

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION :
BY TRANSCANADA KEYSTONE : DOCKET NUMBER HP09-001
PIPELINE, LP FOR A PERMIT UNDER :
THE SOUTH DAKOTA ENERGY :
CONVERSION AND TRANSMISSION :
FACILITIES ACT TO CONSTRUCT THE :
KEYSTONE XL PROJECT :
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**APPLICANT’S RESPONSE TO DAKOTA RURAL ACTION’S
REQUEST FOR FURTHER DISCOVERY**

On July 31, 2009, Dakota Rural Action (“DRA”) served a first set of interrogatories and document requests on TransCanada Keystone Pipeline, LP (“Keystone”). On August 12, 2009, prior to the due date, Keystone initially served only objections to some of the requests so that any issues concerning its objections could be resolved sooner rather than later. (Moore Aff. ¶ 2, Ex. A.) Keystone then served responses to the interrogatories and document requests on August 24, 2009. Keystone served supplemental responses on August 25, 2009, and again on September 3, 2009. (*Id.* ¶¶ 3-4, Exs. C, D.) In its responses, Keystone has produced thousands of pages of information, including copies of all documents that Keystone provided to the Public Utilities Commission in response to Staff’s data requests. Because DRA insists that Keystone’s objections are without merit (even though DRA has not filed a motion to

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compel discovery), Keystone respectfully requests that the PUC determine whether it needs to produce any additional documents.

1. Keystone's production and answers.

Keystone did not object to request nos. 2, 3, 4, 11, 20, 21, or 22. Keystone initially did not object to request no. 1, but added an objection when it served responses on August 25 because some of the responsive documents contained information related to High Consequence Areas that PHMSA requires operators to keep confidential. DRA has not yet challenged this objection.

Keystone stated objections, but also provided answers or responsive documents, to request nos. 5, 7, 8, 9, 10, and 23. (*See generally* Moore Aff.) DRA has challenged all of the objections, without any argument why the responsive documents that were provided are insufficient.

Finally, Keystone objected to request nos. 6 and 12-19 without providing any responsive documents.

2. Keystone's objections are consistent with the scope of discovery.

According to the Commission's rules, discovery occurs under the same rules followed in circuit court in South Dakota, and the Commission has discretion to issue an order compelling discovery, which DRA has not requested. ARSD 20:10:01:22.01. By statute, discovery must be relevant, meaning that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." SDCL § 15-6-

26(b)(1). The extent of discovery, however, shall be limited if the discovery sought “is unreasonably cumulative or duplicative, or is obtainable from some other source,” or is “unduly burdensome or expensive.” *Id.* § 15-6-26(b)(1)(A)(i), (iii). Most of DRA’s requests to which Keystone objected are not relevant—either because they are outside the scope of the PUC’s inquiry in permitting construction of the proposed pipeline or because they concern matters preempted by federal law. Under law, the Applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. SDCL 49-41B-22

In addition, Keystone provided responsive documents to many requests despite its objections, for which DRA does not account in asking the Commission to compel further discovery.

- **Request no. 5—Keystone’s liability for damages**

In request no. 5, DRA sought all documents concerning the scope of Keystone’s liability for damages resulting from operation of the proposed KXL pipeline. Keystone

objected that the request sought legal conclusions beyond the scope of discovery.

Keystone nevertheless produced a copy of its easement, which addresses liability, and a copy of a document addressing liability that was used in connection with the open houses that Keystone hosted. DRA argues that because the PUC has jurisdiction to investigate potential liability of regulated entities, the request seeks relevant documents. (DRA Response at 8.) DRA also relies on the liability-related conditions that the PUC included in its Final Order in permitting the Keystone pipeline. (*Id.*) Finally, DRA states that it seeks “documents containing statements about oil spill liability provided by Keystone to non-privileged parties.” (*Id.* at 9.)

It is beyond dispute that Keystone’s ultimate liability for an oil spill is a legal matter to be determined by the courts, the judgments of which are binding on Keystone. Keystone’s position on liability, however, is stated in the easement document, which Keystone produced. (Moore Aff. ¶ 5, Ex. E.) Keystone is also bound by conditions imposed by the PUC, like the liability conditions in the Keystone Final Order, from HP07-001, which are consistent with the language in Keystone’s easement. (Keystone Final Order, Permit Conditions ¶¶ 53-57.) Any other “statements about oil spill liability” would not help the Commission determine whether Keystone has met its burden under SDCL § 49-41B-22. Rather, the risk of an oil spill and its consequences (a subject on which Keystone has provided DRA with extensive documents), not liability therefor, is relevant to whether the proposed pipeline threatens serious injury to the environment or

the inhabitants near the pipeline. *Id.* § 49-41B-22(2).

- **Request no. 6–Keystone's Emergency Response Plan**

In request no. 6, DRA seeks “all documents concerning your preparation of an Emergency Response Plan for the Keystone XL pipeline.” Keystone objected that the request seeks information beyond its burden of proof, that the ERP is governed by federal law and is within the province of PHMSA, that jurisdiction over the ERP is preempted by federal law, and that the ERP contains proprietary and confidential information. DRA responds that the PUC should “investigate whether Keystone is in compliance with federal law.” (DRA Response at 9-10.)

First, DRA does not challenge that the ERP is governed by federal law, *see* 49 C.F.R. 194 (requiring that ERP be completed and filed with PHMSA), and the issue of federal preemption is clear. The Pipeline Safety Act expressly preempts any state “safety standards.” 49 U.S.C. § 60104(c)). *See also Northern Nat'l Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 824 (8th Cir. 2004); *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir. 1993); *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987). In this context, requiring Keystone to produce “all documents” concerning its preparation of the ERP for the KXL Pipeline would not help the Commission.

Second, DRA cites no authority for its remarkable and repeated statements that the PUC's role is to investigate Keystone's compliance with federal law. To the contrary,

that is the job of agencies charged with enforcing federal law. The PUC instead has jurisdiction to permit construction of the pipeline. SDCL § 49-41B-4; Keystone Final Order, Conclusion of Law ¶¶ 1. The standards for granting a permit are stated in SDCL § 49-41B-22. While SDCL § 49-41B-22(1) requires Keystone to prove that its proposed pipeline will comply with all applicable laws and rules, proof that an ERP has been completed and filed with PHMSA will satisfy rather easily that burden with respect to this request. The PUC is not charged with determining the content of the ERP.

Thus, even if the PUC were to investigate Keystone's compliance with federal law, DRA's wide cast for "all documents concerning your preparation of an Emergency Response Plan," which is unfinished, would not help such an inquiry. At issue is not Keystone's process in developing the ERP, but whether it produces and submits an ERP with which PHMSA is satisfied. The PUC can treat the issue as it did with the Keystone pipeline in its final order, and require Keystone, as proof of compliance, to file the ERP with the PUC when it is completed. (Keystone Final Order, Permit Condition ¶ 44.)

Finally, the information that DRA seeks, which is not just the ERP, does include confidential and proprietary information. The PUC previously recognized this when requiring as a permit condition that the ERP and Integrity Management Plans for the Keystone Pipeline also be filed with the Commission, subject to the Commission's confidential filing rules found at ARSD 20:10:01:41.

- **Request no. 7-Advisory Bulletin**

DRA seeks “all documents concerning Advisory Bulletin ABD-09-01.” (DRA Response at 11-12.) Keystone objected that the request was beyond the PUC’s jurisdiction and Keystone’s burden, and addresses an issue that is preempted by federal law. Keystone nevertheless produced a copy of its response to the PUC’s earlier inquiry concerning the advisory bulletin. (Moore Aff. ¶ 6, Ex. F.) DRA counters that the Commission should investigate Keystone’s compliance with federal law, “even if the Commission cannot change federal standards.” (DRA Response at 12.)

Keystone’s response, which DRA does not address, is sufficient. If DRA is dissatisfied with Keystone’s explanation why the concerns addressed in the Advisory Bulletin have already been addressed by Keystone and do not create compliance concerns for construction of the KXL Pipeline, then DRA should state why Keystone’s response is inadequate, and not merely request “all documents” concerning the bulletin.

- **Request no. 8—Keystone’s special permit application**

DRA broadly requested “all documents concerning whether a design factor of 0.80 is appropriate for use in crude oil pipelines.” (DRA Response at 12.) Despite the subject matter obviously being preempted by federal law, *see* 49 C.F.R. § 195.106; 49 U.S.C. § 60118, Keystone produced to DRA its application to PHMSA dated October 10, 2008, an amendment to the application, and the appendices. (Moore Aff. ¶ 7, Ex. G.) DRA nowhere explains in its response (DRA Response at 13) why these detailed documents are not sufficient for its stated purpose of recognizing the risks and means of mitigating

the risks of operating a pipeline with a design factor of 0.80.

- **Request no. 9—composition of the crude oil to be transported**

DRA requested all documents concerning the composition of the crude oil to be transported by the KXL Pipeline, which it says will help the PUC determine “how the material to be transported may or will affect the internal components” of the pipeline. (DRA Response at 13.) Keystone objected to relevance and based on federal preemption, but also produced a copy of the tariff under development with the Federal Energy Regulatory Commission. (Moore Aff. ¶ 8, Ex. H.) DRA argues that the chemical composition of the oil is relevant to wear and tear and in case of a leak. (DRA Response at 14.) DRA does not, however, explain why Keystone’s response is inadequate for this purpose, especially given Keystone’s extensive production of documents related to its assessment of the risks of an oil spill or leak.

- **Request nos. 12-19—demand issues**

DRA requested documents related to Western Canadian oil production forecasts, Canadian export capacity to the United States, domestic demand, binding shipper agreements, an explanation why shippers are not satisfied with only the Keystone pipeline, an evaluation of the 2009 Canadian Association of Petroleum Producers June 2009 Crude Oil Forecast, a description of the impact of the Energy Information Agency’s 2009 Annual Energy Outlook Report, and a description of the impacts of increased imports into the United States of Canadian crude on domestic demand. (DRA Response

at 15-18.) Keystone produced no documents in response to these requests because they are beyond the PUC's jurisdiction and Keystone's burden of proof. DRA responds that South Dakota law requires evidence of demand, that the information provided in Keystone's application related to demand is conclusory and outdated, and that demand issues are not really preempted by federal law. (*Id.* at 15, 17-18.)

DRA argues, in essence, that because it deems the information that Keystone provided in its application insufficient, inaccurate, or untrustworthy, it can demand extensive production of documents in a fishing expedition to see whether Keystone has any documents that might contradict its application. Moreover, three of the requests at issue are not document requests at all; instead, they ask Keystone to "provide a description" of the proposed pipeline's use or the impact of certain reports on domestic demand for Canadian crude oil. (Request nos. 16-18.)

Missing in DRA's response is any explanation of the relevance of documents concerning demand beyond what Keystone submitted in its application. The Commission's primary focus has been on pretrial construction and operational issues and their effect on landowners and residents near the pipeline corridor. Discovery serving only to justify to DRA's satisfaction the demand for oil (proved in the market by shipper contracts) is not relevant.

- **Request no. 23—the proposed route.**

DRA requests all documents related to efforts to identify alternative routes that do

not require a new right of way through South Dakota. (DRA Response at 23.) Keystone objected that routing is, by statute, beyond the PUC's jurisdiction, but produced documents from the Presidential Permit application describing the process involved in determining the current proposed route. (Moore Aff. ¶ 9, Ex. I.) DRA concedes that the PUC lacks jurisdiction to route the proposed pipeline, SDCL § 49-41B-36, but argues that Keystone must nonetheless explain how it chose the "site" for the facility pursuant to ARSD § 20:10:22:12. (DRA Response at 18.)

DRA does not explain, however, why the documents Keystone provided are insufficient to satisfy ARSD § 20:10:22:12. Unless DRA establishes that Keystone's response is inadequate, it is not entitled to demand "all documents" without showing some basis for its request.

Conclusion

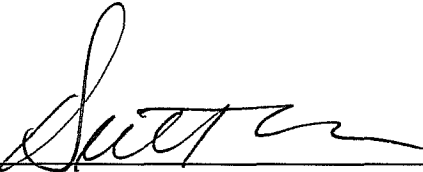
Keystone has been responsive to both the PUC Staff's data requests and to DRA's written discovery. Keystone has produced thousands of pages of documents and will present live testimony, in addition to its pre-filed testimony, at the hearing set on its permit application, where DRA will have an opportunity to cross-examine. Because DRA has not established any need or relevance for the additional discovery to which Keystone objected, Keystone respectfully requests that no additional discovery be compelled.

Dated this 18th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2009, I sent by United States first-class mail, postage prepaid, and/or e-mail transmission, a true and correct copy of the foregoing Applicant's Response to Dakota Rural Action's Request for Further Discovery, to the following:

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