

**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 |) | DAKOTA RURAL ACTION'S |
| DOCKET HP09-001 TO CONSTRUCT THE |) | MOTION AND SUPPORTING |
| KEYSTONE XL PIPELINE |) | MEMORANDUM TO COMPEL |
| |) | DISCOVERY |
| |) | |

Pursuant to SDCL §15-6-37(a), Dakota Rural Action (“DRA”), by and through counsel, hereby moves the South Dakota Public Utilities Commission (the “Commission”) for an order compelling TransCanada Keystone Pipeline, LP (“TransCanada”), to provide substantive, non-evasive answers to DRA’s First Interrogatories to TransCanada numbered 7, 8, 12, 13, 15, 16, 17, 21, 23, 25, 26, 30, 40, 48, 56, 57, 58, 60, 76, 83, and 86, and to the documents requested by DRA its First Request for Production of Documents to TransCanada numbered 1, 9, 10, 12, 13, 26, 28, 29, 30, 31, 33, 34, 36, 37, 38, 42, 44, 46, 48, 50, 51, 53, 55, and 56. Because the information sought in these discovery requests and requests for production of documents is relevant and discoverable, TransCanada’s objections should be overruled and TransCanada should be directed to provide meaningful answers and to produce documents responsive to the subject discovery and document requests.

In compliance with SDCL §15-6-37(a)(2), counsel for DRA hereby certify that they have in good faith conferred or attempted to confer with counsel for TransCanada in an effort to secure the information or material sought through discovery requests prior to filing this motion.

Factual Background

On September 15, 2014, TransCanada, after having failed to commence construction of its proposed Keystone XL Pipeline project (the “Pipeline”) for more than four years, filed its petition

seeking recertification of findings of fact and conditions set forth in the Commission's Amended Final Decision and Order dated June 29, 2010 (the "Original Permit"), which granted TransCanada authority to construct the proposed Pipeline subject to a number of conditions. Under SDCL §49-41B-27, if construction of the proposed Pipeline has not commenced within four years of issuance of the Original Permit, TransCanada is required certify to the Commission, prior to commencing construction, that the Pipeline continues to meet the conditions upon which the Original Permit was issued. That means each and every one of the fifty conditions under which the Original Permit was issued.

Notwithstanding the objections of a number of intervenors including DRA, and notwithstanding the wide scope of subject matter areas requiring certification that were contained in the conditions to the Original Permit, on December 17, 2014, the Commission acceded to TransCanada's request to set an unreasonably compressed scheduling order in these proceedings (the "Scheduling Order"). The inevitable result of this action, as has been argued by various intervenors is that they have been prejudiced by the Commission's ruling in favor of TransCanada, which has had the effect of not affording adequate time to permit complete, full, and exhaustive discovery into all of the conditions to the Original Permit.

On January 6, 2015, DRA served its First Interrogatories and First Request for Production of Documents on TransCanada. On February 6, 2015, TransCanada served its responses to DRA's discovery requests (See **Exhibit 1**, *Keystone's Responses to Dakota Rural Action's First Interrogatories to TransCanada Keystone Pipeline, LP*, and **Exhibit 2**, *Keystone's Responses to Dakota Rural Action's First Request for Production of Documents*).

Interestingly, TransCanada itself acknowledged the unreasonably short time frame it successfully managed to obtain from the Commission in the Scheduling Order. In Interrogatory No. 2, DRA asked:

“Prior to answering these interrogatories, have you made due and diligent search of all books, records, and papers of the Applicant with the view of eliciting all information available in this action?”

TransCanada responded by stating:

“Yes, to the extent reasonably practicable in attempting to respond to over 800 discovery requests within the time allowed.” (Exhibit 1, p. 2-3.)

In effect, TransCanada is admitting that it did not conduct a complete and accurate search of its records in responding to DRA’s discovery requests. Consequently, DRA does not know whether TransCanada complied with South Dakota’s discovery rules, as TransCanada is only willing to state that it engaged in a “reasonably practicable” effort to comply – whatever “reasonably practicable” means. In fact, to the extent that it is only willing to state that it engaged in “reasonably practicable” efforts to comply, TransCanada has for all practical purposes admitted that it has not provided full, accurate, and meaningful responses to legitimate discovery requests.

Legal Standard Mandates Compelling Discovery

Under Public Utilities Commission Administrative Rule 20:10:01:22.01, an order to compel may be granted by the Commission upon the showing of good cause by a party to the proceeding. Additionally, this rule sets forth that discovery is to proceed “in the same manner as in the circuit courts of this state.” A.R.S.D. 20:10:01:22.01.

In South Dakota circuit court discovery is governed by SDCL §15-6-26(b):

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

- (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the

claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The ability to engage in meaningful and complete discovery is an essential component to affording parties to proceedings due process rights. SDCL §15-6-26(b) covers the scope of discovery. That statute provides, in part, that:

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. SDCL §15-6-26(b)(1) (emphasis added).

The South Dakota Supreme Court has ruled that the discovery rules are to be accorded a “broad and liberal treatment.” *Kaarup v. St. Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17, 21 (S.D. 1989). “A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Id.* at 19 (citing 8 C. Wright and A. Miller, *Federal Practice and Procedure*, §2001 (1970)).

Furthermore, “[t]he proper standard for ruling on a discovery motion is whether the information sought is “relevant to the subject matter involved in the pending action....” SDCL 15–6–26(b)(1). This phraseology implies a broad construction of “relevancy” at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Id.*

Discovery Sought to be Compelled – Interrogatories

DRA's specific interrogatories TransCanada should be compelled to answer are set forth as follows:

DRA Interrogatory No. 7

DRA sought information regarding leaks and spills of crude oil from pipelines owned or operated by TransCanada and, in connection with these leaks and spills, requested information concerning TransCanada's Integrity Management Plan, SCADA (supervisory control and data acquisition) specifications, and Emergency Response Plan. While TransCanada provided a schedule setting forth numerous leaks and spills, it objected to providing its Integrity Management Plan, SCADA specifications, and Emergency Response Plan in connection with the listed spills and leaks on the basis that they were "confidential and not relevant" (see Exhibit 1, p. 11). TransCanada does not get to make the call as to what is "relevant" with respect to discovery. The applicable standard for discovery is that answers are required to be provided if they might lead to discovery of admissible evidence. Furthermore, in the event TransCanada truly believes the requested information is confidential, it can seek a protective order – which it has not requested. Given the pre-filed testimony of Evan Vokes in these proceedings about TransCanada's corporate culture of cutting costs and sacrificing pipeline safety in order to increase profitability (see **Exhibit 3**, *Testimony of Evan Vokes on Behalf of Dakota Rural Action*), it would appear that leaks and spills with respect to the proposed Pipeline are a virtual inevitability. Therefore, the information requested by DRA is highly relevant and should be disclosed.

DRA Interrogatory Nos. 8, 12, 13, 15, 16, 17, 26, 30, 33, 34, and 40

DRA is aggregating these discovery requests because, in various aspects, they all seek information regarding forecasts TransCanada developed with respect to crude oil demand, refinery capacity,

and other business factors that play into the decision as to whether or not the Pipeline is truly necessary. TransCanada objected to these requests because, among other things, it believes any response is outside the Commission's jurisdiction and seeks information that it does not have (see Exhibit 1, pp. 12, 15, 16, 18-20, etc.). Information sought by DRA is relevant because it directly addresses the need for the proposed Pipeline and directly addresses the specific findings made by the Commission in the Original Permit as noted in DRA's interrogatories. TransCanada's response defies credibility in that it asks DRA and the Commission to believe that it did not engage in any economic forecasting prior to launching a multi-billion dollar project. No company would do that. The failure to do so would constitute a serious breach of a corporate officer's fiduciary duty to that corporation. This response frankly undermines TransCanada's credibility with respect to the entire discovery process in these proceedings. TransCanada has not provided an adequate basis for objecting to DRA's discovery requests and should be compelled to completely disclose the information requested by DRA.

DRA Interrogatory No. 21

DRA requested that TransCanada inform it whether a failure by TransCanada to design, construct, test, or operate the proposed Pipeline in accordance with the special conditions developed by the Pipeline Hazardous Materials and Safety Administration (PHMSA), and set forth in Appendix Z to the Department of State, January 2014 Final Supplemental Environmental Impact Statement (FSEIS), would be a violation of federal law, and if so, to identify: (a) the law(s) under which enforcement of these special conditions would be brought; (b) the enforcing agency; and (c) all correspondence between TransCanada and PHMSA. This is an important issue because it goes directly to TransCanada's compliance with law and the conditions placed upon it by the Commission. TransCanada's response was inadequate in that it replied as follows:

This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-27. This request also seeks information addressing an issue that is governed by federal law and is within the province of PHMSA. In addition, this request depends on a hypothetical condition and is therefore speculative and improper as to form. It is also overly broad and burdensome to the extent that it seeks all correspondence between TransCanada and PHMSA, and asks for information that is not relevant and not likely to lead to the discovery of admissible evidence under SDCL § 15-6-26(b). Without waiving the objection, unless and until the Department issues a Record of Decision and a Presidential Permit, the recommendations in the Final EIS are not binding on Keystone. (See Exhibit 1, p. 21-22).

TransCanada is trying to have it both ways. The Commission's Original Permit clearly requires compliance with laws and regulations, yet TransCanada takes the position that any such compliance is outside the Commission's purview. While TransCanada asserts that providing correspondence between it and PHMSA is burdensome, that is not a sufficient rationale for dodging DRA's legitimate discovery request. Disclosure of TransCanada's correspondence with PHMSA could very well delineate any concerns PHMSA may have with respect to TransCanada's ability to construct the proposed Pipeline in compliance with law. That question is not hypothetical, but very real, in light of the pre-filed testimony of Evan Vokes in these proceedings about TransCanada's corporate culture of ignoring rules governing pipeline safety (see Exhibit 3). Consequently, TransCanada should be compelled to fully respond to this discovery request.

DRA Interrogatory No. 23

DRA sought information concerning the dates on which WCSB (Western Canadian Sedimentary Basin) crude oil transportation was disrupted due to spill or leak incidents. In response, TransCanada simply provided a spreadsheet setting forth a list of spills or leaks. See **Exhibit 4**, attached hereto. The information provided by TransCanada was not fully responsive to DRA's request because, while it set forth the date of each spill/leak incident, it failed to specify a range of dates in association with each spill during which crude oil transportation was disrupted. This information is relevant because the length of time of disruption could provide DRA with

information concerning the nature of potential pipeline damage or defects, along with information concerning TransCanada's ability to repair damaged or defective pipeline segments in a timely manner. TransCanada should be compelled to fully respond to this discovery request.

DRA Interrogatory No. 25

Because of public disclosures made by TransCanada that enhancements to the proposed Pipeline will result from its SCADA systems, it is reasonable to assume that software and data systems will be vulnerable to hackers. DRA sought information regarding TransCanada's proposed data security for the Pipeline. It is important for DRA, the Commission, and the public to know whether TransCanada has adequate data security systems and controls in place. This is information that should be disclosed because it directly affects the integrity and operations of the proposed Pipeline. Yet TransCanada objected to answering this request because largely it didn't think it was "prudent" to do so (see Exhibit 1, p. 24). Again, that is not TransCanada's call. The public has a right to know whether or not TransCanada has adequate and effective countermeasures in place to thwart hackers. This is a core operational and safety issue that is highly relevant to these proceedings. TransCanada should be compelled to answer DRA's request.

DRA Interrogatory No. 40

DRA asked TransCanada to state potential for pipeline transportation to replace rail transportation for shipments from the WCSB and the Williston Basin to PADDs 1 and 5. This information is relevant given public statements by Pipeline supporters that transportation of tar sands crude oil via pipeline is safer than rail. TransCanada objected on the basis that this information is not within the purview of the Commission and that it does not have this information. Again, TransCanada's response defies credibility in that it asks DRA and the Commission to believe that it did not engage in any economic forecasting with respect to marketplace competition prior to launching a multi-billion

dollar project. TransCanada has not provided an adequate basis for objecting to DRA's discovery requests and should be compelled to completely disclose the information requested by DRA.

DRA Interrogatory No. 48

In this interrogatory, DRA asked TransCanada to provide information concerning the worst case discharge and describe in detail the worst case scenario that would result from damage caused to the Pipeline from the high swelling potential of the Cretaceous and Tertiary rocks located in the Missouri River Plateau – which occurs due to this land form's susceptibility to instability in the form of slumps and earth-flows, including landslides. Additionally, DRA requested that TransCanada provide the locations where such ground swelling could be anticipated, and requested documents supporting TransCanada's answer. In answering, TransCanada appears to believe that the geology of South Dakota is a confidential homeland security matter, as that formed the basis for its failure to fully answer DRA's discovery request. TransCanada provided no statutory or regulatory authority for claiming a "homeland security" exemption to the discovery rules. If any such rule exists, TransCanada should file a motion for a protective order instead of putting DRA in the position of having to ask the Commission to compel discovery – but given we are at the point where no time is left to reach any other resolution, DRA requests that the Commission compel TransCanada to fully its discovery request.

DRA Interrogatory No. 56

DRA asked TransCanada to describe the worst case scenario of a worst case discharge into the Little Missouri, Cheyenne, and White River crossings, and to identify documents used to provide answers. While TransCanada provided a partial answer it objected on the following grounds:

“This request seeks information that is confidential. The location and volume of a worst case scenario spill are kept confidential for homeland security reasons.” (See Exhibit 1, p. 50).

Again, TransCanada provided no statutory or regulatory authority for claiming a “homeland security” exemption to the discovery rules and should be compelled to fully answer DRA’s discovery request because the impacts of a worst-case spill scenario could potentially have a devastating effect upon watersheds and water systems throughout South Dakota, and to populations downstream from spills for several hundred miles, and affect drinking water intakes for hundreds of thousands of people in cities like Lincoln, NE; Omaha, NE; Nebraska City, NE; St. Joseph, MO; and Kansas City, MO (see **Exhibit 5**, Stansbury, “*Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills From the Proposed Keystone XL Pipeline*”, p. 2).

DRA Interrogatory No. 57

DRA asked TransCanada to describe the worst case scenario which could occur from the Keystone XL pipeline as it passes under channels, adjacent flood plains and flood protection levees, as well as to identify any documents which would support its answers. Once again, TransCanada provided a partial answer, but objected to fully answering on the following grounds:

“This request seeks information that is confidential. The location and volume of a worst case scenario spill are kept confidential for homeland security reasons.” (See Exhibit 1, p. 52).

Again, TransCanada provided no statutory or regulatory authority for claiming a “homeland security” exemption to the discovery rules and should be compelled to fully answer DRA’s discovery request because the impacts of a worst-case spill scenario could potentially have a devastating effect upon watersheds and water systems throughout South Dakota, and to populations downstream from spills for several hundred miles, and affect drinking water intakes for hundreds of thousands of people in cities like Lincoln, NE; Omaha, NE; Nebraska City, NE; St. Joseph, MO; and Kansas City, MO (see Exhibit 5, p. 2).

DRA Interrogatory No. 58

Again, because of its strong interest in protecting the precious and increasingly scarce water resources of South Dakota, DRA requested that TransCanada, in light of the spill risk assessment it provided in the Commission’s HP09-001 docket, to explain leaks and spills on pipelines operated by the corporation, and to provide additional details concerning worst-case spill scenarios posed by the Pipeline. Continuing its game of “hide the ball”, TransCanada again asserted confidentiality and unsupported “homeland security” concerns in refusing to provide a full and complete answer to DRA’s legitimate discovery request. Given the importance of protecting South Dakota’s water resources, TransCanada should not be permitted to avoid fully answering this question. DRA requests that the Commission issue its order compelling TransCanada to fully answer.

DRA Interrogatory No. 60

Focusing specifically on protection of the water resources of Tripp County, South Dakota, DRA asked TransCanada to describe in detail the impact of a worst case scenario spill into the shallow and surficial aquifers in Tripp County from the proposed Pipeline, and to identify any documents which would support TransCanada’s answers. You guessed it. Once again, while providing a partial answer, TransCanada refused to fully answer on the basis of “confidentiality” and “homeland security” (see Exhibit 1, pp. 54-57). DRA re-asserts its prior responses set forth above with respect to this issue.

DRA Interrogatory No. 76

DRA requested information from TransCanada regarding locations in South Dakota where slope instability poses a threat of ground movement along the proposed Pipeline route, along with TransCanada’s current Integrity Management Plan (“IMP”) showing incorporation of locations where slope instability poses a potential threat to the Pipeline. TransCanada contends it not

required to answer DRA’s discovery request because it is “overly broad and unduly burdensome,” “seeks the discovery of information that is not relevant and not likely to lead to the discovery of admissible evidence,” that the IMP is “beyond the scope” of the Commission’s jurisdiction and TransCanada’s burden in these proceedings, that it seeks information “addressing an issue that is governed by federal law and is within the exclusive province of the PHMSA,” and that DRA’s request seeks information that is “confidential and proprietary” (see Exhibit 1, pp. 75-75). TransCanada’s objections are not well-founded. The request is narrowly-tailored and, hence, cannot be “overly broad and unduly burdensome.” If TransCanada is taking the position that it does not have this information, perhaps it should not be in the pipeline business, as understanding and documenting soil conditions and stability are critical to pipeline safety and integrity. Slope instability could lead to a pipeline shear, resulting in serious ground and water contamination from a spill. To the extent TransCanada suggests that this is not in the Commission’s purview, it is mistaken. The conditions appended to the Original Permit clearly require TransCanada to comply with federal regulations as a condition of receiving a permit. While the content of an IMP may indeed be governed and preempted under federal law, the Commission has required TransCanada to comply with those laws. DRA is entitled to disclosure of the requested information in discovery in order to be able to determine whether TransCanada is actually meeting – or for that matter, if it is even capable of meeting – the conditions set by the Commission. As for TransCanada’s unsubstantiated assertion that the information sought by DRA is “confidential,” TransCanada has failed to provide any basis for such a broad assertion, and regardless, the information sought is important to affording DRA and the Commission an opportunity to get a better understanding of the risks posed by the proposed Pipeline due to slope instability along South Dakota’s varied geology.

DRA Interrogatory No. 83

DRA asked TransCanada to identify the most recent IMP submitted to the Commission and other appropriate agencies, including but not limited to sections in it related to High Consequence Areas (“HCAs”). TransCanada objected to answering this interrogatory on substantially the same grounds asserted in its objection to DRA Interrogatory No. 76, set forth above (see Exhibit 1, pp. 80-81). For the same reasons as set forth above, DRA suggests that TransCanada’s objections have no legal basis and that it should be compelled to fully answer because DRA is entitled to receive complete information and an understanding of whether the IMP is adequate or even whether it meets applicable requirements under federal law. This is relevant due to the conditions TransCanada agreed to comply with in the Original Permit.

DRA Interrogatory No. 86

DRA asked TransCanada that in event of a worst case discharge or substantial release of crude oil into farmland and/or water resources and/or an explosion of the proposed Pipeline near homes or towns with people, to explain how it would have a “minimal” effect on the health, safety, or welfare of its inhabitants. DRA further asked TransCanada to identify the documents it relied upon to answer these questions. TransCanada objected on the basis that DRA’s request was “argumentative and improper in form,” that it “calls for speculation and assumes facts not in evidence and is therefore beyond the scope of discovery,” and that the Commission previously determined that TransCanada had met its burden on this issue. TransCanada’s objections have no legal basis. DRA and, more importantly, the citizens of South Dakota, are entitled to know the risks posed by the proposed Pipeline to their health, welfare, and safety. To the extent TransCanada argues this is not an issue, DRA is entitled to discovery to determine how TransCanada reached such an improbable

conclusion – particularly in the context of testimony contending that TransCanada de-emphasizes safety considerations in favor of profitability (see Exhibit 3).

Discovery Sought to be Compelled – Document Production

DRA’s specific interrogatories TransCanada should be compelled to answer are set forth as follows:

DRA Request for Production No. 1

DRA requested that TransCanada produce all documents identified or referred to in its Answers to DRA’s First Interrogatories. To the extent TransCanada failed to produce documents in response to any specific interrogatory as set forth above, DRA contends that TransCanada has no legal basis for failing to disclose documents for the reasons described with respect to each of the foregoing interrogatories in this motion to compel.

DRA Request for Production No. 9

DRA requested all documents concerning TransCanada’s decision to use API SL X70M high-strength steel for the Pipeline in lieu of API SL X80M high-strength steel. TransCanada objects on the basis that this request is “overly broad and unduly burdensome” (see Exhibit 2, p. 5). TransCanada’s objection has no basis because DRA is entitled to discover details concerning pipeline components and materials, as the selection of materials by TransCanada could have significant impact on the proposed Pipeline’s integrity. These concerns are heightened in light of pre-filed testimony suggesting that TransCanada uses sub-standard materials, sacrificing safety in favor of profits (see Exhibit 3).

DRA Request for Production No. 10

DRA requested all documents concerning TransCanada’s decision to use fusion-bonded epoxy (“FBE”) coating on the proposed Pipeline, including but not limited to, contracts or

other agreements with the manufacturer of the FBE product, and any communications between TransCanada and such manufacturer. TransCanada objects on the basis that this request is “overly broad and unduly burdensome” and “not relevant or likely to lead to the discovery of admissible evidence” (see Exhibit 2, pp. 5-6). TransCanada’s objection has no basis because DRA is entitled to discover details concerning pipeline components and materials, as the selection of materials, including coatings such as FBE, by TransCanada could have significant impact on the proposed Pipeline’s integrity. These concerns are heightened in light of pre-filed testimony suggesting that TransCanada uses sub-standard materials, sacrificing safety in favor of profits (see Exhibit 3).

DRA Request for Production No. 12

DRA requested all documents showing location of power lines for pumping stations proposed for the Pipeline, the location of proposed pumping stations and mainline valves for the Pipeline in South Dakota, and including, but not limited to all communications between TransCanada’s staff, consultants, advisors, or other parties concerning location and operation of pumping stations, mainline valves, and the proposed conversion of valves to remote control operations. TransCanada refused to provide the requested documents because it believes DRA’s request is “overly broad, unduly burdensome, not relevant, and not likely to lead to the discovery of admissible evidence.” The information sought by DRA is important and relevant given the prospect that pipeline leaks and spills often in connection with pumping stations and valves. On this basis, DRA is entitled to know what watersheds in South Dakota run a heightened risk of contamination when spills or leaks inevitably occur. In addition, TransCanada again relies the overused “homeland security” trope to refuse to provide DRA with documents disclosing the location of pump stations and mainline valves. As shown above, TransCanada’s assertion has no basis.

DRA Request for Production No. 13

DRA made a very basic request for TransCanada's documents concerning compliance with PHMSA regulations and conditions, along with TransCanada's communications with federal regulators regarding compliance issues. TransCanada again objected on the basis that providing this information is "overly broad and unduly burdensome." While this request may indeed produce a large volume of documentation, it is crucial for DRA and the people of South Dakota to understand TransCanada's compliance regime and whether or not any special concessions were negotiated between TransCanada and federal regulators, not to mention information describing whether regulators raised any concerns regarding TransCanada's compliance efforts. The Commission clearly placed the burden on TransCanada to comply with federal law as a condition of the Original Permit, so the information sought is highly relevant. DRA is entitled to receive this information.

DRA Request for Production No. 26

DRA requested documents containing information concerning the failure of FBE coating referenced in the update to Finding 68. While TransCanada provided an explanation for the failure of the FBE coating, it failed to produce the requested documents (see Exhibit 2, pp. 12-13). The Commission should compel TransCanada to comply with DRA's discovery request.

DRA Request for Production No. 28

DRA requested documents containing information regarding TransCanada's decision to use horizontal directional drilling to cross waterways, including but not limited to all documents discussing or describing the decision-making process engaged in to determine which waterways would be crossed using horizontal directional drilling. While TransCanada provided a one-

sentence answer, it failed to produce the requested documents (see Exhibit 2, p. 13). The Commission should compel TransCanada to comply with DRA's discovery request.

DRA Request for Production No. 29

DRA requested documents, including but not limited to forecasts and projections of tax revenue accruing to the State of South Dakota should construction and operation of the Pipeline commence.

While TransCanada produced a schedule of taxes paid (see **Exhibit 6**, attached hereto), its limited response was non-responsive to DRA's request for forecasts and projections. The instructions to DRA's request for production of contains a definition of the term "documents" (see **Exhibit 7**, p.

2). Documents are defined as:

"The term "document" is to be interpreted in the broadest sense permitted under the South Dakota Rules of Civil Procedure codified in SDCL Title 15, and includes tangible things and any media upon which information is recorded, stored, or placed, including without limitation, writings, e-mails, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form."

It is unreasonable for TransCanada to suggest that the only documents in its possession that relate to DRA's discovery request consist of the schedule attached hereto as Exhibit 6, meaning that TransCanada has failed to comply with DRA's legitimate request.

DRA Request for Production No. 30

TransCanada objected to DRA's request for production; however, DRA suggests that the documents sought in this request would be covered under its Request No. 1 set forth above, so DRA re-asserts its response to TransCanada's objections.

DRA Request for Production No. 31

DRA Requested documents concerning TransCanada's efforts to obtain and comply with applicable permitting referenced in Condition 2, including but not limited to copies of any permits obtained. This information is relevant to determine whether TransCanada is complying with the

conditions of the Original Permit, yet TransCanada refuses to produce the requested documents because it thinks DRA's request is "overly broad, unduly burdensome, not relevant, and not likely to lead to the discovery of admissible evidence" (see Exhibit 2, p. 14).

DRA Request for Production No. 33

DRA requested all documents concerning or discussing proposed adjustments or deviations in the route of the Pipeline, including but not limited to copies of notices to affected land owners. In response, TransCanada simply provided route variation maps (see Exhibit 2, p. 15). The instructions to DRA's request for production of contains a definition of the term "documents" (see Exhibit 7, p. 2). Documents are defined as:

"The term "document" is to be interpreted in the broadest sense permitted under the South Dakota Rules of Civil Procedure codified in SDCL Title 15, and includes tangible things and any media upon which information is recorded, stored, or placed, including without limitation, writings, e-mails, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form."

It is unreasonable for TransCanada to suggest that the only documents in its possession that relate to DRA's discovery request consist of route variation maps, meaning that TransCanada has failed to comply with DRA's legitimate request.

DRA Request for Production No. 34

DRA requested all documents concerning the appointment of a public liaison officer by TransCanada, and all documents containing information regarding communications between the public liaison officer and landowners affected by the Pipeline. TransCanada failed to respond to this request, objecting on the basis that the documents sought by DRA were "overly broad, unduly burdensome, not relevant, and not likely to lead to the discovery of admissible evidence" (see Exhibit 2, p. 15). TransCanada's objection is off-base. The appointment of a public liaison officer is a direct mandate of the conditions contained in the Original Permit. DRA is entitled to see the

requested documents, as any such documents could reveal TransCanada's noncompliance with conditions of the Original Permit and issues raised by landowners regarding their treatment at the hands of TransCanada.

DRA Request for Production No. 36

DRA requested all documents containing information concerning TransCanada's efforts to comply with mitigation measures set forth in the Construction Mitigation and Reclamation Plan submitted to the Commission. TransCanada completely failed to comply with request, only stating that the recommendations contained in the US State Department's Final EIS are not binding upon it until such time as action is taken by the federal government (see Exhibit 2, p. 16). TransCanada was non-responsive to DRA's request and the Commission should compel TransCanada to comply with DRA's request for production.

DRA Request for Production No. 37 and 38

Both of these document requests by DRA relate to development of construction/reclamation units ("Con/Rec Units") by TransCanada. TransCanada's objection that DRA's request is unduly burdensome and overly broad is off the mark. The request specifically focuses on a category of documents related to Con/Rec Units, so by its nature is narrowly tailored. Furthermore, TransCanada is non-responsive in that when asked for all documents, simply referred to Appendix R of the Department of State FSEIS (see Exhibit 2, p. 16). TransCanada should be compelled to produce the requested documents.

DRA Request for Production No. 42

DRA requested all documents containing information regarding consultations between TransCanada and the South Dakota Department of Game, Fish and Parks. While TransCanada provided a narrative of its consultations, it provided no documents in response to DRA's request, objecting on the basis that

requiring it to produce documents was “overly broad and unduly burdensome” (see Exhibit 2, pp. 17-18).

DRA Request for Production No. 44

This is a critical request for DRA which, because of its concerns that the Pipeline will negatively affect South Dakota’s increasingly scarce water resources, seeks all documents describing or containing information regarding TransCanada’s efforts to comply with conditions regarding construction of the Pipeline near wetlands, water bodies, and riparian areas, such documents including but not limited to compliance plans, construction plans, mitigation plans, and communications with any regulatory agency in such regard. TransCanada failed to respond to DRA’s request, stating only that it “has not yet received its permit authorization for wetland construction” (see Exhibit 2, p. 19). TransCanada’s response is woefully inadequate and the Commission should enter its order compelling TransCanada to comply with DRA’s discovery request.

DRA Request for Production No. 46

DRA seeks production of all documents that reference or identify private and new access roads to be used or required during construction of the Pipeline. TransCanada simply asserts that this information is confidential for “homeland security” reasons without providing any explanation as to why, or what legal basis it has for such a sweeping assertion. DRA has addressed TransCanada’s specious attempts at cloaking information in the trappings of some alleged homeland security regime above. The Commission should compel TransCanada to comply with DRA’s request and produce the requested documents.

DRA Request for Production No. 48

DRA seeks all documents referencing agreements reached with landowners, including but not limited to any agreements reached with landowners modifying any requirements or conditions

established by the Commission. TransCanada refuses to provide any documents, instead, objecting on the basis that DRA's request is "request is overly broad, unduly burdensome, and not likely to lead to the discovery of admissible evidence" (see Exhibit 2, pp. 20-21). TransCanada's objections are misplaced. DRA and the public need to know if TransCanada is upholding the conditions set forth in the Original Permit, and this request was designed to help determine whether, in its communications with landowners along the proposed Pipeline route, TransCanada remains in compliance. The Commission should compel TransCanada to produce the requested documents.

DRA Request for Production No. 50

DRA requested all documents containing information regarding assessments performed in connection with TransCanada's activities in HCAs, including but not limited to documents referencing efforts by TransCanada to comply with 49 C.F.R. Part 195, and any communications or consultations with the South Dakota Geological Survey, the Department of Game Fish and Parks, affected landowners and government officials. This request is reasonable in that TransCanada must comply with the law. Compliance is a condition of the Original Permit. Yet TransCanada first asserts that this information is confidential, and second, claims it is not within the Commission's jurisdiction (see Exhibit 2, p. 21). These objections have no basis. First, the Original Permit demands compliance with all laws – that is a condition. Whether or not TransCanada is in compliance with those conditions is a core question in these proceedings. That is a question to which DRA is entitled to get answers and receive documents. With respect to TransCanada's claims of confidentiality, a bald assertion that PHMSA requires it is insufficient. DRA is entitled to discovery and the Commission should compel production. To the extent TransCanada has a basis for claiming confidentiality, it should seek a protective order instead of simply refusing to respond to legitimate discovery request.

DRA Request for Production No. 51

DRA requested all documents where TransCanada identified hydrologically sensitive areas as required by Condition Number 35 of the Original Permit. TransCanada completely failed to comply with request, only stating that based on the current route in South Dakota which was evaluated in the Department of State FSEIS (2014) in Sections 3.3 and 4.3, the High Plains Aquifer in southern Tripp County is the only vulnerable and beneficially useful aquifer identified as being crossed by the proposed Pipeline in South Dakota (see Exhibit 2, p. 22). TransCanada was non-responsive to DRA's request in that it provided no documents. The Commission should compel TransCanada to comply with DRA's request for production.

DRA Request for Production No. 53

DRA requested all documents containing information regarding TransCanada's efforts to comply with protection and mitigation requirements of the US Fish and Wildlife Service and SDGFP with respect to any endangered species. In response, TransCanada simply referred to the Biological Assessment and Biological Opinion contained in the State Department Final EIS and Final Supplemental EIS (see Exhibit 2, p. 22). The instructions to DRA's request for production of contains a definition of the term "documents" (see Exhibit 7, p. 2). Documents are defined as:

"The term "document" is to be interpreted in the broadest sense permitted under the South Dakota Rules of Civil Procedure codified in SDCL Title 15, and includes tangible things and any media upon which information is recorded, stored, or placed, including without limitation, writings, e-mails, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form."

It is unreasonable for TransCanada to suggest that the only documents in its possession that relate to DRA's discovery request consist of the State Department's Final EIS and Final Supplemental EIS, meaning that TransCanada has failed to comply with DRA's legitimate request and that the Commission should compel production of documents as requested by DRA.

DRA Request for Production No. 55

DRA requested all documents referencing or containing information concerning cultural or paleontological resources along the proposed Pipeline route. TransCanada responded by simply referencing the State Department's FSEIS and stating that the paleontological monitoring plan for South Dakota is "not being produced because it is confidential/privileged information" (see Exhibit 2, p. 23). TransCanada's answer is non-responsive. TransCanada has provided nothing to back up its claim that the requested information is confidential or privileged, leaving DRA with the conclusion that TransCanada is not responding to its requests in good faith.

DRA Request for Production No. 56

Finally, DRA requested the incident reports for each and every spill or leak related to a pipeline operated by TransCanada companies since January 1, 2010. TransCanada simply provided a spreadsheet listing pipeline spills and leaks (see Exhibit 4), but failed to provide the requested incident reports – claiming that production was "overly broad and unduly burdensome" (see Exhibit 2, p. 23). TransCanada's position is ludicrous. First, pipeline spills are serious matters, and it defies credibility to suggest that the requested incident reports are not readily accessible to TransCanada where production would be a burden. Second, DRA requested incident reports for TransCanada and its "Affiliates," a defined term in DRA's First Request for Production of Documents. Without full and complete disclosure of the requested documents, DRA will not be able to make a meaningful inquiry as to TransCanada's safety record and standards, thereby being deprived of the basic due process rights it should be entitled to receive in proceedings of public bodies. The information sought by DRA is extremely relevant to these proceedings because the integrity and safety of TransCanada's pipelines is a key issue.

Conclusion

Throughout its responses to DRA's discovery requests, TransCanada has been less than forthcoming. Its reasons for doing so generally fall into three categories: (1) it believes that compliance with South Dakota's discovery rules is simply too burdensome, as in TransCanada simply doesn't want to be bothered with answering or taking the time to gather and produce documents, (2) that information sought is outside the Commission's jurisdiction, or (3) that it is entitled to withhold documents under some nebulous confidentiality scheme or for some unsubstantiated "homeland security" rationale. A full and fair hearing is essential. Due process demands it. Absent complete and thorough discovery, it is impossible to conduct a hearing capable of fully and carefully examining matters in dispute. Unless the Commission grants DRA's motion to compel discovery, having an open, full and fair hearing in this matter will not be possible. Such a result would deprive DRA and other intervenors of their due process rights under law.

TransCanada filed its petition seeking certification of the conditions of the Original Permit. For it to now claim that having to produce documents and answer questions concerning its compliance with conditions set forth in the Original Permit is unduly burdensome is disingenuous. Likewise, its' attempt to argue that the Commission lacks jurisdiction over certain compliance matters is also specious, given the mere existence of the Commission's authority to impose conditions requiring regulatory compliance with federal and state law. The purpose of these proceedings is to examine those issues in a full and fair hearing. Finally, TransCanada's various claims of confidentiality ring hollow as it provides no legal rationale other than a bare assertion to make this claim. DRA's motion to compel should be sustained and TransCanada ordered to answer fully, non-evasively, and completely to DRA's discovery requests.

Respectfully submitted,

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