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 HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**STAFF'S BRIEF IN RESPONSE TO MOTION FOR STAY OF PROCEEDINGDS** **HP14-001**

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Motion to Stay Proceedings ("Motion") filed by Dakota Rural Action, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and Indigenous Environmental Network ("Movants").

On April 7, 2015, Movants filed a Motion to Stay Proceedings, requesting the Commission essentially hold these proceedings in abeyance pending federal action, as well as an outcome of the Canadian National Energy Board Investigation of TransCanada. For the explained in this Response, Staff does not support holding these proceedings in abeyance indefinitely.

A. Holding these proceedings in abeyance indefinitely does not promote judicial economy.

In the Motion, Movants argue that "it makes no sense … to expend the time and resources preparing for and conducting what will inevitably be a large-scale discovery fight, evidentiary hearing, and appeal…" If, in fact, they are stating that a large scale fight and an appeal are a near certainty, then it stands to reason that judicial economy is best served by going

forward as efficiently as possible so that, should the federal government reach a decision, the process is not held up in South Dakota for an extended period of time.

Moreover, applying the Movants' logic to other jurisdictions would create a chicken-and-egg scenario that could effectively stop any development requiring permits from multiple jurisdictions. For instance, President Obama has cited Nebraska's process as a reason for delays with the Presidential Permit. If Nebraska were to place a condition that Keystone must first get a Presidential Permit, as the Movants suggest South Dakota do with this Motion, Keystone would be unable to receive either permit, regardless of each jurisdiction's review.

In fact, all major siting projects require additional permits beyond those issued by the PUC and the Commission has approved permits to construct for all recent siting dockets before all other jurisdictional permits/approvals were obtained (docket reference: HP09-001, HP07-001, EL13-020, EL13-028, and EL14-061). Permit Applicants should be afforded the opportunity to seek permits and approvals from multiple jurisdictions in parallel in order to reduce the regulatory burden that would result from extending the duration of permitting activities should sequential permitting be required.

Moreover, Staff draws caution to the possibility that staying this proceeding may establish precedent that could potentially burden future development in South Dakota. For example, some siting projects require an Environmental Impact Statement be prepared according to NEPA and future arguments could be made that the Commission should stay the PUC's proceeding until a Record of Decision is entered in the NEPA process. This may extend the time required for project developers to obtain all approvals and permits by one year or more should the PUC not begin its permitting process until after a Record of Decision is entered. Any such precedent would adversely impact the permitting time and efficiency for project developers.

It is staff's opinion that the issue of judicial economy is based on the subjective views of each party. For example, it can be argued that it is more efficient for project developers to obtain permits from multiple jurisdictions in parallel and, thus, promoting judicial economy in this sense. Establishing precedent that sequential permitting is required could actually harm future project developers from the perspective of judicial economy. Therefore, relying on another jurisdiction to take the first step sets a dangerous precedent.

B. Staying these proceedings indefinitely violates Keystone's due process right to have a hearing on their petition.

Keystone filed its Petition for Order Accepting Certification Under SDCL § 49-41B-27 on September 15, 2014. SDCL § 1-26-16 very clearly states that all parties be afforded an opportunity for a hearing. Keystone has not waived that right. Therefore, due process dictates that this proceeding not be postponed indefinitely.

Conclusion

While it is true that there is no way of knowing when, if ever, Keystone will receive a federal permit, that is a risk borne by Keystone. Keystone has a right, per SDCL § 49-41B-27, to seek certification before the Commission. Keystone chose to exercise that right before being granted a federal permit and, therefore, took on the risk that, even if the Commission grants certification, it may not be able to begin construction. However, Keystone had the right to take on that risk, and due process requires that Keystone be given a hearing.

For the foregoing reasons, Staff recommends the Commission deny the Motion to Stay.

Dated this 10th day of April, 2015.

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