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

RESPONSE OF BOLD NEBRASKA TO
TRANSCANADA'S MOTION TO DEFINE THE SCOPE OF DISCOVERY
UNDER SDCL § 49-41B-27

COMES NOW Bold Nebraska ("Bold"), by and through counsel, in response to the October 30, 2014, Motion to Define the Scope of Discovery Under SDCL § 49-41B-27 ("Discovery Motion"), filed by TransCanada Keystone Pipeline, L.P., ("TransCanada") in the above captioned proceeding before the South Dakota Public Utilities Commission ("Commission"). By order dated November 5, 2014, the Commission required that intervenors respond to the Discovery Motion by November 17, 2014, but amended this order on November 14, 2014, to allow response by December 1, 2014.

The Discovery Motion should be denied because it is: (1) premature; (2) poorly structured; (3) unlikely to reduce the time needed by the Commission to address discovery disputes; and (4) excessively restrictive and would exclude issues of clear relevance and importance to the Commission. Moreover, there is a substantial risk that this premature attempt to limit discovery could actually confuse future management of this proceeding. Therefore, the Commission should deny the Discovery Motion and instead resolve the scope of discovery in response to actual discovery requests filed by intervenors.

BACKGROUND

In its Discovery Motion, TransCanada requested that the Commission enter the following order:

> All discovery must be limited to: (1) 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; or (2) the changes to the Findings of Fact in the Amended Final Permit and Order identified in Keystone's Tracking Table of Changes attached as Exhibit C to Keystone's Petition for Order Accepting Certification Under SDCL § 49-418-27. Each discovery request must identify by number the Amended Permit Condition or the Finding to which it is addressed.

TransCanada seeks to limit discovery based on two tests:

(1) whether discovery is related to one or more of the 50 amended permit conditions ("Conditions") in the Commission's Amended Final Decision and Order dated June 29, 2010 ("Final Order"); or

(2) whether discovery is related to one or more of the proposed changes to the Findings of Fact identified in the Table of Changes included as Appendix C to TransCanada's Petition for Order Accepting Certification Under SDCL § 49-4 lB-27 ("Petition").

The Table of Changes discusses 30 Findings of Fact paragraphs that TransCanada has determined should be amended. The Final Order in total contains 115 Findings of Fact paragraphs. Thus, TransCanada has determined that 85 Findings of Fact paragraphs do not require any updates and should not be the subject of discovery.

The Table of Changes also references a 79-page amended Keystone XL Project Construction, Mitigation, and Reclamation Plan ("CMR Plan") containing numerous proposed red-lined amendments, which TransCanada included as part of Appendix C to the Petition. It is unclear whether TransCanada's motion seeks to restrict discovery to only its proposed CMR

Plan amendments or whether it considers facts related to the entire CMR Plan to be subject to discovery.

TransCanada has not attempted to describe how the specific Findings of Fact identified in the Table of Changes correlate to the Conditions, but rather proposes that discovery be allowed if it addresses either any of the 50 conditions or any of its 30 identified amended findings of fact. Since the facts on which the Conditions are based are found in more than just the 30 Findings of Facts included in the Table of Changes, it is unclear how the limitation based on the Table of Changes would in practice limit discovery.

ARGUMENT

I. The Discovery Motion Is Premature

TransCanada has proposed to preemptively limit discovery based on its speculation that intervenors will submit an excessive number of irrelevant discovery requests, such that the Discovery Motion is hypothetical in nature. Specifically, the Discovery Motion on page 4 argues that the intervenors are likely to submit discovery requests on the following matters:

> Thus, the following issues that have been raised by various Intervenors in applications for party status are beyond the scope of this proceeding: the effects of the Project on the soils of the Sandhills; the effects of the Project on the Ogallala Aquifer and other streams, river, and waterbodies; whether the Project is in the national interest; whether the Department of State conducted sufficient consultation with interested Tribes under Section 106 of the National Historic Preservation Act; whether Keystone is entitled to exercise the right of eminent domain; and whether development of the oil sands in Canada harms the environment and contributes to levels of C02 in the atmosphere.

Perhaps intervenors will do so; perhaps they won't. It is one thing to raise issues in an application for party status and an entirely different thing to submit discovery requests on these issues.

Rather than attempt to anticipate what intervenors might or might not do, the Commission should reserve judgment on the need for a broad limitation on discovery or a protective order until at least the first round of discovery is submitted to TransCanada. If it appears that the discovery requests submitted by intervenors are legally irrelevant and subject to redress by reference to the scope of the 2010 Final Order, such that the administration of this proceeding would benefit from a generalized limitation of discovery, the Commission could reconsider a motion to limit discovery or for a protective order at that time. This timing would allow the Commission to consider a motion to protect TransCanada from irrelevant and burdensome discovery in light of actual and not hypothetical discovery disputes. The Commission should not grant relief now based on speculation of the contents of as yet nonexistent discovery requests.

II. The Discovery Motion Is Poorly Structured

TransCanada's approach to restricting discovery begs the question about how the Conditions relate to the Table of Changes in terms of defining the scope of discovery. Also, reviewing the Final Order paragraph-by-paragraph now as a means to define future discovery would be cumbersome and could result in hypothetical arguments about possible discovery disputes rather than actual disputes. In this circumstance, there is a substantial risk that any lines drawn by the Commission now would not be clear, such that an order limiting discovery could add to and potentially confuse future Commission deliberations about the efficacy of specific discovery requests.

With regard to TransCanada's request to allow discovery related to any of the Conditions but only certain cherry-picked facts, the conditions broadly relate to many findings of fact not included in the Table of Changes. For example, Conditions 1 through 4 generally relate to the

Commission's requirement that TransCanada comply with other federal and state laws. Thus, given TransCanada's proposed order language limiting discovery to one or more of the Conditions, issues related to its ability to comply with such laws would be subject to discovery. However, the Findings of Fact expressly or arguably related to compliance with other laws are contained in paragraphs 30, 31, 32, 41, 51, 58, 60-76, 79, 84, 88, and 89-102.[1] Of these Findings of Fact, the only ones also identified in the Table of Changes include 32, 41, 60-63, 68, 73, and 90. Thus, it appears that the proposed order language could either allow discovery on any of the facts underlying the compliance with law Conditions, or it could restrict discovery to only the Findings of Fact in the Table of Changes.

In addition, as described below, other Conditions are also dependent on Findings of Fact not identified in the Table of Changes. Thus, TransCanada's proposed discovery limitation methodology is internally conflicted and ordering its adoption would likely confuse the scope of discovery more than clarify it.

The foregoing example also illustrates that marching through the Final Order paragraph by paragraph to confirm whether it should be the subject of discovery would be cumbersome and time consuming for all parties and the Commission itself. While discussing each party's interest in submitting possible discovery requests related to each particular Condition and Finding of Fact and then cross correlating such interests might result in interesting discussions, such discussions could relate to entirely hypothetical discovery requests and would be time consuming and burdensome for all involved.

Similarly, the Table of Changes references an amended 79-page CMR Plan, which is in the record, but TransCanada did not state whether it considered the entire CMR Plan to be

[1] Bold does not intend to imply that it will submit discovery requests about all of these findings of fact, but rather identifies them here for the purpose of discussing the weaknesses in TransCanada's proposed limitations.

subject to discovery or only its proposed amendments. It would seem burdensome for the parties and Commission to wade through this plan to determine whether none, some, or all of it should form the basis for discovery.

The Final Order was not intended or drafted to be used as a reference for the scope of future discovery. The scope of each Condition and Finding of Fact was not written to be precise, but rather most of them were intended to be general and summary in nature. Therefore, they form a poor basis on which to limit discovery.

Referencing the Conditions and Findings of Fact in an order to limit discovery or a protective order would likely result in diverse arguments about whether or not particular discovery requests are related to particular Conditions and/or Findings of Fact. Therefore, using the Conditions or Findings of Fact as a general guide for discovery would at best draw blurry lines that could add to the complexity of future Commission decisions on the appropriate scope of discovery. In contrast, declining to use TransCanada's proffered methodology here would not preclude the parties from referencing the Final Order or other documents in the docket with regard to the relevance of specific discovery requests – to the extent such reference was actually helpful.

III. The Discovery Motion is Unlikely to Substantially Reduce the Time Required to Resolve Discovery Disputes

Regardless of a Commission decision now to limit discovery, it is highly likely that TransCanada will nonetheless object to the vast majority of discovery requests on a variety of other grounds, which objections would need to be addressed by the Commission. Since it is unclear whether or not granting the Discovery Motion would substantially reduce the actual number of requests submitted to TransCanada (particularly given the uncertainty generated by TransCanada's methodology), the Commission would likely hear arguments on most <u>if not all</u> of

the requests regardless of whether or not it grants the Discovery Motion. Therefore, it is unclear that a general limitation on discovery would substantially increase administrative efficiency or reduce the time required by the Commission for resolution of discovery disputes.

Instead, an issuance of an unwise order now could substantially increase the overall amount of time required relative to simply ruling on each discovery request that is actually submitted. If, after reviewing an initial round of discovery it appears that a broad protective order is merited and would reduce the time required for Commission decision making, TransCanada could offer a motion for such order then, but at least it would reference real and not hypothetical discovery disputes.

IV. The Discovery Motion Is Excessively Restrictive and Would Exclude Relevant Information and Data

Attempting to march through the entire Final Order to identify all of the Findings of Fact that might be subject to a Bold discovery request would be very burdensome, so rather than do so Bold identifies the following examples demonstrating how TransCanada's proposed limitation might prevent discovery of information that the Commission should find relevant and consider in its forthcoming deliberations.

- ***Discovery Related to County and Township Road Use and Repair*** – Finding of Fact 88 relates to the Commission's 2010 consideration of evidence related to the risk that TransCanada's heavy construction will damage county and township roads. It found that TransCanada must post a bond for "$15,600,000 for 2011 and $15,600,000 for 2012." Final Order at 19. This finding resulted in Conditions 23(a)-(f), which includes the actual condition for the bond amounts, as well as other procedural conditions. In contrast, TransCanada did not include Finding of Fact 88 within the Table of Changes, though clearly this finding should be reconsidered because the dollar amounts and dates should

be adjusted. Underlying the general descriptions contained in the Finding of Fact and Condition is the Commission's record about this issue, much of which relates to evidence of TransCanada's practices during construction of the first Keystone Pipeline through eastern South Dakota. Given the limitation proposed by the Discovery Motion, it is entirely unclear whether discovery about TransCanada's road use and repair practices related to the first Keystone Pipeline between the close of the evidentiary record in 2010 and the present would be allowed or prohibited by the requested order. It is the subject of Condition 23, but not listed on the Table of Changes, and the discovery would be about the first Keystone Pipeline and not strictly speaking the Keystone XL Pipeline. Bold suggests that the Commission should allow discovery on TransCanada's continued practices related to roads impacted by the first Keystone Pipeline to confirm that the Conditions are adequate given current road construction costs and whether the Conditions are sufficiently clear to protect the interests of counties and townships.

- ***Discovery Related to Protection of "the Permeable Sand Hills and Shallow High Plains Aquifer" in Southern Tripp County*** – Findings of Fact 46-53 and 86 (Final Order at 12-13, 18) discuss shallow aquifers and the location of wells and drinking water sources and the potential for spills impacting these resources. Of these, only Finding of Fact 50 is included in the Table of Changes. In addition, this overall issue implicates TransCanada's compliance with federal pipeline safety law[2] related to High Consequence Areas that are the subject of Finding of Fact 102, which also is not included in the Table of Changes. The concerns raised in these Findings of Fact are reflected in Condition 35 (Final Order at 34), which requires the following:

[2] Compliance with federal law is also generally discussed in the list of Findings of Fact shown on page 5 of this Response.

> Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation.

Again, from the face of the order language proposed in the Discovery Motion, it is unclear whether this issue, including but not limited to TransCanada's treatment of sensitive areas in its Integrity Management and Emergency Response Plans, would be subject to discovery. Bold believes that discovery related to additional information about threats to groundwater and TransCanada's efforts to protect these resources that have come to light since the closure of the record in the 2010 should be the subject of discovery. Also, discovery about TransCanada's compliance with federal integrity management requirements as regards the relevant Findings of Fact and Condition and any additional information about TransCanada has learned about "vulnerable and beneficially useful surficial aquifers" during its ongoing route evaluation efforts should be considered by the Commission.

- ***Discovery Related to Leak Detection*** – Findings of Fact 94 and 95 relate to TransCanada's leak detection efforts and Condition 1 relates to compliance with federal pipeline safety law. The Table of Changes does not include changes to either of the foregoing Findings of Fact. Again, it is unclear whether discovery about TransCanada's possible improvements in its leak detection technology would be allowed under the proposed order language. Since leak detection technology is constantly evolving and over four years have passed, Bold asserts that discovery related to TransCanada's current leak detection technology and design is appropriate.

- ***Discovery Related to Emergency Response*** – Findings of Fact 20, 45, 51, 53, 97-100, and 103, and Conditions 8, 10, 34-36, and 42 relate to TransCanada's emergency response planning efforts. Of these Findings of Fact paragraphs, the Table of Changes identifies only Finding of Fact 20 as being subject to discovery, yet a number of Conditions require actions by TransCanada related to emergency response planning before the start of construction. Bold asserts that discovery should include facts related to TransCanada's development of its emergency response efforts since close of the administrative record in 2010.

As noted, the foregoing are examples of possible subjects of discovery that might be eliminated from consideration by the Commission due to the proposed order language in the Discovery Motion. They are also examples of the ambiguity that arises from TransCanada's proposed tests for limiting discovery.

Attempting to identify all of the potential errors in TransCanada's selection of Findings of Facts that should be subject to discovery would be unduly burdensome to Bold and other parties in their responses to the Discovery Motion. Moreover, an attempt by the Commission staff or the Commissioners themselves to march through all of the Findings of Fact to confirm whether or not they should be amended and so be subject to discovery would also likely require substantial premature time and effort.

V. Conclusion

It is clear that adoption of the order language proffered by the Discovery Motion would be premature, fail to provide clarity to intervenors, risk increasing the time required for resolution of discovery issues, and result in an excessively restrictive discovery. Therefore, for

the foregoing reasons, Bold respectfully requests that the Commission deny the Discovery Motion.

Dated December 1, 2014

Respectfully submitted,

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