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	)	Docket 14-001 **DAKOTA RURAL ACTION'S MOTION AND SUPPORTING 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 the Commission's staff ("PUC Staff") to provide the documents requested by DRA its First Request for Production of Documents to the PUC Staff, Number 5. DRA respectfully contends that since the information sought in this request for production of documents is relevant and discoverable, PUC Staff's objections should be overruled and the PUC Staff should be directed to produce documents responsive to the subject 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 the PUC Staff in an effort to secure the information or material sought through discovery requests prior to filing this motion.

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 – Document Production

In connection with these proceedings, DRA sent the PUC Staff its First Request for Production of Documents, with request No. 5 asking for: "All correspondence between TransCanada or its Affiliates and the Commission or Commission Staff concerning the Project. [Applicable Finding or Condition No.: all]."

In response, the Staff objected:

> OBJECTION. Staff objects to this request on the grounds of attorney work product. All communications between Staff and TransCanada have been conducted by attorneys and are, therefore, the subject of attorney work product. Furthermore, Staff operates as a party, separate from the Commission and does not have access to or knowledge of Commission communications.

Informal efforts to resolve the issue of disclosure with PUC Staff Counsel solely as to communications between PUC Staff and TransCanada, including attorneys therefore, have been unsuccessful.

DRA respectfully contends that the requested communications pertaining to the KXL Pipeline construction permit application in HP 09-001 and HP 14-001, however documented, are clearly relevant to these proceedings. As PUC Staff noted in its objection, it is a party to these proceedings separate from the Commission. It is also supposed to be a party separate from TransCanada. As a party, it is subject to discovery under A.R.S.D. 20:10:01:22.01 and SDCL §15-6-26(b). In *Kaarup v. St. Paul Fire and Marine Insurance Co., supra*, the South Dakota Supreme Court held that communications between attorneys for a party and the company responsible for the decision is issue was relevant and therefore discoverable. *Id.*, 436 N.W.2d at 22.

PUC Staff, in their objection, did not state what the basis was for the privilege, other that it was between attorneys. It did not claim the communications were privileged work product consisting of an "attorney's opinions and mental impressions" which "receive a greater level of protection." *Kaarup,* 436 N.W.2d at 21-22. See, also, SDCL §15–6–26(b)(3). Communications

not containing such opinions or impressions should therefore be discoverable. It should be noted that although the request for production was not limited to communications between attorneys for the TransCanada and the PUC Staff, no objection or disclosure was made as to disclosure of any communications between TransCanada and PUC Staff who were not attorneys.

DRA therefore requests that the Commission enter its order compelling PUC Staff to disclose such documents, whether between attorneys or staff of TransCanada.

Conclusion

Counsel for the PUC Staff should be instructed to state the search conducted for such documents and whether the requested communications concern solely the opinions and mental impressions of attorneys, or whether they involve other matters related to the pipeline construction permit. Should the PUC Staff continue to assert its objection is based upon the purported "privileged" nature of any or all of the documented communications requested, DRA requests the PUC examine those documents *in camera*, to determine if they really are attorney opinions and mental impressions, or whether they are otherwise discoverable as related to TransCanada's efforts to get and get recertified its construction permit. If any documents or parts thereof are non-privileged, the Motion to Compel should be granted and the Staff ordered to disclose. Should the PUC determine that any of the documents are privileged, DRA asked that they be placed sealed in the file of this case to permit later judicial review.

Respectfully submitted,

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