near miss" outside St. Louis involved a discovery on the walls of the buried and in-service Keystone pipeline, of a number of corrosion anomalies. Kothari testified that "we had corrosion identified through an in-line inspection run." (EH:1026). Goulet, despite his purported duties as President of the Keystone Pipeline system, and TransCanada's purported ethos of learning from incidents to build better pipelines, was unfamiliar with his company's own *Study of Root Cause and Contributing Factors to the Keystone Pipeline Corrosion Anomaly - Final Report of TransCanada 2-13-13* (EH:362-363, 374). The report regarding the St. Louis near-miss was admitted as DRA Exhibit 153, and is attached hereto as **Exhibit G**.

Questioned about **Exhibit G**, Goulet testified that the most problematic "feature, although it was as thick as a dime, it was also only the size of a dime in diameter" (EH:309) which was about 5/8 of an inch in diameter (EH:364). Goulet told the PUC he got this information from someone in TransCanada's pipeline integrity department, as well as its communications department. However, upon being shown and reviewing photographs of the

anomalies in **Exhibit G** with a ruler, Goulet agreed the feature shown in Figure 10 of **Exhibit G** was "[m]aybe 1 3/4 average diameter" (EH:372). Being challenged with the finding that another anomaly revealed more than a 50% wall loss of the pipeline, Goulet again had to agree that a description of a photo of another anomaly on p.18 of **Exhibit G** (referencing Dig Site 2), had a "73.9%" wall loss (EH:375, 381). Furthermore, what **Exhibit G** referenced as Dig Site 1, revealed a corrosion anomaly with a loss of nearly 97% of the pipeline wall thickness (EH:1183). PHMSA regulations required that, due to safety concerns, any wall loss of 80% required immediate repair (EH:1182). TransCanada's Kothari was unable to explain why such massive wall loss had gone undetected until the corrosion had left the pipeline wall with only 3% of its original and required thickness [EH:1183] and, along with King, how long the pipeline had been corroding [EH:1182, 2300].

Subsequent to the PUC's evidentiary hearing, PHMSA released a Notice of Proposed Violations regarding the St. Louis "near miss". The Appellants, over TransCanada's objection, successfully moved the PUC to admit PHMSA's November 20, 2015 Notice of Proposed Violation, Proposed Civil Penalty, and Proposed Compliance Order, as substantive evidence. A copy is attached hereto as **Exhibit H**.

In its Notice, PHMSA found that TransCanada appeared to violate the requirements of 49 CFR §195.401(a) in that: "No operator may operate or maintain its pipeline systems at a level of safety lower than that required by this subpart and the procedures it is required to establish under §195.401(a). PHMSA further found that TransCanada failed to conduct tests to monitor the pipeline at least once each calendar year; failed to correct cathodic protection deficiencies found in 62 locations within a reasonable time; and failed to minimize the highly corrosive effect

caused by known interference currents on at least two areas of pipe under the influence of another, nearby pipeline in a timely manner ("as required by §195.577"). **Exhibit H**, pp. 2-6.

Appellants submit the proffered additional evidence related to a weld failure and potentially other issues concerning the Freeman Spill would provide relevant and material evidence of TransCanada's pattern and practice of non-compliance with PHMSA regulations with regard to welding, inspection, and coating-related issues, as well as add to the evidence of a more general pattern and practice of non-compliance on the part of TransCanada.

5. Emergency Response Plan; Leak Detection and Response Time.

Condition 36 of the Original Permit issued to TransCanada by the PUC requires creation of and implementation of an Emergency Response Plan, to be filed with and approved by the South Dakota Department of Environment and Natural Resources. During the evidentiary hearing, significant testimony centered on the U.S. State Department's 2014 Final Supplemental Environmental Impact Statement ("**FSEIS**"), which was part of the record. In the section of the FSEIS titled, "Potential Releases & Pipeline Safety, Mitigation Measures Recommended," it was noted that spills of more than 20 barrels of heavy crude "could be detectable above ground "(visually or by other sensor) within a reasonable timeline." FSEIS, Appendix B, Potential Releases & Pipeline Safety, Mitigation Measures Recommended, 3.0(1)(g), p. 28.

The Freeman Spill was not detected by TransCanada's electronic systems control and data acquisition ("**SCADA**") detection system, or even by ground patrols, before it was discovered by a local landowner traveling down a road along the pipeline route. The Freeman Spill was not detected by any means until after it had leaked some 400 barrels into the ground and then to the surface – a spill volume 20 times greater than was expected to become detected

as anticipated in the FSEIS. TransCanada's Kothari agreed with the findings of the FSEIS that TransCanada's accidental detection by a landowner appears to be the main detection method for spills up to 1,400 barrels of crude, for which, if a spill would occur at a greater volume than the Freeman Spill, TransCanada's electronic systems could take up to two hours to detect (EH:1200-1201). *See*, FSEIS, Appendix B, Potential Releases & Pipeline Safety, Mitigation Measures Recommended, 3.0(1)(g), p. 28.

Despite its magnitude, the Freeman Spill was not discovered by the regular aerial surveillance, or by ground patrol, which TransCanada is to regularly conduct under PHMSA regulations (EH:896, 1263-1264). Compliance with PHMSA regulations, as discussed above, is also required by Condition 1 of the Original Permit. For the KXL pipeline, TransCanada recommended aerial surveillance "26 times per year, not to exceed 3 weeks" (*see*, 2009 Written Testimony of Meera Kothari, (PUC No. HP-09-001) Ques. 9, p. 4; and 2009 Updated Direct Testimony of Meera Kathori, Ques. 9, p. 4). The FSEIS, due to the frequency of human errors underlying the causes of spills, recommended that "Keystone assess its Emergency Response Plan/Spill Response Plan efficacy of increasing aerial surveys and or ground patrol frequency to one time per week." *See*, FSEIS, Appendix B, Potential Releases & Pipeline Safety, Mitigation Measures Recommended, 3.0(1)(f), p. 28.

As the attached affidavit of Paul Seamans attests, there appears to have been a slow detection of the leak resulting in the large magnitude of the Freeman Spill (**Exhibit F**). New and additional evidence proffered by the Appellants would tend to show that TransCanada either cannot or is incapable of meeting its burden to show compliance with leak detection conditions of the Original Permit, specifically Conditions No. 37 and 38. Additionally, from the

observations Paul Seamans and Cindy Myers at the scene of the Freeman Spill within two days of it being reported, the continued arrival of night-time work lights and heavy equipment suggests a slow response time, all increasing the likelihood and extent of damage caused by the Freeman Spill. See, **Exhibits E** and **F**.

Granting the Appellant's Motion to Remand would appropriately permit discovery limited to both issued pending reports by TransCanada relating to the Freeman Spill, and analysis by PHMSA, concerning both the detection of the Freeman Spill and TransCanada's response. This is evidence directly related and relevant to whether TransCanada was complying with leak detection and response required by applicable permit conditions and regulations, as well as mitigation requirements contained in federal regulations, permit conditions and specifications. Such evidence will demonstrate a further pattern and practice of non-compliance on the part of TransCanada with PHMSA regulations, if not permit specifications.

6. Nature and Extent of Involvement of Public Liaison.

Condition 7 of the Original Permit requires that a public liaison be appointed to interact with the public regarding any Keystone Pipeline matters. As witnessed by Cindy Myers over more than one day at the scene of, and within two days of the report of the Freeman Spill, despite repeated requests, an opportunity to meet with such a public relations person were unsuccessful. *See*, Affidavit of Cindy Myers, **Exhibit E**. Such additional evidence, relevant to TransCanada's non-compliance with Original Permit Condition No. 7, requires remand for discovery and presentation of evidence on this issue.

Conclusion

On April 2, 2016, a spill of at least 400 barrels of hazardous petrochemicals was discovered, leaking from a weld between two sections of pipe on the Keystone Pipeline system near Freeman, South Dakota. Preliminary findings by PHMSA in the form of a Correction Action Order issued to TransCanada mandated studies into the nature, extent, cause(s) and damage from the spill. PHMSA findings suggest a weld failure in violation of that agency's regulations and conditions. TransCanada has been ordered to conduct studies and report to PHMSA for a detailed and comprehensive analysis.

Appellants contend that the PHMSA COA issued in response to the Freeman Spill, the eyewitness affidavits submitted with this memorandum, together with the prospective reports TransCanada is required to submit to PHMSA for analysis, and any resulting PHMSA analysis reports on the Freeman Spill are relevant and material to the history of a pattern and practice of non-compliance by TransCanada with respect to PHMSA safety regulations and conditions in the record.

The Appellant's Motion for Remand should be granted and the matter returned to the PUC with instructions to permit discovery into the pending TransCanada and PHMSA findings and reports regarding the Freeman Spill, conduct an evidentiary hearing, and to then determine whether the new and additional evidence warrants a change its Order or its written findings and conclusions, before returning this case to the Circuit Court for continued proceedings.

Respectfully submitted this 18th day of July, 2016.

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EXHIBIT LIST

A. April 9, 2016, PHMSA Corrective Action Order
B. March 21, 2011, PHMSA Warning Letter
C. September 10, 2013 PHMSA Warning Letter
D. PHMSA Construction Evaluation
E. Affidavit of Cindy Myers
F. Affidavit of Paul Seamans
G. TransCanada Root Cause Analysis – St. Louis Corrosion
H. November 20, 2015, PHMSA Notice concerning St. Louis Corrosion