

1 **BEFORE THE PUBLIC UTILITIES COMMISSION**
2 **OF THE STATE OF SOUTH DAKOTA**

3)
4 **IN THE MATTER OF THE PETITION)**
5 **OF TRANSCANADA KEYSTONE)** **MOTION TO EXPAND DISCOVERY**
6 **PIPELINE, LP FOR ORDER)** **AND BRIEF IN SUPPORT OF**
7 **ACCEPTING CERTIFICATION OF)** **MOTION TO EXPAND DISCOVERY**
8 **PERMIT ISSUED IN DOCKET HP09-001)**
9 **TO CONSTRUCT THE KEYSTONE XL)** **HP14-001**
10 **PIPELINE.)**
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12)
13)

14 COMES NOW the Rosebud Sioux Tribe – Tribal Utility Commission and moves the
15 Commission to expand discovery on Applicant’s request for reauthorization of the HP 09-001
16 permit to construct the Keystone XL Pipeline. The Rosebud Tribal Utility Commission herein
17 supports and incorporates into its argument, those arguments of intervenors whose briefs have
18 been previously submitted. Petitioners Motion to Define Discovery was filed under SDCL 49-
19 41B.27, filed on October 30, 2014.

20 **BACKGROUND**

21 Since the award of the original SD PUC permit in 2009 under HP 09-001, the
22 environment of diluted bituminous (hereinafter “dilbit”) crude oil pipelines has changed
23 significantly, and all changes demonstrate negative impacts to the environments, resources, and
24 economic development such pipelines present. A major factor to this change was the catastrophic
25 Enbridge spill of dilbit in the Talmadge Creek & Kalamazoo River in Michigan. This spill of
over 1,000,000 gallons of oil into Talmadge Creek and the Kalamazoo River quickly broke
down into its component parts, which component parts immediately sank to the creek and river
bottoms. Clean up crews had never before experienced the heavier than water crude and were
unprepared for a cleanup response of material below the surface of the water. What was

1 originally considered a cleanup of several weeTks, turned into a monumental task lasting several
2 years, and millions of dollars over the original estimated cleanup costs. This, in and of itself,
3 demonstrates new and emerging factors to be considered when reviewing the permitting
4 requirements of the Keystone XL pipeling.

5 Based on experience from the Talmadge Creek/Kalamazoo River spill, the EPA was
6 confronted with the cleanup of hazardous material it had not dealt with in the past. Because of
7 this, the EPA proposed new regulations under both the Clean Water Act and the United States
8 Department of Transportation pipeline safety acts to deal with the emerging problem. The dilbit
9 crude oil from the Enbridge spill in Michigan is the same material being pumped through
10 pipelines proposed by Keystone XL through the State of South Dakota.

11 The Rosebud Sioux Tribe Utility Commission has promulgated legal codes and
12 ordinances since the award of the 2009 SD PUC permit under HP 09-001. De minimus, the State
13 of South Dakota Public Utility Commission has concurrent jurisdiction over the construction of
14 the Keystone XL pipeline, with the Rosebud Sioux Tribal Utiltity Commission. In fact, new
15 legislation specifically contains language that seeks Tribal consultation and input with respect to
16 these pipeline projects.
17

18 Congress has been so concerned with the environmental impacts of dilbit crude oil that it
19 proposed the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, amending
20 Title 49 of the United States Code. This act was written to double the fines for spills and
21 removing any administrative penalty caps. This new act further requires the installation of
22 automatic and remote-controlled shut-off valves for new transmission pipelines. Said regulations
23 were not in place during the issuance of the original 2009 SD PUC permit, and based on these
24 new regulations and other regulatory amendments, the requirements imposed by the South
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1 Dakota PUC must be revisited in their entirety and expounded upon to ensure the proposed
2 Keystone XL pipeline complies with the this evolving regulatory environment. Said environment
3 has evolved due to catastrophic spills by pipeline companies such as Enbridge who are shipping
4 dilbit crude oil under the same or similar proposals to that of the Keystone KL pipeline.

5 In April of 2012, the United States Department of Transportation published in the Federal
6 Register, proposed rulemaking seeking to revise the pipeline safety regulations to establish
7 criteria and procedures for determining the adequacy of state pipeline excavation damage
8 prevention law enforcement programs, and establish Federal requirements PHMSA will enforce
9 if states have inadequate prevention program laws. The Federal DOT found that a comprehensive
10 damage prevention program requires nine important elements be present and functional for the
11 program to be effective. All stakeholders must participate in the excavation damage prevention
12 process. The elements are:

- 14 1. Enhanced communication between operators and excavators.
- 15 2. Fostering support and partnership of all stakeholders in all phases (enforcement,
16 system improvement, etc.) of the program.
- 17 3. Operator's use of performance measures *for persons performing locating of pipelines
18 and pipeline construction.*
- 19 4. Partnership in employee training.
- 20 5. Partnership in public education.
- 21 6. Enforcement agencies' role as partner and facilitator to help resolve issues.
- 22 6. Fair and consistent enforcement of the law.
- 23 8. Use of technology to improve all parts of the process.
- 24 9. Analysis of data to continually evaluate/improve program effectiveness.
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1 A comprehensive review of the 2009 SD PUC requirements is required to determine if
2 the pipeline meets any or all of the regulations promulgated wince the original permit was issued.
3 In contrast to the conditions by which the South Dakota PUC granted the 2009 permit, the
4 Enbridge project in Michigan was subject to over 200 requirements, which the granting
5 authorities began to rethink after the ensuing Talbridge/Kalamazoo spill. It became clear to all
6 regulatory authorities that codes and ordinances written to protect and preserve culture, property,
7 and the environment, during the transportation of dilbit crude through pipelines such as Enbridge
8 and Keystone, were insufficient to make the same assurances as for the transport of regulated
9 crude oil under the same circumstances.
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12 Dated this 1st Day of December, 2014.

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