

**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, ROSEBUD SIOUX TRIBE’S, CHEYENNE RIVER SIOUX TRIBE’S AND INDIGENOUS ENVIRONMENTAL NETWORK’S JOINT MOTION FOR APPOINTMENT OF SPECIAL MASTER
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Dakota Rural Action (“DRA”), the **Rosebud Sioux Tribe** (“Rosebud”), the **Cheyenne River Sioux Tribe** (“Cheyenne River”), and the **Indigenous Environmental Network** (“IEN”) (DRA, Rosebud, Cheyenne River, and IEN are hereinafter collectively referred to as the “Movants”), by and through counsel, hereby collectively move the South Dakota Public Utilities Commission (the “Commission”) for an order appointing a special master to oversee the discovery process in these proceedings. In support of its motion, Movants state as follows:

Introduction

The purpose of these proceedings before the Commission is to examine TransCanada Keystone Pipeline, LP’s (“TransCanada”) application for recertification of its proposed Keystone XL Pipeline (the “Pipeline”), a project that, if approved, would transport hundreds of thousands of barrels a day of diluted bitumen through South Dakota, and which would pose a risk to the increasingly scarce water resources of this state and its citizens. To state that discovery in these proceedings has been contentious is an understatement. Movants and the other intervenors in these proceedings have consistently informed the Commission that the issues are complex and that the risks posed by the Pipeline are such that they warrant a complete and thorough examination of

whether TransCanada can meet the conditions set by the Commission's Amended Final Decision and Order dated June 29, 2010 (the "Original Permit"). The Original Permit sets fifty separate conditions, all of which TransCanada must demonstrate that it either can comply with, or that it continues to comply with almost five years after those conditions were set.

The condition of the Original Permit range from everything to compliance with all federal and state environmental laws, pipeline safety laws, local permitting, compliance with laws relating to endangered species, historic preservation and cultural resources, land reclamation, and paleontological resources. TransCanada is asking the Commission, the intervenors, and the people of South Dakota to blithely accept its assurances that it can meet these conditions, yet at every stage of these proceedings has sought to limit the scope of inquiry, limit the amount of time afforded parties to examine these crucial issues, and to exclude the voices of South Dakota citizens who are concerned about the future of their families, land, and water. The people of South Dakota deserve a careful and exhaustive review of the issues at stake. That requires a complete and thorough discovery process, with full disclosure on the part of TransCanada.

Rationale for Appointment of a Special Master

Unfortunately, in addition to its efforts to limit the scope of inquiry and prevent DRA and other intervenors from engaging in a full and complete discovery process, TransCanada has been less than forthcoming in its responses to discovery requests made by DRA and Rosebud (and other intervenors, as well). This reality is borne out by DRA's Motion to Compel Discovery which is being filed concurrently with this motion, as well as by similar motions to compel that are likely to be filed by other intervenors, including Rosebud. TransCanada itself acknowledged that it had not provided complete responses to DRA's discovery requests. In Interrogatory No. 2 of its First Interrogatories propounded to TransCanada, 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.” (see Exhibit 1 to DRA’s Motion to Compel Discovery, p. 2-3.)

The fact that TransCanada, a corporation with \$59 billion in assets and \$10.185 billion in annual revenue¹ is unable to do more than what is “reasonably practicable” when responding to legitimate discovery requests posed under the South Dakota Rules of Civil Procedure is telling. TransCanada is perfectly capable of fully complying with DRA’s (and the other intervenors’) discovery requests, yet it chooses to only do what it deems “reasonably practicable.”

Based on TransCanada’s statement that it is only doing what is “reasonably practicable,” whatever that means, Movants have no confidence that TransCanada will fully comply with South Dakota’s discovery rules, nor do they have confidence that even in the event the Commission grants motions to compel discovery, that TransCanada will fully comply. On this basis, Movants suggest that the Commission appoint a special master to oversee the discovery process in these proceedings.

Role of Special Master

Courts often employ special masters to serve a variety of objectives, for example, to alleviate caseload problems. The sheer magnitude of a complex case may overwhelm the time available to a tribunal which has other cases on the docket. Furthermore, conducting an *in camera* review of documents to review claims of privilege or confidentiality might take weeks or months of time, and many judges cannot fairly absent themselves from their other cases to devote this

¹ Source: TransCanada Corporation 2014 Annual Report.

amount of time to a single case. Lynn Jokela and David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 William Mitchell Law Review 1299, 1302 (2005).

The Commission is in a similar situation with multiple outstanding discovery disputes that need to be resolved, not just between Movants and TransCanada, but between TransCanada and other intervenors. Appointment of a special master would alleviate the Commission's burden and ensure that sufficient is devoted to fairly examining all items in dispute.

Given the nature of these proceedings and the issues in dispute, Movants suggest that appointment of a special master is appropriate, and suggests that a special master be given authority to issue rulings on discovery disputes between the parties (subject to appeal by either party to such dispute directly to the Commission), and that the special master, upon the conclusion of discovery, issue a report setting forth his or her findings regarding TransCanada's overall compliance with South Dakota's discovery rules. The individual appointed as special master should be a member of the South Dakota Bar and one approved by counsel to Movants, TransCanada, and the other intervenors in these proceedings. The special master's fees should be paid for by the Commission.

Conclusion

Because TransCanada has only been willing to do what is "reasonably practicable" in answering discovery requests, and because the risks posed the proposed Pipeline to South Dakota's land and scarce water resources are potentially significant, a full and complete approach to discovery is essential. Appointment of a special master can create an efficient process for assisting the Commission, TransCanada, the Movants, and the other intervenors in resolving discovery disputes. DRA, Rosebud, Cheyenne River, and IEN collectively suggest that Commission appoint a special master to oversee discovery as set forth in this motion.

Respectfully submitted,

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