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January 31, 2008

RE: TransCanada Keystone Pipeline, LP

Attached each of you will find a copy of Commission Staff Reply Brief with reference to the above captioned matter. This is intended as service upon you either by mail or electronically.

Very truly yours,

Kara Semmler
Staff Attorney

Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE APPLICATION BY)
TRANSCANADA KEYSTONE PIPELINE, LP)
FOR A PERMIT UNDER THE SOUTH)
DAKOTA ENERGY CONVERSION AND)
TRANSMISSION FACILITIES ACT TO)
CONSTRUCT THE KEYSTONE PIPELINE)
PROJECT)**

**COMMISSION STAFF
REPLY BRIEF**

HP07-001

At the conclusion of the hearing held in early December, the Public Utilities Commission (Commission) ordered all initial briefs be filed on or before January 11, 2008, and all reply briefs be filed on or before January 31, 2008. Commission Staff (Staff) submits this brief in accordance with such Order and in support of its position TransCanada (Applicant) met the burden of proof contained in SDCL 49-41B-22.

Many individuals intervened in the TransCanada Docket and several parties chose to be very vocal regarding his or her opinion in the media, at the local input hearings and at legislative hearings. Several of those same parties participated at the Commission evidentiary hearing. WEB Water is, however, the only party that chose to participate in the briefing process. It is clear from WEB Water's brief that it attempts to represent interests above and beyond those of a rural water pipeline. Further, the brief shows WEB Water is not interested in facts that show: the proposed pipeline plans include the best technology and safety measures available; the proposed pipeline route considers a list of factors beyond location of rural water pipelines; and the proposed pipeline shows compliance with all Pipeline Safety Rules. Instead WEB Water attempts to inject doubt regarding its interpretation of the Applicant's behavior, not evidence, in an attempt to show the pipeline should not be built. Staff will, in this brief, attempt to correct WEB Water's mischaracterizations and second address the Applicant's concerns regarding Staff's recommended conditions.

I. **MISCHARACTERIZATION REGARDING PROJECT IN GENERAL**

- a) WEB Water mischaracterized the nature of the proposed route and the character of the land along the proposed route

WEB Water characterized the proposed route selection as a hurried process and as one where attention was not given to environmentally sensitive areas. Contrary to WEB Water's characterization, the Commission heard extensive testimony regarding the proposed site selection process. See Testimony of Scott Ellis, Heidi Tillquist and Buster Gray. The process involves consideration of geology, hydrology, animal life, plant life and historical artifact presence. Id. Rather than discrediting the Applicant's proposed route, it seems WEB Water's argument discredits its own proposed route. WEB Water experts failed to consider necessary siting requirements when they made route recommendations. See Cross Examination of Mr. Rahn, beginning at TR page 1056 and Mr. Davis, beginning at TR page 1080. WEB Water expert testimony emphasized WEB Water's failure to consider all necessary environmental and engineering relevance in its proposed route. As with nearly all other arguments WEB Water made, the route recommendation was made with disregard to pipeline rules and standard pipeline practice. On the other hand, as the Commission heard from state agency representatives, the Applicant's routing process began with state agency consultation nearly two years ago. Specifically, the Commission heard witnesses testify they have no concern with Applicant's behavior including site selection.

In addition, the Commission heard testimony to establish that nearly the entire proposed pipeline route falls over glacial till. See testimony of Brenda Winkler and Heidi Tillquist. Experts testified glacial till is impermeable to all products, including crude oil. Id. Staff agrees, however, with WEB water that Marshall County does contain hydrologically sensitive areas. Staff stands by its recommendation that Marshall County

be recognized by the Applicant as sensitive and, therefore, be provided special consideration in its emergency planning and integrity management plan.

b) WEB Water suggested the public did not have adequate notice

The public was provided with extensive notice and ample opportunity to participate in the process. Many of the timelines under which both the Commission and the Applicant operated are statutorily mandated. For example: SDCL 49-41B-15 requires the Commission provide notice and schedule public hearings within thirty days following receipt of an application for a permit to build a pipeline. Additionally, SDCL 49-41B-16 requires the Commission hold public hearings within thirty days after public notice is given of the proposed pipeline. The Commission extended every deadline it possibly could, including the deadline for intervention and testimony. Aside from a Motion by WEB Water to extend the pre-filed testimony deadline, the Commission did not receive a request to amend the schedule. It is simply inappropriate to claim inadequate time at this late date after failing to take advantage of the Commission process months ago.

c) WEB Water mischaracterizes a thinner pipe wall as less safe

The Applicant went to great lengths in its initial brief to explain the various levels of Federal Regulation regarding pipelines of this type. Staff will, therefore, not repeat the analysis. Rather, in summary, the Office of Pipeline Safety is the federal agency specializing in pipeline safety. Its standards are dynamic and change with evolving technology. The Office of Pipeline Safety found, with the addition of fifty-one conditions, the pipeline as designed with the thinner wall pipe is safe. With evolving steel construction, thinner wall pipe can be made equally strong and safe. WEB Water's arguments should be made to the Federal Office of Pipeline Safety as the State of South Dakota has no jurisdiction over the issue. As a result, the Commission is precluded from

attaching conditions that are more stringent than the federal requirements unless agreed to by the Applicant.

d) WEB Water misrepresented testimony regarding soil borings

Many of WEB Water's questions and certainly its recommendations appear to stand for the sole purpose of inhibiting this potential pipeline project. The questions and recommendations do not appear to be based on evidence or facts. One such finding and conclusion was that soil borings "need to be done" along particular areas of the pipeline route. See WEB Water Findings of Fact and Conclusions of Law Number 36. None of the experts familiar with standard and accepted pipeline procedure recommended this expensive and burdensome step be taken. Rather, the experts stated that any additional information collected before, during or after potential construction is good, and will help in the event of a leak. Specifically, Staff expert Brenda Winkler, testified mandatory borings are unnecessary and are not usually done in conjunction with routing. She proceeded to state, however, that documenting vulnerable soil types during the course of construction are recommended. TR Page 822 and 823. The benefit of mandatory soil boring tests along the route is not established in evidence and is not a necessary or reasonable recommendation. Documenting soil boring information obtained during the course of construction could, however, be a prudent act on the part of the Applicant as it finalizes its emergency plan.

II. MISCHARACTERIZATION REGARDING APPLICABLE LAWS AND RULES

a) WEB Water mischaracterized the Commission's jurisdiction regarding emergency planning and other safety measures

WEB Water argued the Applicant failed to provide necessary and adequate emergency response and integrity management documents. Again, the Applicant presented argument and authority to show the Commission lacks jurisdiction to alter or

amend the federal guidelines or federal pipeline safety rules. The applicable federal rules and guidelines do not require either the emergency management or the integrity management documents be complete prior to operation. TR Starting at Page 1528. Although the Applicant has not completed its emergency response planning, it does not show lack of safety, nor does it demonstrate a failure regarding its emergency planning. Rather, the Applicant is following all necessary Federal Rules. Id.

WEB Water suggested the Commission has authority to require different safety measures than those imposed by the federal government. The 51 additional safety measures attached to the Office of Pipeline Safety's waiver cannot now be modified for a variety of reasons. First, the waiver and the attached conditions had its own due process. WEB Water, or any other interested person could have been involved with the judicial process surrounding the waiver application. Second, the Commission does not have regulatory safety oversight of the proposed pipeline. It is an interstate pipeline and does not, therefore, fall within state pipeline safety jurisdiction. Finally, to reiterate the Applicant's preemption arguments, the federal findings and rules simply preempt the State's as a basic legal principal.

- b) WEB Water attempts to argue the application is somehow incomplete because a bond was not offered by the Applicant

Staff does not believe this Commission has statutory authority to Order the Applicant post a bond. Despite WEB Water's argument, no evidence to support its request was entered into the record. WEB Water did not enter any evidence to show the current pipeline safety rules do not adequately protect the environment and surrounding landowners in the event of a spill. WEB Water did not enter any evidence into the record to show operators are not held to a high standard regarding remediation if a spill occurs. WEB Water did not enter any evidence to show a required bond will protect landowners or the environment above what is currently required of the Applicant. Finally, WEB

Water's own witnesses subpoenaed to be at the hearing testified all laws as they exist protect the public and the environment. WEB Water's subpoenaed witnesses all feel comfortable with the current laws and do not believe changes, additions or modifications are necessary. The current laws do not allow the Commission to Order the Applicant post a bond.

c) WEB Water implied private wells are not protected

Although private landowner wells are not considered a highly sensitive area according to the applicable federal definitions, they are not void from protection. Private wells used by landowners for either human or livestock water consumption are not given less protection than any other water system. Again, as with other water systems, wells are not affected by the mere presence of a hydrocarbon pipeline. To be at risk: first the pipeline must leak near the well, next the leak must occur in permeable soils and finally the leak must go unremediated long enough to allow oil to move into the well. Unless all the above steps occur, wells are not at risk. In the event, however, a well is contaminated, it, just like all other affects, must be remediated by the Applicant under current laws and rules.

III. MISCHARACTERIZATION OF STAFF RECOMMENDATIONS

a) WEB Water mischaracterized Staff Expert Dan Hannan's recommendation regarding emergency response review

WEB Water in its Findings of Fact Number 73 mischaracterized Mr. Hannan's recommendation as amended at the Commission hearings. Again, the Commission does not have jurisdiction to dictate what, where and how the emergency management plan is written or executed. Rather, the Applicant must submit its emergency management plan to the Office of Pipeline Safety, the federal agency with ultimate authority to accept and approve the plan. Mr. Hannan's recommendation is that the Applicant submit both its emergency management and integrity management plans to

the Public Utilities Commission when such plans are submitted to the federal government. Staff recommends the Commission be kept informed regarding the status of emergency planning and believes it is advisable the Commission track the progress of such planning. TR Page 1589. Staff does not believe, however, it is jurisdictionally appropriate for the Commission to hold an approval process for the emergency management plan itself.

IV. CLARIFICATION OF STAFF RECOMMENDATION

a) Trenching Method

Staff appreciates the Applicant's concern regarding Staff's recommended trenching method. In pre-filed testimony Staff recommended a particular type of trenching that requires disruption of a greater amount of private land. The initial recommendation was made with a high concern for top and sub-soil separation. After, however, hearing Applicant's testimony regarding its past experience and ultimately the affect on landowners, Staff modified its recommendation. Staff stands by the modified recommendation in its initial brief.

b) Native Grassland Protection

Staff also appreciates the Applicant's concern regarding Staff's recommended native grassland protection methods. After hearing testimony regarding the extreme difficulties such a condition will place on the Applicant, Staff agrees the recommendation is not reasonable and thus modified its pre-filed recommendation. Due to the assembly-line construction method, it is not possible to isolate native grassland sections for construction without extreme burden to the entire project. Staff, therefore withdraws its native grassland construction recommendation as presented in its pre-filed testimony.

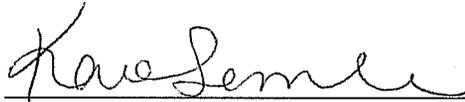
V. CONCLUSION

In Conclusion, with the above two clarifications, Staff recommends all construction conditions presented in its pre-filed testimony and in its initial brief. Clearly

the Commission's Order must balance jurisdictional limits, the evidentiary record, factual accuracy and necessary environmental and public protection. Staff relied heavily on Pipeline Safety Rules and Regulations to review the Application at issue. Although South Dakota does not have specific pipeline safety regulatory control over this project, the Federal Office of Pipeline Safety does. As a consequence, that office designed rules to provide the safest construction and operating environment possible. To require adherence to "all other rules and laws," this Commission requires compliance with the aforementioned Federal Regulatory Scheme. Staff believes the Applicant met its burden of proof and with the recommended conditions, the proposed pipeline falls within acceptable risk levels.

Dated this 31st day of January, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of Commission Staff Reply Brief were served on the following electronically on this the 31st day of January, 2008.

See attached.



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South Dakota Public Utilities Commission