

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

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IN THE MATTER OF THE PETITION OF	)	
TRANSCANADA KEYSTONE PIPELINE,	)	Docket 14-001
LP FOR ORDER ACCEPTING	)	
CERTIFICATION OF PERMIT ISSUED IN	)	<b>JOINT MOTION TO VACATE OR,</b>
DOCKET HP09-001 TO CONSTRUCT THE	)	<b>IN THE ALTERNATIVE, TO</b>
KEYSTONE XL PIPELINE	)	<b>CLARIFY OR AMEND</b>
	)	<b>PROTECTIVE ORDER</b>
	)	

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**Dakota Rural Action** (“DRA”), the **Rosebud Sioux Tribe** (“Rosebud”), the **Standing Rock Sioux Tribe** (“Standing Rock”), the **Cheyenne River Sioux Tribe** (“Cheyenne River”), the **Yankton Sioux Tribe** (“Yankton”), the **Indigenous Environmental Network** (“IEN”), and **Bold Nebraska** (“Bold”) (DRA, Rosebud, Standing Rock, Cheyenne River, Yankton, IEN, and Bold are hereinafter collectively referred to as the “Intervenors”), by and through their respective counsel, hereby collectively move the South Dakota Public Utilities Commission (the “Commission”) for an order vacating, or in the alternative, amending or clarifying, the protective order entered by the Commission on April 17, 2015 (the “Order”). In support of its motion, the Intervenors state as follows:

**Background**

In accord with the scheduling order adopted by the Commission, various Intervenors served discovery requests on TransCanada Keystone Pipeline, LP (“TransCanada”). After receiving insufficient responses to discovery requests from TransCanada, various Intervenors filed their respective motions to compel discovery, which were granted in part by the Commission at its hearing on April 14, 2015.

During the course of the April 14, 2015 hearing, TransCanada alleged that certain documents requested by various Intervenors should be deemed confidential in nature. On this basis, the Commission – without counsel for the Commission or TransCanada consulting with the Intervenors regarding the scope of a protective order and without TransCanada filing a motion seeking a protective order – entered the Order granting the documents at issue treatment as confidential information on April 17, 2015, shortly before TransCanada made thousands of files (both designated confidential and non-confidential) available to the Intervenors for download via an online FTP (File Transfer Protocol) site.

The Intervenors have a number of issues with respect to the very issuance of the Order as well as the wording of the Order in that its wording seriously impairs their ability to comply with the Commission’s scheduling order requiring that exhibit lists be submitted on April 28, 2015, and because it precludes the prospect of meaningful review on the part of the Intervenors and potential expert and fact witnesses. For these reasons, the Intervenors request that the Commission enter an order vacating the Order, or in the alternative, amending or clarifying the terms of the Order.

### **The Protective Order Should be Vacated**

To obtain a protective order, a party **must file a motion** that 1) certifies that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and 2) shows good cause, including specific injury, for issuance of a protective order. SDCL §15-6-26(c). Furthermore, the South Dakota Supreme Court has held that:

Initially, the burden rests on the party opposing discovery to show that the information is a trade secret or other confidential commercial information and that disclosure would be harmful to that party's interest in the information. *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1032 (8th Cir.1991). Once the party opposing discovery makes that showing, “the burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial.” *Id.*

*Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 704-705 (S.D. 2011). Finally, the protective order must be necessary to protect the party from annoyance, embarrassment, oppression, or undue burden or expense. SDCL §15-6-26(c).

TransCanada failed to file a motion with the Commission seeking a protective order. Instead, it merely relied upon its numerous boilerplate objections to certain discovery requests and awaited the Commission's ruling on the subsequent motions to compel filed by various Intervenors. Again, TransCanada has not followed South Dakota Law. It failed to fulfill the statutorily-mandated prerequisite for obtaining a protective order by neglecting to file a motion, and it failed to meet its legal burden of certifying a good faith attempt to resolve the dispute and showing good cause, including specific injury, for issuance of a protective order. Furthermore, TransCanada failed to make a good faith effort to attempt to resolve confidentiality disputes *prior* to issuance of the Protective Order.

Moreover, it does not appear that any burden of proof, let alone good cause, was placed on TransCanada before the Order was issued. Under SDCL 15-6-26(c), a showing of good cause for a protective order includes a demonstration of specific injury. During the hearing, each of the Intervenors' respective Motions to Compel was addressed in broad strokes by TransCanada and by the Commission. TransCanada did not, as is necessary to show specific injury, present facts or arguments alleging potential harm for each individual discovery request at issue. TransCanada has therefore failed to meet its burden for issuance of a protective order and the Order must be vacated.

In addition to its failure to follow the requirements of South Dakota's statutes as clarified by the State Supreme Court, TransCanada also failed to follow the basic requirements of the Commission's own Administrative Rules. To the extent TransCanada wished to designate any of

its information as “confidential”, §20:10:01:41 of the Commission’s Administrative Rules provides a clear procedure:

“A request for confidential treatment of information shall be made by submitting the material to the commission along with the following information:

- (1) An identification of the document and the general subject matter of the materials or the portions of the document for which confidentiality is being requested;
- (2) The length of time for which confidentiality is being requested and a request for handling at the end of that time. This does not preclude a later request to extend the period of confidential treatment;
- (3) The name, address, and phone number of a person to be contacted regarding the confidentiality request;
- (4) The statutory or common law grounds and any administrative rules under which confidentiality is requested. Failure to include all possible grounds for confidential treatment does not preclude the party from raising additional grounds in the future; and
- (5) The factual basis that qualifies the information for confidentiality under the authority cited.

Information shall be sent to the commission's executive director, unless another person is designated. Each page must clearly be marked "confidential" in large, bold letters. Information submitted by mail or hand delivery must be in a separate, sealed envelope and clearly state in large, bold letters on the envelope that confidential treatment is requested. If filed electronically, the information must be filed as a separate document.” §20:10:01:41.

TransCanada completely and utterly failed to follow the Commission’s Administrative Rules. A request for a protective order is not the same as a request for confidential treatment, and it would defeat the purpose of the regulations governing confidential treatment to allow a party to circumvent them by obtaining a protective order. TransCanada has not made a valid request to the Commission for treatment of the materials at issue as confidential, thus TransCanada is not entitled to such treatment. On this basis alone, the Protective Order should be vacated by the Commission as having been unlawfully issued.

In addition to providing a clear mechanism for designating information as confidential, the Commission's Administrative Rules also provide a mechanism for proving that a document is truly confidential. Significantly, the burden of proving that a document deserves confidential treatment is squarely on TransCanada, not on any party seeking it:

“A request for confidentiality generates confidential treatment of information pursuant to § 20:10:01:40, but it does not constitute a determination that the information is or is not confidential. The information will be treated as confidential and shall not be released until after a confidentiality determination has been made. The commission shall determine confidentiality after a request for access to the information is received. **The party requesting confidentiality has the burden of proving by a preponderance of the evidence that the information qualifies as confidential information** by showing that disclosure would result in material damage to its financial or competitive position, reveal a trade secret, or impair the public interest. § 20:10:01:42 (emphasis added).

To procure a determination from the Commission that a document is confidential, thereby entitling that document to the protections provided by §§ 20:10:01:39-44, *TransCanada must prove by a preponderance of the evidence* that the information qualifies as confidential based on the documents submitted pursuant to § 20:10:01:41. Because TransCanada failed to submit this information, it is impossible for TransCanada to have proven by a preponderance of the evidence that *each document* at issue is entitled to confidential treatment.

TransCanada and the Commission have placed great emphasis on following procedural rules and processes, particularly with respect to matters such as scheduling and even as to its denial of the right of parties to present evidence and testimony. If strict compliance to the Commission's Administrative Rules is demanded of intervening parties in these proceedings, the Intervenors should likewise expect that TransCanada be held to the same standard by the Commission. If the Commission intends to demonstrate that it is even-handed and fair to all parties, it should demonstrate that by vacating the Protective Order.

### **Alternatively, any Protective Order Ultimately Issued Should be Amended or Clarified**

Without waiving their position that the Protective Order was improperly issued and should be vacated as set forth above, the Intervenors note that the language of the Order issued by the Commission is problematic in a number of respects.

- 1. The terms of the Order are overly restrictive so as to preclude meaningful review of the documents produced by TransCanada.*

Section 2 of the Order states that “access to and use of such information by the receiving Party's counsel of record for purposes of preparation for the proceedings in this matter and use in the proceedings shall be permitted subject to the provisions of this Protective Order.” Ostensibly, this provision contemplates the inevitable need for the Intervenors’ counsel to review confidential documents and share such documents with their witnesses for preparation and prospective use as exhibits in the proceedings before the Commission.

Other documents are of questionable confidentiality. For example, in its initial responses to DRA’s first discovery requests, TransCanada objected to seven separate requests on the basis that the information sought was confidential for “homeland security” purposes. Yet, in responses to DRA’s motion to compel, TransCanada was unable to provide any federal statutory or regulatory basis for claiming such an exclusion other than asserting it received a communication from the Pipeline and Hazardous Material Safety Administration (“PHMSA”) directing them not to disclose certain information. Absent verification of a specific regulatory basis for exempting such information from discovery in the proceedings, the Commission properly ordered TransCanada to comply with discovery requests and produce the requested information. Nonetheless, TransCanada was given complete discretion to designate whatever documents it

wished as “confidential.” TransCanada exercised this opportunity to fullest, by designating as “confidential” approximately 2,508 files in 222 folders, consisting of 35.7 gigabytes of data.

The issue this has created lies in the language of Section 3 of the Order, which inexplicably provides that “[a]ny Party, and their attorney, receiving Confidential information from another Party, or from the Commission in the case of filed documents, is responsible to the Commission and to the providing Party (i) for limiting disclosure only to such Party’s attorneys of record. All confidential documents provided as a result of any motion to compel granted by the Commission shall be viewable only by attorneys of record for the Party or Parties to the motion to compel.”

The language of the Order results in a situation where the Intervenors to whom “confidential” documents were disclosed are left in a situation where only their counsel of record are permitted to review them – this would seemingly exclude other attorneys and persons working under the supervision of counsel of record from assisting with review of documents, including consultants engaged to evaluate documents for the purpose of enabling the Intervenors and their counsel to understand the meaning and significance of disclosed documents. This language also potentially restricts counsel for other intervenors, who were not a “Party or Parties to the motion to compel,” from examining these documents for the purpose of case development, cross examination, and briefing; an outcome that cannot have been intended by the Commission and one which denies fundamental due process rights to the parties by unacceptably limiting their ability to effectively participate in the proceedings.

The sheer volume of allegedly confidential information TransCanada produced<sup>1</sup>, combined with the Commission’s order that the parties file exhibit lists by April 28, 2015, along with the

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<sup>1</sup> What TransCanada actually produced is a separate issue. Counsel for TransCanada communicated to counsel for Intervenors that due to the volume of information required to be produced, and the short time frame ordered by the Commission for production of documents, it was “impossible” to comply with the Commission’s order compelling production, and hence, that it was not complying with such order(s).

overly restrictive access to allegedly confidential files, has put the parties in an untenable position. The Intervenors intend to address the Commission's time line in a separate motion, but the reality is that the extraordinarily compressed time frame for the proceedings, combined with the volume of information produced and what TransCanada has yet to produce in order to fully comply with the Commission's orders compelling discovery, has resulted in a situation where meaningful review of TransCanada's petition has been rendered impossible. This goes directly to the Intervenors' due process rights – where the Commission may certainly have provided for process, but not due process.

2. *Inadequate mechanisms exist for challenging confidentiality designations.*

While the Order provides a means for challenging confidentiality designations, in reality, any such mechanism is meaningless in light of the Commission's schedule for these proceedings.

Section 11 of the Order states that:

“This Order shall not be construed as a determination by the Commission or an agreement or concession by any Party that any document or data provided under the terms of this Order in fact contains Confidential information entitled to protection. This Order is not intended to diminish any Party's right, through appropriate motion, to contest the entitlement of any particular document or data to confidential treatment or to request a more limited scope designation with respect to a document or data, such as redaction of only the particular information required by law, rule or contract to be kept confidential, sensitive personal identity information, competitively valuable material or other material properly entitled to confidential treatment.”

First, given that the deadline for designating documents to be used as exhibits in these proceedings is Tuesday, April 28, 2015, there is simply no time to examine the documents provided by TransCanada, much less make a determination as to whether TransCanada fully complied with the Commission's orders compelling discovery. Second, even assuming for the sake of argument that Intervenors could review all of the documents provided by TransCanada in the time provided, if after examination of documents designated as confidential by TransCanada, the Intervenors



contest confidential treatment and thereby require TransCanada to prove, by a “preponderance of evidence that the information qualifies as confidential”, there will be no time to do so in a meaningful way prior to the commencement of the evidentiary hearing. Commission Administrative Rules §20:10:01:42. Thus, one necessary result of the Commission’s compressed schedule is that it would unlawfully withhold from public review any documents that TransCanada might have improperly designated as confidential

### **Relief Sought by Intervenors**

First, based on the foregoing reasons, the Commission should vacate the Order. There is ample basis for doing so as the Order itself was issued in non-compliance with the Commission’s own Administrative Rules.

Alternatively, should the Commission decide that TransCanada is not required to follow the rules and fail to vacate the Order, any ruling on this motion should amend or clarify the Order to expressly permit review of documents designated by TransCanada as “confidential” by persons working under the supervision of the Intervenors’ counsel of record, to include expert and fact witnesses engaged by counsel to assist in review of scientific or technical information. To provide necessary protection for confidential information prior to any challenge as to whether it is truly confidential or not, any such persons working under the supervision of Intervenors’ counsel would be directed to sign the form of confidentiality agreement as provided for in Exhibit A of the Order. While TransCanada appears to have concurred with this solution via email to counsel for the Intervenors, the Commission’s Order is still in place.

Second, the Order should be amended or clarified to provide that counsel for other intervening parties in this action also be given access to information designated as confidential by TransCanada, not just counsel for parties who filed motions to compel discovery. Such an

amendment is necessary to provide attorneys for represented intervenors as well as *pro se* intervenors to effectively prepare their case, prepare and conduct cross examination of witnesses, and prepare post-hearing briefs.

Third, the Commission's own rules already provide for a process for review of confidentiality designations. TransCanada should be ordered to prove, by a preponderance of the evidence, why the information it seeks to designate as confidential is deserving of such treatment. While the Intervenor recognize this may be a time-intensive process, it was precisely for reasons such as this that DRA, Rosebud, Cheyenne River, and IEN previously filed their motion for appointment of a special master to assist with discovery, which was denied by the Commission at its April 14, 2015 hearing. The Intervenor would respectfully suggest that revisiting this concept is warranted.

### **Conclusion**

It is clear that a meaningful examination of whether TransCanada's proposed Keystone XL Pipeline can meet the conditions originally imposed by the Commission nearly five years ago is rendered impossible by the language of the Order – not to mention timing and scheduling issues which will be addressed by the Intervenor in a separate motion. For the reasons articulated above, the Order should be vacated by the Commission and, should the Commission decide that TransCanada is above the law by refusing to vacate the Order, amend or clarify it as suggested.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of April 2015, the foregoing *Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order* 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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