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SENT VIA EMAIL

James E. Moore
William Taylor
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RE: TransCanada's Deficient Production Compelled by the Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery; Deadlines; Documents Designated as Confidential

Messrs. Taylor and Moore:

We are writing to notify you that your production in response to the *Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery* is deficient and we intend to file a motion requesting the Public Utilities Commission exclude you from using documents compelled but not produced; from presenting witnesses and evidence based upon the compelled but not produced documents; or other relief including dismissal of your application.

In the *Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery from TransCanada*, the Commission recounted that it "voted unanimously to overrule TransCanada's objections and grant the Motion with respect to interrogatories 15 and 21 and requests for production of documents numbers 2, 3, 4, 7, and 8." The Commission then ordered that "TransCanada must provide answers to Yankton's interrogatories 15 and 21... [and] all documents with respect to Yankton's requests for production numbers 2, 3, 4, 7, and 8 by Friday, April 17, 2015."

With respect to the documents you were compelled to produce, you provided us access to a number of documents classified as either confidential or non-confidential.

Request for Production No. 2

Request no. 2 states: “All documents relating to environmental and hydrological surveys. Changed Finding of Fact Number Forty-One.” The documents produced in response to our request no. 2 include biological survey reports provided in the confidential documents and hydrological surveys provided in the non-confidential documents. We were only provided with copies of the biological and hydrological reports when the request asks for “all documents relating to the environmental and hydrological surveys”. (Compare to our RFP No. 6 wherein we requested all documents *constituting* the emergency response plan.) Your response to request no. 2 appears incomplete and deficient.

Request for Production No. 3

Request no. 3 states: “All documents relating to cultural and historic surveys, training, and response plans. Condition Forty-Four.” The documents provided in response to our request no. 3 include cultural survey reports provided in the confidential documents. We were only provided with copies of the cultural survey reports when the request asks for “all documents relating to cultural and historic surveys”. (Compare to our RFP No. 6 wherein we requested all documents *constituting* the emergency response plan.) Your response to request no. 3 appears incomplete and deficient.

Request for Production No. 4

Request no. 4 states: “All documents relating to required permits, both in South Dakota and outside South Dakota, including permit applications which were denied, revoked, or suspended.” It appears that your response to this request is deficient on multiple levels:

1. Our request sought documents pertaining to permit applications including those which were denied. Due to security safeguards necessarily employed for the protection of our clients’ confidentiality, we are unable to open one of the documents provided, titled “Presidential Permit Application from TransCanada Keystone Pipeline LP.url.” However, based on the title of this document, you appear to have provided only one Presidential Permit application, despite the fact that a previous Presidential Permit application had been submitted in 2008 and denied in 2012. This then begs the question, what other permit applications in addition to the 2008 Presidential Permit application have been denied for which you have failed to produce discovery?
2. Your response states that it includes all non-environmental permits *obtained* in South Dakota. Does this mean every application for a permit in South Dakota has been approved because the request is not limited to those which were denied, revoked, or suspended? Furthermore, does the distinction “non-environmental” indicate that TransCanada has also applied for environmental permits in South Dakota? If so, it appears your response is deficient for failure to include documents pertaining to such permit applications.
3. Our request sought documents pertaining to permit applications both within and outside of South Dakota. However, your response states that you included “all non-environmental permits obtained in South Dakota.” Does this mean TransCanada has not

applied for non-environmental permits outside of South Dakota? Moreover, does it mean TransCanada has not applied for *any* permits outside of South Dakota? If TransCanada has applied for permits other than the Presidential Permit outside of South Dakota, this response is incomplete and deficient.

We also would like to take this opportunity to reiterate our concern with the timing and mechanics of the production of the documents that were produced. Although access to the ftp website hosted by TransCanada's IT company was provided on Friday, April 17, 2015, we experienced technological problems associated with firewalls that our firm utilizes to address its concerns with unsecure ftp sites. We continued to experience significant delay once the firewall issue was resolved. It seems as though the size of the document files you chose to upload resulted in significant download delays that could have been eliminated by breaking them down into smaller file sized or producing the documents on an external hard drive. While we agree that an extension to April 28, 2015, for the filing of witness and exhibit lists is appropriate given the circumstances and we appreciate you agreeing to that extension, we believe a longer extension is in order considering these documents should have been produced on February 6, 2015. We believe a longer extension as well as a continuance of the May trial dates is appropriate.

Finally, we would like to take this opportunity to notify you that we intend to challenge the Commission's confidential treatment of the materials you produced to Yankton that you designated as confidential. The administrative regulations were not followed in that TransCanada was not required to request confidential treatment of information nor follow the other requirements of ARSD 20:10:01:41. Instead, the Commission, upon your insistence, has shifted the burden to intervenors and others who wish to challenge the "confidentiality determination" and request access by seeking such relief from the Commission pursuant to the Protective Order and ARSD 20:10:01:42 without first requiring you to meet your burden of ARSD 20:10:01:41. This shortcut together with your liberal designation of documents as confidential may result in the expenditure of more resources in order for the Commission to hear and decide any challenges and requests for access. Without knowing what, if any, basis exists to consider the documents confidential, we are uncertain at this point whether we are asking for the Tribe, all parties, or the public should have access to the documents you designated as confidential.

Please contact me if you would like to discuss any of these matters further.

Sincerely,



Thomasina Real Bird
Attorney