BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-0001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	Docket 14-001 **DAKOTA RURAL ACTION'S RESPONSE TO TRANSCANADA'S MOTION TO DEFINE THE SCOPE OF DISCOVERY UNDER SDCL § 49-41B-27** AND **MOTION TO EXPAND THE SCOPE OF DISCOVERY UNDER SDCL §§49-41B-22, 27 AND 33**

Dakota Rural Action ("DRA") hereby responds to the Motion filed by TransCanada Keystone Pipeline, LP ("TransCanada") to Define the Scope of Discovery under SDCL § 49-41B-27. TransCanada's Motion should be overruled by the Public Utilities Commission of the State of South Dakota (the "Commission") because it seeks to impermissibly limit discovery in a manner that unduly restricts the Commission's authority in these proceedings, initiated by this attempt to restrict South Dakota's broad civil discovery rules,[1] and because it would render meaningless any genuine attempt to examine the merits of TransCanada's petition seeking re-certification of the permit previously issued by the Commission. TransCanada relies entirely upon *Jundt v. The Hon. A.P. Fuller*, 2007 S.D. 62, 736 N.W.2d 508 in support of its position. Reliance on the *Jundt* decision by TransCanada is misplaced.

[1] See, ARSD 20:10:01:01.02 (Rules of Civil Procedure apply to these proceedings). Therefore, pursuant to SDCL §15-6-26(b)(1): "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989) ("broad construction of 'relevancy'"). It should be noted that TransCanada's Motion has not followed requisite procedures including a threshold showing of need for a protective order for any purported privileged matters, pursuant to SDCL §15-6-26(c).

Additionally, pursuant to SDCL §§ 49-41B-22, 27 and 33, DRA hereby moves the Commission for an order facilitating the most expansionist or broadest discovery permissible in these proceedings, to maximize its ability to obtain evidence in support of its position that the re-certification of TransCanada's construction permit should be denied.

Procedural Background

On June 29, 2010, the Commission issued its Amended Final Decision and Order (Docket HP 09-001) (the "Permit") for construction of the Keystone XL Pipeline through South Dakota. The Permit contained fifty (50) amended conditions ranging from compliance with laws and regulations, to reporting and relational requirements, conduct of construction activities, pipeline operations and emergency response, various environmental requirements to protect water resources and wildlife, treatment of cultural resources including §106 of the National Historic Preservation Act (NHPA), and treatment of paleontological resources, as well as enforcement and liability for damages.

Once a permit for construction of a pipeline is issued, under SDCL § 49-41B-27 "if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." TransCanada has failed to commence construction of the Keystone XL Pipeline within this four-year period and is therefore required to comply with the statute and seek certification. On September 15, 2014, TransCanada filed its Petition under SDCL § 49-41B-27 seeking certification of the Permit.

On September 18, 2014, the Commission issued its order granting parties an opportunity to intervene in the certification proceedings, imposing a deadline of October 15, 2014, to seek intervention. DRA sought to intervene and was granted party status by the Commission.

TransCanada filed its Motion to Define the Scope of Discovery under SDCL §49-41B-27 on October 30, 2014. Subsequently, the Commission entered an order providing that intervenors responses to that motion be filed on or before December 1, 2014.

South Dakota Law Supports a Broad Approach to Discovery

Not surprisingly, TransCanada contends that discovery in these proceedings should be dramatically limited in scope and depth, and is encouraging the Commission to adopt a reading of SDCL § 49-41B-27 which limits to *di minimis* this agency's authority in the certification proceeding before it. TransCanada's misguided attempt to limit discovery and restrict the Commission's authority begins by attempting to minimize the broad South Dakota civil discovery rules otherwise available to party-intervenors permitting exploration of facts and circumstances occurring since the Permit was granted over four years ago. DRA suggests that a comprehensive review of those facts through a robust discovery process is critical to uncovering evidence relevant to a certification proceeding – not just to examine the narrow issues TransCanada attempts to focus on, but facts which, if known or had occurred at the time the Permit was issued by the Commission, would have resulted in a denial of that Permit.

In addition to opposing TransCanada's motion, DRA, pursuant to SDCL §§49-41B-27, 49-41B-22, and 49-41B-33, further and hereby moves the Commission to permit discovery into areas potentially relevant to whether the Permit should be re-certified after the lapse of four years without construction having begun.[2]

[2] DRA hereby expressly adopts and joins the argument and authority presented by the other party-intervenors in opposition to the Motion by TransCanada and in support of broad discovery being appropriate and necessary in these proceedings.

Significantly, SDCL § 49-41B-33 supports this position and provides a clear rationale for the propriety of enhanced discovery. The statute provides that "[a] permit may be revoked or suspended by the Public Utilities Commission for:

1) Any **misstatement of a material fact in** the **application** or in **accompanying statements or studies** required of the applicant, if a correct statement would have caused the commission to refuse to grant a permit; or

2) **Failure to comply** with the **terms or conditions** of the permit; or

3) **Violation** of any material provision of **this chapter or** the **rules** promulgated thereunder. (*Emphasis added*).

A broad approach to discovery is further supported, particularly for issues relevant to § 49-41B-33(2), by SDCL § 49-41B-27, which states in relevant part that:

> "… if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that **such facility continues to meet the conditions** upon which the permit was issued." (*Emphasis added*).

Additionally, pursuant to SDCL §49-41B-22, not only does the burden of proof as to the purported propriety of re-certification of the Permit and respective conditions remain with TransCanada, but DRA contends discovery which would potentially reveal whether information or evidence now exists, that since the granting of the original Permit, circumstances have changed or TransCanada has acted or failed to act in a manner which would show:

1) The proposed **facility will comply** with **all applicable laws and rules**;

2) The facility will **not pose a threat of serious injury to** the **environment** nor to the **social and economic condition** of inhabitants or expected inhabitants in the siting area;

3) The facility will **not substantially impair the health, safety or welfare of** the inhabitants; and

4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. SDCL §49-41B-22 (*emphasis added*).

TransCanada, by narrowly reading just one of a number of applicable statutes, bases its Motion seeking to limit discovery on the hope that the Commission will ignore the larger statutory context. The statutes governing the Commission's approach must be read together and not in isolation. "To determine legislative intent, this Court will take other statutes on the same subject matter into consideration and read the statutes together, or *in pari materia.*" *Onnen v. Sioux Falls Indep. Sch. Dist. No. 49–5*, 801 N.W.2d 752, 756 (S.D. 2011) (citing *Loesch v. City of Huron*, 723 N.W.2d 694, 697 (S.D. 2006)). "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State,* 636 N.W.2d 675, 683 (S.D. 2001); *City of Rapid City v. Estes*, 805 N.W.2d 714, 718-719 (S.D. 2011).

TransCanada argues in its petition that "[b]ecause the permit has not expired and the Amended Final Decision and Order was not appealed and is entitled to preclusive effect, the scope of this proceeding is necessarily narrower than whether the permit should have been granted in the first place." This is simply incorrect. The fact that the Permit issued by the Commission was not appealed gave it preclusive effect for four years. However, since TransCanada failed to begin construction within the four year period specified in SDCL § 49-41B-27, the "conditions upon which the permit was issued" may have changed. The whole point of that language is to grant the

Commission the opportunity to re-examine the utilities application, because it may be that the permit needs to be revoked or suspended pursuant to SDCL § 49-41B-33. Therefore, the discovery that DRA will likely seek in these proceedings should not be limited in any way and should, in fact, be as expansive as possible.

In *Jundt v. Fuller, supra,* the Supreme Court granted petitioners' writ of prohibition to prevent the Circuit Court's remand to the South Dakota Water Management Board of an eminent domain action for enforcement of a water permit.[3] TransCanada's reliance on the opinion in *Jundt* is misplaced because it did not involve issues related to discovery.

While noting the general limits of re-opening the merits of a final agency action after time for appeal had past, the Supreme Court acknowledged, that in considering whether to permit reconsideration of agency action based upon "additional evidence," despite the passage of time for appeal, the agency should determine "whether the evidence is merely cumulative to that before it at the time its decision was rendered and whether the evidence was in existence and at hand at the time of the original hearing."[4] *Jundt,* at 512 (citing, *Stepan v. J.C. Campbell Co.*, 36 N.W.2d 401, 404 (Minn. 1949)). The Supreme Court held that "[i]f the evidence is cumulative or was in existence, there is no abuse of discretion in denying reconsideration." *Id.* Here, DRA seeks disclosure of non-cumulative evidence which was not in existence or unavailable at the time of the original permit proceeding.

Thorough Re-Examination of the Keystone XL Pipeline Permit is Warranted

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[3] The Circuit Court had remanded the water permit issue to the South Dakota Water Management Board with instructions to provide adequate Findings of Fact and Conclusions of Law, particularly on the issue of whether [petitioners] are considered "persons" under SDCL 46-5- 34.1. *Jundt,* at 509-510.

[4] "Moreover, the record does not reflect any consideration of whether the evidence the respondent wanted the Board to review was before the Board at the time of its original decision or whether that evidence was in existence and available at that time. If it was, it would have been an abuse of discretion for the Board to reconsider the evidence." *Id.,* at 513.

TransCanada's efforts to restrict the authority and power of the Commission by suggesting it has limited authority to re-examine a utility's application when that utility fails to begin construction within four years is one of first impression in South Dakota. However, similar issues have arisen in sister states, which have taken a reasoned approach to preserving the regulatory authority of their governing bodies.

For example, in Illinois, "[t]he certificate of public convenience and necessity confers no property right on the utility in whose favor it is granted. It is not irrevocable, to be accepted at any time the utility may choose, but is a mere permission to do a specified act within a fixed time; …" *Chicago Rys. Co. v. Commerce Commission*, 167 N.E. 840, 848 (Ill. 1929).

Likewise, in 1993 Hawaii passed HRS § 174C–56 requiring its Commission on Water Resource Management to conduct a comprehensive study of all issued permits once every twenty years to monitor compliance with permit conditions. "These provisions, expressly and by obvious implication, grant the Commission wide-ranging authority to condition water use permits in accordance with its mandate to protect and regulate water resources for the common good." *In re Water Use Permit Applications*, 9 P.3d 409, 496 (Haw. 2000).

In New Mexico, the board of county commissioners may "revoke or suspend … approval for failure of the developer to comply with a schedule of compliance." *Miller v. Board of County Commissioners of Santa Fe County*, 192 P.3d 1218, 1226 (N.M. Ct. App. 2008) (citing *Parker v. Board of County Commissioners of Dona Ana County*, 603 P.2d 1098, 1099 (N.M. 1979)).

The intent of the law is clear. After a permit is granted, a utility has four years to begin construction. If that schedule is not met, the Commission has the option to determine whether or not the permit should be revoked or suspended. Therefore, discovery should not be limited in any way and should be broadly interpreted to permit a full and complete discovery process for evidence

related to the issues in this matter. DRA suggests that the issues in these proceedings are substantial, thereby supporting a comprehensive approach to discovery.

50 Permit Conditions Require Comprehensive Discovery

In its Motion seeking to limit discovery and improperly restrict the authority of the Commission, TransCanada has ironically acknowledged that the 50 conditions imposed upon its development of the Keystone XL Pipeline are in fact subject to discovery. *See* TransCanada's Motion at p. 5, stating that "whether the proposed Keystone XL Pipeline continues to meet the 50 Amended Permit Conditions stated in Exhibit A to the Amended Final Permit and Order dated June 29, 2010" is appropriate for discovery in these proceedings.

A review of the conditions set forth in the Permit reveals that discovery would be appropriate on issues including, but not limited to:

1) TransCanada's compliance with laws, regulations, permits, standards and commitments relating to all aspects of the proposed Keystone XL Pipeline.
2) TransCanada's efforts and actions with respect to reporting requirements and relationships with key stakeholders – to include not just the Commission, but affected communities.
3) TransCanada's conduct of construction activities, to include, for example, whether its mitigation and reclamation plans and proposed efforts are adequate in light of changed conditions and additional scientific information regarding environmental risks.
4) TransCanada's approach to pipeline operations, detection and emergency response – for example, not just with respect to the proposed Keystone XL Pipeline, but how TransCanada and its affiliated entities have handled operations and response with respect to other pipelines under its control.

5) Whether TransCanada can be relied upon to meet various environmental requirements, and whether changes in the scientific community's understanding of environmental threats have changed or developed in a way that would serve to inform the Commission and affected South Dakota residents of the risks posed by the proposed Keystone XL Pipeline.
6) Whether TransCanada has engaged in appropriate treatment of cultural and paleontological resources throughout the route of the proposed Keystone XL Pipeline and whether its plans adequately address the needs of affected communities and stakeholders.
7) Whether, knowing the risks posed by TransCanada's proposed construction of the Keystone XL Pipeline, the conditions for enforcement and liability for damages are adequate, and whether TransCanada has, in other areas where it or its affiliates operate, have provided sufficient redress for damages inflicted upon affected individuals and communities.

In short, by TransCanada's own admission, it is simply not possible to limit discovery in the manner it proposes. The conditions imposed by the Permit are expansive in nature, and any limitation on discovery would wrongfully limit the inquiry demanded by South Dakota law.

Conclusion

To grant TransCanada's motion would render the discovery process meaningless and would thwart the due process afforded to intervenors in these proceedings. TransCanada's motion to limit discovery should be denied because the applicable statutes clearly contemplate a thorough and comprehensive re-examination of permits after the lapse of four years with no construction activity. South Dakota's statutes make sense. They recognize that over the course of years, things change. Acknowledging this reality, the law provides a mechanism for re-examination of permits via the certification process. This mechanism is, in effect, a statutory safety valve that provides an

additional level of protection for individuals and communities that may be negatively affected by proposed activities such as pipeline construction.

The approach urged by TransCanada in its motion would seek to neuter the Commission's statutory and regulatory authority, transforming the Commission into nothing more than a rubber stamp for TransCanada's desires. On that basis alone, the Commission should deny TransCanada's motion. However, South Dakota's statutes are clear that discovery in these proceedings cannot be limited. DRA urges the Commission to deny TransCanada's motion and to permit discovery with respect to all aspects of the proposed Keystone XL Pipeline. The Commission owes it to the citizens of South Dakota to afford them due process and to engage in a thorough review of TransCanada's re-certification efforts. An expansive and comprehensive approach to discovery will permit that to occur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2014, the foregoing document on behalf of Dakota Rural Action in Case Number HP 14-001, was filed on the Public Utilities Commission of the State of South Dakota e-filing website. Also on this day, a true and accurate copy of the foregoing was transmitted via email to the following:

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