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

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| 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 XL PROJECT | ) ) ) ) ) ) | DOCKET NUMBER HP09-001 |

**MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS ADDRESSED TO TRANSCANADA KEYSTONE PIPELINE, LP PROPOUNDED BY DAKOTA RURAL ACTION**

Dakota Rural Action ("DRA"), by and through its attorneys, hereby moves for an order, pursuant to SDCL § 15-6-37(a), compelling TransCanada Keystone Pipeline, LP ("Applicant") to provide substantive, non-evasive responses to and/or to produce the documents sought by DRA Discovery Requests 1-3, 5-10, 12-19, and 23 contained in Dakota Rural Action's First Set of Interrogatories and Request for Documents to TransCanada dated July 31, 2009.

Because the information sought in these discovery requests and requests for production of documents is relevant and discoverable, Applicant's objections should be overruled and Applicant should be directed to provide meaningful answers to interrogatories and to produce responsive documents.

DRA's specific arguments in response to each of Applicant's general or specific objections and to Applicant's inadequate responses to particular requests are detailed below.

## I. SCOPE OF DISCOVERY

"The scope of discovery in administrative hearings is governed by statute and the agency's discretion as well as by due process." 2 AmJur2d Administrative Law § 328 (footnote omitted). Here, SDCL 1-26-19.2 and ARSD 20:10:01:01:02 (promulgated pursuant to SDCL § 49-41B-35) require that discovery before the Commission be conducted in accordance with the South Dakota Rules of Civil Procedure ("Rules"), SDCL Ch. 15-6. Therefore, the scope of discovery in this proceeding is defined by the Rules, specifically Rules 26 through 37. Rule 26(b) states in relevant part: "Parties may obtain discovery regarding <u>any matter, not privileged,</u>

which is relevant to the subject matter involved in the pending action . . . . 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). Thus, discovery may be had regarding any non-privileged matter that at a minimum is reasonably calculated to lead to discovery of admissible evidence and relevant to the subject matter of this proceeding.

As described below, the subject matter of this proceeding and the scope of the Commission's jurisdiction is defined by SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

## II. SCOPE OF COMMISSION JURISDICTION

"The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute." *O'Toole v. Bd. of Trs.*, 2002 SD 77; 648 N.W.2d 342, *citing Johnson v. Kolman*, 412 N.W.2d 109, 112 (SD 1987); *Springville Com. Sch. Dist. v. Iowa Dept. of Pub. Inst.*, 252 Iowa 907, 109 N.W.2d 213 (1961); *Montana Bd. of Nat. Res. & Con. v. Montana Power Co.*, 166 Mont. 522, 536 P.2d 758 (1975). The Commission's jurisdiction in this matter is provided by SDCL Chapter 49-41B and further described in ARSD Chapter 20:10:22. With regard to environmental issues, the Commission has jurisdiction under SDCL Chapter 34A-9. There is no disagreement that the Commission has jurisdiction to permit and conduct an environmental review of the proposed Keystone XL Pipeline ("Proposed Pipeline").

Many of Applicant's objections are based on arguments that the Commission's jurisdiction is limited because: (1) Applicant need produce only documents related to its burden of proof under SDCL § 49-41B-22, presumably because the Commission's jurisdiction is limited to the scope of SDCL § 49-41B-22; (2) state law does not provide jurisdiction over a particular matter; and/or (3) jurisdiction has been preempted by federal law. Due to the frequency of use of these objections, the following discusses the scope of the Commission's jurisdiction over pipeline permitting under law.

### A. The Commission's Jurisdiction and the Subject Matter of this Proceeding Is Not Defined by SDCL § 49-41B-22 but Rather by All Substantive Provisions in SDCL Ch. 49-41B and its Related Regulations and SDCL Ch. 34A-9

Applicant objects to Requests 6 to 8, 12 to 18, and 19 because these requests seek "information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under

SDCL § 49-41B-22." Applicant objects to Requests 5 and 23 because they are "beyond the scope of the PUC's jurisdiction."

Applicant's argument that the Commission's scope of jurisdiction is limited to its burden of proof ignores other provisions in SDCL Chapter 49-41B, SDCL Chapter 34A-9, and ARSD Chapter 20:10:22. While SDCL § 49-41B-22 defines Applicant's burden of proof and generally describes the policy balancing required in Commission decision making, the scope of information relevant to the Commission's balancing process is defined by a number of provisions, including:

- the application contents required by SDCL § 49-41B-11;
- the Applicant's burden of proof under SDCL § 49-41B-22, including evidence of whether or not the proposed facility will comply with all applicable laws and rules;
- other provisions in SDCL Chapter 49-41B related to specific matters, such as SDCL § 49-41B-19 (information provided by state and local governments), SDCL § 49-41B-21 (environmental impact statement), SDCL § 49-41B-28 (impact of county ordinances), and SDCL § 49-41B-38 (roads damage);
- application contents required by ARSD Chapter 20:10:22, such as § 20:10:22:10 (demand for facility), 20:10:22:12 (alternative sites), 20:10:22:13 (environmental information), and 20:10:22:38 (gas or liquid transmission line description); and
- SDCL Chapter 34A-9, including particularly the contents of an environmental impact statement.

If Chapter 49-41B is read to limit Commission jurisdiction to only SDCL § 49-41B-22, the Commission could not consider information required to be in an application that is not also a part of the burden of proof. Such reading of law would make much of the application contents irrelevant and render much of SDCL § 49-41B-11 and ARSD § 20:10:22 without effect. Since interpretations of law that render specific provisions null are to be avoided, Applicant's argument that SDCL § 49-41B-22 alone defines the Commission's scope of jurisdiction is an incorrect statement of law.

All of DRA's Requests are founded on particular provisions of law and are related to issues raised by Applicant in its Application. The statutory or regulatory foundations for the Requests to which Applicant objects are specifically identified for each Request, below. Since

all of DRA's requests concern subject matters at issue in this proceeding, they are relevant to this proceeding and therefore may be the subject of discovery.

Should the Commission prevent discovery by intervenors of facts related to matters required to be included in the Application, the practical effect of such decision would be to allow Applicant to provide only that information it desires to disclose, because intervenors could not discover facts that applicants might choose to withhold. Such limitation would violate state law and be fundamentally unfair and thereby fail to provide due process of law.

### B. Federal Pipeline Laws Do Not Preempt Commission Jurisdiction to Investigate Facts Related to these Laws or Applicant's Compliance with these Laws

Applicant argues that DRA is not entitled to responses to Requests 6 to 9 and 16 to 19 because the subject matter of these requests are preempted by federal law. Federal law does not preempt discovery of facts related to matters that are regulated by federal law. It only prevents state regulation of these matters.

#### i. The Commission Has Authority to Investigate Facts Even where these Facts Relate to Federal Law

Applicant confuses the Commission's broad jurisdiction to investigate facts relevant to federal law with federal preemption of state action that interferes with federal law. Under SDCL § 49-41B-22(2) and (3), the Applicant must prove and therefore the Commission must investigate whether "[t]he 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" and whether "[t]he facility will not substantially impair the health, safety or welfare of the inhabitants." It is not possible for the Commission to find that the Applicant has met these burdens of proof without investigating: (1) facts related to the threat posed by the proposed pipeline, which threat is addressed largely by federal pipeline safety law; (2) Applicant's compliance with federal law; and (3) the scope of permit conditions needed to mitigate pipeline threats that do not interfer with federal law.

Further, the Commission may not issue a permit to Applicant unless it proves that "[t]he proposed facility will comply with all applicable laws and rules . . . ," which includes federal laws. SDCL § 49-41B-22(1) (emphasis added). Therefore, the Commission has the authority

and duty to investigate Applicant's compliance with federal law. Should the Commission find that Applicant has not complied with federal law, then it may not issue a permit. Applicant argues that investigation of Applicant's compliance with federal law would be a usurpation of federal authority because only federal entities may enforce federal pipeline safety laws. This argument confuses authority to investigate with authority to regulate and enforce law.

Moreover, the Commission has previously conducted a variety of investigations into Applicant's compliance with federal law to satisfy itself that Applicant is in compliance and to determine if supplemental non-preempted state action is appropriate. For example, the Commission has inquired into PHMSA Special Permit matters, compliance with federal High Consequence Area designation, and Applicant's response to a PHMSA advisory bulletin. Therefore, investigation of matters related to Applicant's compliance with federal law are within the Commission's jurisdiction and are subject to discovery.

ii. The Commission Has Authority to Provide Additional Protections that do Not Frustrate the Intent of Federal Law

That federal law preempts certain types of pipeline safety regulations does not mean that the Commission has no ability to protect the health and safety of South Dakotans through non-preempted permit conditions. SDCL § 49-41B-24 specifically authorizes the Commission to grant a permit "upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission may deem appropriate." This discretion is very broad. This state authority permits the Commission to investigate and consider facts even if the facts are also relevant to federal regulation. While conditions imposed on the proposed pipeline by the Commission may not frustrate the intent of federal law, such conditions may provide additional protection.

Adoption of non-preempted state health and safety conditions cannot be accomplished without investigation of the protections offered by federal law, the limits of federal authority, the limits of state authority, and facts that may be relevant to both federal and state policy. For example, in Request 3 DRA seeks information on setbacks, which are in turn related to the threat posed by ruptures of pipelines. Federal law imposes a construction setback of 50 feet from pipelines. Such federal construction setback does not prevent state or local governments from imposing land use regulations that prohibit certain uses in areas outside this federal construction

setback. In fact, a number of local governments have imposed land use setbacks of up to 500 feet as a means of providing additional protection to their citizens. Page 11, supra. These land use setbacks are not preempted by federal law because they relate to future development by other landowners. In order to evaluate whether local land use protections should be adopted, state and local agencies would need to investigate: (1) facts related to the risks created by pipelines; (2) the scope of protection offered by the federal 50 foot setback; (3) the boundary between federal and state authority to control land uses near pipelines; and (4) the appropriate size of state setbacks needed to mitigate risks not addressed by federal law.

Facts may be relevant to both federal and Commission regulatory processes. In order to fulfill its duty under law, the Commission must have the authority to investigate facts related to state law even if such facts also relate to federal regulations. Therefore, DRA may conduct discovery related to possible non-preempted state action.

iii. The Commission Has Authority to Comment on and Request Appropriate Implementation of Federal Pipeline Safety Law by Federal Agencies

The Commission may comment on and request that the Applicant or responsible federal agencies apply federal law in particular ways based on local needs. For example, in the K1 Final Order, Exhibit A, Paragraph 43, the Commission investigated federal spill prevention and clean up planning requirements and required the Applicant to treat the Middle James Aquifer area in Marshall County as a hydrologically sensitive area (a federal designation) in its federally mandated Integrity Management and Emergency Response Plans. This example of Commission action demonstrates that even though the Commission cannot change or implement federal pipeline safety law, it may comment on and seek voluntary action by federal agencies to help ensure that the implementation of federal law in South Dakota is thorough and appropriate. Such state action could only happen after gathering of facts related to federal requirements and compliance with these requirements. Therefore, the Commission has authority to investigate Applicant's compliance with federal pipeline safety requirements and to request that Applicant voluntarily comply with federal law in an appropriate fashion.

The Commission may investigate facts relevant to both federal and state law, investigate the scope of federal and state law and authority, impose requirements that supplement but not frustrate federal law, determine that applicants are in full compliance with federal law, and

request voluntary federal action to help ensure that South Dakotans receive the maximum protection offered federal law. Therefore the Commission has jurisdiction to investigate matters related to federal law; therefore discovery related to these matters is relevant and subject to discovery.

## III. DISCUSSION OF DRA'S DISCOVERY REQUESTS AND APPLICANT'S INADEQUATE RESPONSES THERETO

The following discusses the DRA discovery requests that are in contention. For each request, DRA includes the text of the request, Applicant's objections and responses to the request, and DRA's arguments as to why Applicant's objections and response are inadequate under law, such that the Commission should compel Applicant to respond to the request.

### A. APPLICANT'S GENERAL OBJECTION RELATED TO DISCOVERY OF DOCUMENTS IN THE POSSESSION OF APPLICANT'S CORPORATE AFFILIATES IS WITHOUT MERIT

Applicant provides the following general objection to DRA's entire discovery request:

> Keystone objects to the instructions and definitions contained in Dakota Rural Action's First Set of Interrogatories and Request for Documents to the extent that they are inconsistent with the provisions of SDCL Ch. 15-6. *See* ARSD 20:10:01:01.02. In particular, Keystone objects to the definition of "you" and "yours" to the extent that it encompasses TransCanada Keystone Pipeline, LP's partners, corporate parents, subsidiaries, affiliates, or successors. Keystone will respond to the discovery only on its behalf as the Applicant and party before the Public Utilities Commission.

This general objection is without merit for the following reasons.

Applicant has provided no meaningful legal foundation for its General Objection. Applicant argues that extension of discovery to Applicant's "partners, corporate parents, subsidiaries, affiliates, or successors" is inconsistent with SDCL Chapter 15-6, the South Dakota Rules of Civil Procedure, and also cites ARSD § 20:10:01:01:02 for support. Applicant fails to point to any particular provision within SDCL Chapter 15-6 that supports its objection, such that DRA and the Commission can only speculate about how the Rules of Procedure limit discovery to Applicant's "partners, corporate parents, subsidiaries, affiliates, or successors." SDAR 20:10:01:01:02 provides no legal basis for the objection because it merely states that the Rules of

Civil Procedure apply to Commission proceedings and does not speak to the appropriate scope of discovery. Therefore, Applicant has provided no meaningful legal basis for its objection.

Instead, the standard for whether or not a corporate affiliate is subject to discovery is based on the relationship between the entities and the relevance of the information sought to the proceeding. Although there appears to be no direct South Dakota court precedent on this matter, the Federal Courts have described the reach of discovery into corporate affiliate files. In *Murphy v. Kmart Corp.*, 255 F.R.D. 497; 2009 U.S. Dist. LEXIS 6081, the court described the test applicable there:

> In *Hunter Douglas, Inc. v. Comfortex Corp., 1999 U.S. Dist. LEXIS 101, 1999 WL 14007 (S.D.N.Y. Jan. 11, 1999)*, involving a dispute over the production of documents in response to certain discovery requests, the court held that "[i]f the nature of the relationship between the parent and its affiliate is such that the affiliate can obtain documents from its foreign parent to assist itself in litigation, it must produce them for discovery purposes." See *Hunter Douglas, Inc., 1999 U.S. Dist. LEXIS 101, 1999 WL 14007 at *3*. "[T]he test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents.' " Id. (citation omitted); see also *Japan Halon Co., Ltd. v. Great Lakes Chemical Corp., 155 F.R.D. 626, 628 (N.D. Ind. 1993)* (holding that the relationship between the plaintiff and its two Japanese parent corporations was sufficiently close to justify enforcing the defendant's discovery request for documents in the physical possession of the parent corporations).

Thus, the federal courts do not provide a blanket exemption from discovery for corporate affiliates from the reach of discovery. Instead, the federal courts examine the ability of a party to acquire information from its corporate affiliates, the relevancy of the information, and other objections, such as that a request is unusually, unduly, or extraordinarily burdensome on the corporate affiliate. 255 F.R.D. 497; 2009 U.S. Dist. LEXIS 6081.

This refusal by the federal courts to allow a blanket exemption for corporate affiliates makes sense given the complexity, diversity, and multinational nature of corporate relationships. If the Commission were to adopt such broad exemption and allow discovery only of the specific entity that submits an application for a Commission permit or license, it would be entirely possible for applicants to shield important information from Commission process by simply ensuring that applicant entities are not provided such information by their corporate parents.

There is a particular risk that important information might not be in the files of applicants for Commission permits where an applicant, such as Applicant, was formed to develop a new project and itself has no experience or history operating similar projects. Such applicants must

of necessity rely on the operating history and experience of their corporate parents or other affiliates. Here, Applicant was purpose-formed to develop the Keystone pipeline system such that it has never operated a pipeline and must rely on its corporate parent, TransCanada, for information.

The South Dakota Rules of Civil Procedure recognize no general right to exempt corporate affiliate files from discovery. Further, neither SDCL Chapter 1-26 nor the Commission's rules of procedure, ARSD 20:10:01, provide an exemption from discovery for corporate affiliates. It does not appear that the Commission has so limited the discovery rights of other parties that have practiced before it, nor would such a blanket exemption serve the public interest. This broad exemption simply does not exist.

Also, it appears that Applicant has included information from its corporate affiliates in its application and in its responses to some of DRA's discovery requests. For example, the Applicant has provided information about the rate of spills experienced by its corporate parent, TransCanada. Therefore, the Commission should find that Applicant has access to information from its affiliates and require discovery of relevant corporate affiliate files. Shielding TransCanada from the reach of discovery would allow Applicant and TransCanada to select which information could be acquired by the Commission and intervenors by simply keeping it out of Applicant's files.

Moreover, Applicant's use of a blanket general objection here is procedurally improper. Although the South Dakota and federal courts recognize a limited role for general objections, *DM&E Railroad v. Acuity*, 2009 S.D. 69 (general objection "may suffice for a time as the parties deal with issues of privilege . . . ."); *Cotracom Commodity Trading Co. v. Seaboard Corp*., 1998 U.S. Dist. LEXIS 6726 (D KS) (general objections "may occasionally serve as an efficient response . . . ."), the general rule is that "blanket" objections are patently improper. *Ritacca v. Abbott Labs*., 203 F.R.D. 332; 2001 U.S. Dist. LEXIS 4366 (ND IL). A general objection may be used for a time to identify general discovery issues, but ultimately the withholding party must object with specificity otherwise the general objection is deemed to be waived.

Here, it is entirely possible for the Applicant to specify why inclusion of its corporate affiliates as respondents to a specific discovery request would be unduly burdensome or otherwise state specific objections to specific discovery requests. Therefore, Applicant must do

so. Applicant should re-state its general objection with specificity as to each of DRA's Requests and state why discovery of information from its corporate affiliates is objectionable.

## B. DRA ARGUMENTS IN RESPONSE TO OBJECTIONS TO SPECIFIC REQUESTS AND TO THE INADEQUACY OF APPLICANT'S RESPONSES

The following discusses DRA Requests 1-3, 5-10, 12-19, and 23 in order. For each Request, the text of the Request and Applicant's objections and responses thereto are included, followed by DRA's arguments related to specific objections and/or to the inadequacy of specific responses.

**DRA REQUEST 1:** Produce all documents concerning the potential damage caused by a crude oil pipeline rupture, including but not limited to the maximum distance that crude oil may be projected through the air from a rupture of a crude oil pipeline; the speed and force of the oil upon leaving a rupture of a crude oil pipeline; the potential for explosion or fire caused by a rupture of a crude oil pipeline; the potential damage that may be caused to residential or business structures by crude oil that is released by a rupture of a crude oil pipeline; the potential damage that might be caused to livestock or growing crops by a rupture of a crude oil pipeline; the potential harm that might be caused to natural persons by a rupture of a crude oil pipeline; any case studies or media accounts demonstrating the impacts of a rupture of a crude oil pipeline; and any modeling that predicts the potential damage caused by the rupture of a crude oil pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their determination of the adequacy, given the size and operating pressure and temperature of the proposed Keystone XL pipeline, of existing setbacks from structures, businesses, thoroughfares, and other occupied land, as well as the identification of other mitigation measures that may limit damage caused by ruptures.

**APPLICANT OBJECTION AND RESPONSE:** This request seeks information that is confidential to the extent that any responsive document contains information related to High Consequence Areas that PHMSA requires operators to keep confidential. Without waiving the objection, responsive documents, including an index, are attached as Exhibit A. In addition, counsel has several voluminous final or draft environmental impact statements for other pipeline projects that may be responsive to this request, namely: (1) a draft Environmental Impact Statement for Shell's New Mexico Products Pipeline dated April 2003; (2) an Environmental Assessment for the Longhorn Partners Pipeline; (3) the Final Environmental Impact Statement for Questar, Williams, & Kern River Pipeline Project dated June 2001; and (4) a draft Environmental Impact Statement for the Entrega Pipeline Project dated February 2005. Counsel will either make these documents available for review or produce copies on request.

**DRA ARGUMENT:**

The intent of this request is to determine whether existing setbacks are adequate and the types of mitigation measures that would address inadequate setbacks. The federal construction setback regulation, 49 C.F.R. 195.210, states that no pipeline may be located within 50 feet of a private dwelling, industrial building, or place of public assembly. However, the 50 foot requirement was promulgated in 1981, nearly three decades ago, before crude oil pipelines typically operated at the size and pressure of modern pipelines. DRA's members are concerned that this one-size-fits-all regulation is outdated and does not provide adequate protection for their families, properties, and businesses. They would like to know the potential zone of danger of a rupture of this pipeline so that they may make intelligent choices about how close to the pipeline to site different types of structures and other facilities. DRA is also concerned that certain types of future land uses, including but not limited to daycare centers, nursing homes, medical facilities, schools, emergency response facilities, water treatment plants, and hazardous materials facilities, should not be allowed to locate too near to the Proposed Pipeline.

The Commission has jurisdiction to investigate whether land use setbacks are needed under SDCL § 49-41B-22(threat to inhabitants); SDCL § 49-41B-24 (permit conditions); SDAR 20:10:22:18 and 19 (land use); 20:10:22:23 (community impact); 20:10:22:37 (pipeline standards). Further, setbacks constitute a type of environmental mitigation, such that the Commission may consider imposing setbacks by including them within the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7(6).

Zoning setbacks from pipelines have been established by many local governments such as Austin, TX (certain uses restricted within 500 feet of hazardous liquids pipelines); O'Fallon, MO (500 foot setback); Redmond, WA (500 foot setback); Clay County, MN (60 foot setback from the edge of pipeline right of way); and Olathe, KS (100 foot setback from retirement community). Also, the Canadian National Energy Board has established a ~100 foot "safety zone" on either side of pipeline rights of way.

In response to DRA's Request, Applicant provided 233 documents. It appears that <u>none</u> of the documents provided by Applicant relate to setbacks from pipelines or the distance that crude oil may be propelled through the air from a breach in a crude oil pipeline, though given the large volume of nonresponsive information included in the response and the lack of organization of these documents, it is possible that some relevant information is buried somewhere in the

thousands of pages of documents provided.[1] If Applicant has no documents related to the distance that its proposed pipeline could propel oil through the air if ruptured or information about pipeline setbacks, it should so state.

Therefore, Applicant's response to Request 1 is not fully responsive to DRA Request 1. DRA requests that the Commission compel Applicant to provide documents related to the appropriateness of setbacks to mitigate the risks posed by the pipeline.

**DRA REQUEST 2:** Produce all documents concerning the potential for pipelines to lose their earth cover due to soil erosion, movement of earth, or movement of the pipe, such that pipelines have less than required amounts of cover, as well as means to monitor the depth of a pipeline below the surface of the land over time and to maintain required depth of cover. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their determination of the potential that the proposed Keystone XL pipeline could lose required depth of cover during its expected operating life and the methods that you will use to ensure that required depth is constantly maintained over time in all soil types and landforms.

**APPLICANT RESPONSE:** Responsive documents, including an index, are attached as Exhibit B.

**DRA ARGUMENT:**

Request 2 relates to maintenance of required depth of cover after construction and during the entire operational life of the proposed pipeline. DRA's members are concerned that over its operational life (50+ years) the proposed pipeline could lose its required depth of cover due to soil erosion or instability and become vulnerable to damage. Since DRA's member landowners are primarily farmers and ranchers, they are concerned that loss of depth of cover would create a greater risk of damage to the pipeline by normal farming and ranching operations and therefore a greater risk of personal and property injury to themselves. DRA's members seek to understand

[1] Many of the documents provided in response to Request 1 are not responsive to DRA's Request. Applicant could consider many of the documents it provided to be responsive only under an unreasonably broad reading of DRA's Request. Applicant chose to read this Request as encompassing any document having any possible relationship to damage from oil spills and therefore included a large number of documents not related to this request. Examples of nonresponsive documents include general descriptions of pipelines in North Dakota (##63-65), nearly illegible photocopies of topographical maps of the proposed pipeline route in Nebraska (##71-76), the US EPA drinking water standards (#163), and the Big Stone II application submitted to the SDPUC (#232). Sorting responsive material from this nonresponsive material required substantial effort. The difficulty of review of these documents was enhanced by the fact that the documents were provided in stacks of paper in randomly organized documents separated by a single sheet of white paper, rather than being stapled, clipped, bound, or even separated by a sheet of colored paper. Further, in one of the boxes the documents had shifted and fallen out of order. Applicant's delivery of its response in this fashion substantially increased the time required to perform review these documents.

the risk of this happening on their particular properties given soil types and erosion rates, the methods that Applicant will use to ensure that a minimum four foot depth is constantly monitored and maintained, and the liability of Applicant to pay for any corrective actions taken and any damages that might result to landowners during operation of the Proposed Pipeline.

The Commission has jurisdiction to investigate the risk of loss of cover, monitoring to prevent this, and corrective actions under SDCL § 49-41B-22 (compliance with federal law) and SDCL § 49-41B-24 (permit conditions); SDAR §§ 20:10:22:18(3) (effects on rural life and the business of farming); and 20:10:22:23(3) (impact on agricultural uses). Further, depth of cover is a type of environmental mitigation, such that the Commission may consider issues related to depth of cover included in the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7(6).

Applicant's response to Request 2 is largely nonresponsive. Of the 67 documents provided by Keystone in response to Request 2:

- 1 document, indexed as #28, contains data on erosion potential along the proposed route specifically related to the Keystone XL pipeline. This document is a 144 page spreadsheet providing soil erosion data for the entire pipeline. Over 29 pages containing 56 lines of small font data per page contain information about South Dakota, for an approximate total South Dakota data set of 1,650 entries. Given the size of the data set and the format of the document, it is extremely difficult to use this information in hardcopy form. Since Applicant undoubtedly generated this document from a database, it should have been provided in electronic common spreadsheet or database format.
- 1 document, the Keystone 1 Construction Mitigation and Reclamation Plan ("CMRP"), indexed as #22, contains very limited information (4 general bullet points) related to post-construction monitoring of pipeline depth for the Keystone 1 pipeline. CMRP § 4.15. Of the thousands of pages of material provided in response to Request 2, the following statements from this single document appear to comprise the only statements that discuss how Keystone might ensure that adequate depth of cover is maintained over the pipeline throughout its operational life:

  > Operations and maintenance programs such as vegetation management, pipeline maintenance, integrity surveys, hydrostatic testing or other programs may have an impact on the final reclamation of the right of way.

To ensure that the integrity of the facility and land surface reclamation of the right of way is maintained after completion of construction and that regulatory requirements are adhered to during operations, the following measures shall be implemented unless otherwise directed by Keystone in response to site specific conditions or circumstances. However, all work shall be conducted in accordance with applicable permits.

- Keystone shall monitor the pipeline right of way and all stream crossings for erosion or other potential problems that could affect the integrity of the pipeline. Any erosion identified shall be reclaimed as expediently as practicable by Keystone or by compensation of the Landowner to reclaim the area.

* * *

- Post construction monitoring inspections shall be conducted of disturbed areas after the first growing season to determine the success of revegetation. Areas which have not been successfully re-established shall be revegetated by Keystone or by compensation of the Landowner to reseed the area. If, after the first growing season, revegetation is successful, no additional monitoring shall be conducted.

* * *

- Keystone shall maintain communication with the Landowner and or tenant throughout the operating life of the pipeline to allow expedient communication of issues and problems as they occur. Keystone shall provide the Landowners with corporate contact information for these purposes. Keystone shall work with Landowners to prevent excessive erosion on lands disturbed by construction. Reasonable methods shall be implemented to control erosion. This may not be implemented if the property across which the pipeline is constructed is bare cropland which the Landowner intends to leave bare until the next crop is planted.

- If the Landowner and Keystone cannot agree upon a reasonable method to control erosion on the Landowner's property, the recommendations of the appropriate county Soil and Water Conservation District shall be considered by Keystone and the Landowner.

- 14 documents are illegible or unusable in the form provided (*e.g.*, color maps in black and white without a usable key);
- 15 documents contain general descriptions of earthquakes, landslides, definitions of scientific terms, and other relevant but nonspecific information; and
- 36 documents contain information so tenuously related to the Request (*e.g.*, information about the location of coal formations) as to be nonresponsive.

DRA believes that Applicant has greater information about monitoring depth of cover and the risk of loss of depth of cover than provided. Since Applicant has failed to provide substantial information on maintenance and monitoring of depth of cover after construction, it has failed to provide an adequate response to Request 2.

**DRA REQUEST 3:** Produce all documents concerning abandonment of pipelines, including but not limited to documents that describe: the risks posed by abandoned pipelines to individuals, livestock, farm implements, vehicles, land, water, or other landowner interests; planning for pipeline abandonment; the costs of pipeline abandonment; options for removal of abandoned pipelines; options for filling or stabilizing abandoned pipelines or other methods to mitigate risks posed by abandoned pipelines; alternative uses for abandoned pipelines; or materials prepared pursuant to 49 C.F.R. § 195.402(c)(10) or other regulatory requirement related to abandonment of pipeline facilities. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their determination of the risks, options, and costs of abandonment, as well as planning for abandonment.

**APPLICANT RESPONSE:** Responsive documents are attached as Exhibit C.

**DRA ARGUMENT:**

Request 3 relates to information about the inevitable abandonment of the Proposed Pipeline. DRA's members are concerned about the potential liabilities and impacts of the Proposed Pipeline after it has been abandoned by the entity that owns it at that time. DRA's members understand that upon abandonment a pipeline owner has no obligation to maintain the integrity of its pipeline or its right of way. Should a pipeline of this diameter not be maintained, it could present a hazard to personal safety and farming and ranching operations due to collapse, formation of sinkholes, interference with row cropping equipment, and other risks associate with leaving a three-foot diameter steel pipe untended in the ground. Further, the presence of an abandoned pipe may interfere with future use of the land, particularly if a use, such as construction of a new building, requires that pipe be removed. At a minimum, DRA's members seek to understand the risks of abandoned pipelines, landowner legal rights and options for remediating the impacts of abandoned pipelines, and who will bear the costs of such remediation.

The Commission has jurisdiction to investigate the risks caused by abandoned pipelines under SDCL §§ 49-41B-22(2)(3) and 49-41B-24 (permit conditions); SDAR 20:10:22:18(3) (effects on rural life and the business of farming); SDAR 20:10:22:23(3) (impact on agricultural uses). Further, removal, stabilization, and other types of reclamation are types of environmental

mitigation, such that the Commission may consider issues related to abandoned pipelines included in the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7(6).

In response to this Request, Applicant provided one document, specifically a six page TransCanada operating procedure related to abandonment. Applicant's response is wholly inadequate.

DRA is aware that Applicant's corporate parent, TransCanada, is in possession of non-privileged documents related to pipeline abandonment, because it has participated in the Canadian National Energy Board ("NEB") Land Matters Consultative Initiative ("LMCI"), and particularly Streams 3 and 4 of this process, which relate to the financial and physical issues of pipeline abandonment, respectively. Further, TransCanada likely participated in the Canadian Pipeline Abandonment Steering Committee process and other Canadian pipeline abandonment processes that preceded the LMCI process. Further, DRA assumes that TransCanada's internal pipeline abandonment policy was developed based on some internal process and investigation of information about pipeline abandonment, such that TransCanada likely collected information in preparation of it abandonment policy. Thus, Applicant has withheld information about pipeline abandonment to which it has access.

Although the Canadian regulatory structure is different from that in the US, much of the information gathered in Canada is relevant to this proceeding, including information about the physical impacts and costs of abandonment. Further, Canadian regulatory efforts could serve as a model for possible Commission action to protect landowner interests from the adverse impacts of pipeline abandonment, such that Canadian policy and regulatory process information is relevant, too.

To the extent that Applicant seeks to withhold this information under its general objection that it need not provide files from its corporate affiliates, its response here provides a clear example of why such limitation would prejudice the interests of South Dakotans. Applicant has provided a single document authored by TransCanada, its corporate parent, but failed to provide relevant documents related to a public process in which TransCanada has actively participated. Thus, Applicant has provided a responsive document from its corporate parent while simultaneously objecting to all discovery of relevant documents from this same parent. Upholding Keystone's general objection would allow Applicant and TransCanada to selectively decide which relevant information in TransCanada's files to provide to the

Commission and intervenors by simply keeping relevant files out of Applicant's possession and selectively choosing which documents to voluntarily provide to the Commission and intervenors.

Since Applicant's response consists of only a single document and it has access to much more information on pipeline abandonment, its response to Request 3 is wholly inadequate.

**DRA REQUEST 5:** Produce all documents concerning the scope of your liability for damages resulting from operation of the proposed Keystone XL pipeline in South Dakota, including but not limited to liability for cleanup costs; liability for permanent damage to land; liability for damage to business interests; liability for damages related to personal injury; liability for damages related to lost wages; or liability for other types of damages, where such documents have been disclosed to the public, governmental entities, or other persons the disclosure of which is not protected by the attorney-client privilege or other privilege. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public determine your scope of liability as it relates to particular types of damages.

**APPLICANT OBJECTION AND RESPONSE:** This request seeks legal conclusions beyond the scope of discovery and addressed to issues that are beyond the scope of the PUC's jurisdiction in this proceeding. The determination of liability for damages resulting from operation of the Keystone XL Pipeline is a matter for the courts. Without waiving the objection, a copy of the easement, which addresses liability in paragraph 1, and a relevant portion of a document that Keystone used in connection with the open houses that it hosted addressing the Keystone XL pipeline are attached as Exhibit E.

**DRA ARGUMENT:**

DRA members seek to understand their legal remedies and liabilities related to a possible spill from the proposed pipeline. Although Applicant has admitted some liability for oil spills, it has also limited its liability. Further, even where the liability of parties is clearly understood, the legal process for recovering damages is complex and costly and may impose burdens that pipeline owners can readily bear but that landowners would find difficult or impossible to bear. Therefore, DRA's members seek to understand and procure information about not just the liability of the various parties that might be involved in a spill, but also the process for recovering damages and options that the Commission might take to improve such process.

The Commission has jurisdiction to investigate liability for spills under SDCL § 49-41B-22(2)(3) and § 49-41B-24 (permit conditions); SDAR 20:10:22:18(3) (effects on rural life and the business of farming); and SDAR 20:10:22:23(3) (impact on agricultural uses).

Applicant states two objections to Request 5: (1) that Request 5 calls for a legal conclusion; and (2) that determination of liability is beyond the scope of the Commission's

jurisdiction and instead is a matter for the courts. Since Applicant's second objection is broader, it is discussed first.

Applicant objects that the issue of liability for oil spill damages is "beyond the scope of the PUC's jurisdiction in this proceeding" and that "[t]he determination of liability for damages resulting from operation of the Keystone XL Pipeline is a matter for the courts." The first statement is incorrect as a matter of law and the second is inapposite to the current situation. If the Commission sustains this objection on these grounds, it would hold that it has no power to investigate the potential liability of regulated entities under its jurisdiction, and this is not the case.

SDCL § 49-41B-22(2) gives the Commission jurisdiction to investigate the threat of pipelines to the social and economic conditions of inhabitants. The Commission's regulations require that it consider impacts on the business of farming and rural life. SDAR 20:10:22:18(3); SDAR 20:10:22:23(3). A spill could dramatically impact the social and economic conditions of a few or a great many inhabitants and their businesses, particularly farms and ranches. If Applicant's liability and legal remedies for the proposed pipeline adequately redress private property damages, then the Proposed Pipeline's economic threat is substantially reduced. Therefore, the extent and nature of the legal remedies available to landowners for recovery of damages for oil spills is relevant to this proceeding and unprivileged documents that describe this scope of liability are discoverable.

Further, in its K1 Final Order, Exhibit A, Paragraphs 53 to 57, the Commission imposed conditions related to liability after investigation of the scope of liability in that proceeding. Therefore, Commission precedent demonstrates the Commission has jurisdiction to investigate liability issues and that such issues are relevant to this proceeding.

Applicant confuses the authority of the Commission to establish remedies for oil spill damages with the authority of the courts to determine the right to and amount of recovery for particular spills. The courts have no legislative power and therefore do not have jurisdiction to address the adequacy of existing remedies under law. That the courts might be called on some day to determine liability in the event of a future spill of oil from the Proposed Pipeline does not mean that the Commission is without jurisdiction to investigate this matter, to clarify Applicant's scope of liability under law, and to condition the permit as appropriate to provide protections that supplement judicial remedies. Since the Proposed Pipeline has not yet been built, there is

presently no case or controversy and any attempt to seek a court determination of the scope of liability for an oil spill from the Keystone XL pipeline would seek an unpermitted advisory ruling.

The Commission has the power to assess the adequacy of existing remedies for damages for oil spills and to impose permit conditions that address any inadequacies. The courts do not have this power. Therefore, the Commission has jurisdiction to consider issues related to liability for oil spills, and DRA may conduct discover on such matters.

A request may be said to call for a legal conclusion when it purports to require a party to admit, for example, that a statute or regulation imposes a particular obligation. *Miller v. Holzmann*, 240 F.R.D. 1 (DDC 2006) citing *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 1, 3 (D.D.C. 2006).

Here, DRA has not requested that Applicant admit that the law imposes any obligation, but rather requests non-privileged documents containing statements about oil spill liability provided by Applicant to non-privileged parties. Where information would amount to an admission of liability, then Applicant need not produce such documents. However if Applicant has collected documents related to this issue that are not admissions (perhaps because Applicant did not write them) and not otherwise protected by Applicant's attorney-client privilege or other privilege, then it should disclose such documents so that the Commission has a full understanding of the efficacy of the legal remedies for oil spills available to landowners in South Dakota.

**DRA REQUEST 6:** Produce all documents concerning your preparation of an Emergency Response Plan for the Keystone XL pipeline, including but not limited to the amount and placement of emergency response equipment and other emergency response materials; the number and placement of emergency response personnel; estimated deployment-to incident- site times for emergency response personnel and equipment; emergency response planning; and coordination with local and state emergency personnel. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand of the measures that you plan to take to protect interests in South Dakota from a spill or leak of crude oil from the proposed Keystone XL pipeline.

**APPLICANT OBJECTION:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. This request also seeks information addressing an issue that is governed by federal law and is within the province of the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA). The PUC's jurisdiction over the emergency response plan is preempted by federal

law. *See* 49 C.F.R. Part 194; 49 U.S.C. § 60104(c). This request further seeks information that is confidential and proprietary. Public disclosure of the emergency response plan could commercially disadvantage Keystone. This request is also unduly burdensome. Keystone has employees who have worked essentially full time for the better part of the last year preparing the emergency response plan for the Keystone XL Pipeline. Moreover, the emergency response plan will be completed as the pipeline is built, making the request premature.

**DRA ARGUMENT:**

DRA's members understand that the primary governmental mechanism for protecting their lives, properties, and businesses in the event of a spill from the proposed pipeline is the federally mandated Emergency Response Plan ("ERP"). They are understandably concerned that Applicant fully comply with this federal requirement and seek information from Applicant about such compliance. DRA's members also seek to understand State and local government roles within the ERP, in part to determine whether the State and local governments should take action that appropriately supplements federal requirements, such as through the provision of additional state or local emergency response resources.

The Commission has jurisdiction to investigate Applicants compliance with federal emergency planning requirements under SDCL § 49-41B-22(1) (compliance with federal law); SDCL § 4949-41B-24 (permit conditions); SDAR 20:10:22:23 (community impact); and SDAR 20:10:22:37 (pipeline standards). Further, emergency planning to respond to and clean up oil spills constitutes a type of environmental mitigation, such that the Commission may consider the adequacy of emergency planning in the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7(6).

For the reasons previously discussed, federal law does not preempt discovery of information related to Applicant's compliance with federal law. Even if the Commission may not change the requirements of federal law, it may investigate whether Applicant is in compliance with federal law and the scope of on-the-ground protection provided to South Dakotans by federal law. Further, the Commission may hear evidence from citizens about Applicant's compliance with federal law and in response the Commission may request that PHMSA improve Applicant's ERP before it is implemented and/or request that the Applicant voluntarily augment its obligations under federal law. To the extent that Applicant believes that disclosure of particular information related to development of an ERP for the proposed pipeline

would violate or frustrate federal law, it should clearly state the legal foundation for such objection rather than through sweeping statements.

Applicant is required by SDCL § 49-41B-22(1) to prove that it is in compliance with all federal laws. Therefore, Applicant's compliance with federal ERP requirements and the appropriate development of the ERP are relevant to this proceeding. That this is a federal requirement does not prevent the Commission from investigating Applicant's compliance with federal law to ensure the safety and welfare of South Dakotans. Further, the Commission may investigate and determine the extent to which the State may enhance the safety of South Dakotans through non-preempted state and local government actions, for example by providing additional first responder training or additional spill containment equipment to local governments.

Applicant alleges that information related to the ERP is confidential and proprietary and that public disclosure of ERP information could commercially disadvantage Applicant. Although some of the information in the ERP might be subject to a protective order requiring the nondisclosure of sensitive information, most of the information in an ERP does not appear to be confidential, proprietary, or commercially sensitive. For example, an ERP must contain information related to:

- A description of each spill response zone;
- The person, position, or facility responsible for starting immediate notification of a spill;
- The maximum time required to detect spills and shut down flow in bad weather;
- Spill containment strategies;
- Description of spill response equipment and procedures to maintain it;
- The location of spill response equipment;
- The time to deploy response equipment;
- A description of the amount of trained personal and deployment of personnel for spill containment operations;
- The contents of the training program to be provided to first responders; and
- Drill procedures.

It is difficult to see that this sort of information is confidential, proprietary, or commercially sensitive. Rather, the information contained in the federal ERP is required to comply with minimum federal health and safety standards. To the extent that information is confidential, it could either be redacted or be subject to protective order.

Compliance with federal ERP standards is of vital importance to the landowners whose lands are crossed by the pipeline as it represents the only government plan to protect their interests in the event of a spill. The Commission has investigated Applicant's compliance with other federal standards and should do so with regard to the ERP, as well. Therefore, a blanket exemption for discovery of all information related to the ERP is not appropriate such that Applicant should identify which information in the ERP is confidential, proprietary, or commercially sensitive and disclose the rest.

Applicant also objects that disclosure of the information in the ERP would be unduly burdensome. Applicant must describe how disclosure of information would be unduly burdensome and disclose information to the extent that doing so is not unduly burdensome. DRA is willing to discuss how to make compliance with this Request less burdensome.

Finally, Applicant states that because the ERP will not be complete until the pipeline is built, that therefore the request is premature. Since the point of discovery about the ERP is to ensure that Applicant complies with federal law and to provide an opportunity to improve the ERP before it goes into effect, waiting to allow discovery until after completion of the ERP would result in a failure to protect the interests of South Dakotans. Further, the Commission's decision on the application must of necessity be made before the start of operations, such that waiting would mean that the Commission conducts no review of this important matter.

Since documents related to the ERP are in existence and relevant to this proceeding, they are subject to discovery.

**DRA REQUEST 7:** Produce all documents concerning Advisory Bulletin ABD-09-01, prepared pursuant to Docket No. PHMSA-2009-0148, entitled "Potential Low and Variable Yield and Tensile Strength and Chemical Composition Properties in High Strength Line Pipe" as noticed and described at 74 Fed. Reg. 23930 ("Advisory Bulletin"), including but not limited to: your investigation of whether you have used or intend to use pipe from the steel or rolling mills that provided the defective pipe described in the Advisory Bulletin; your correspondence with the federal Pipeline and Hazardous Materials Administration ("PHMSA") concerning the Advisory Bulletin or the issues described therein; your participation in the April 23, 2009, New Pipeline Construction Workshop in Fort Worth, Texas, hosted by PHMSA; other investigations by you to confirm whether or not you have acquired substandard pipe; and measures you have taken to ensure that you do not use substandard pipe. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand the efforts you took related to your possible use of pipe from a steel or pipe mill that provided the substandard pipe identified in the Advisory Bulletin.

**OBJECTION AND RESPONSE:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. In addition, this request seeks information concerning issues that are governed by federal law, and over which the PUC's jurisdiction is therefore preempted. *See* 49 U.S.C. § 60104(c). Without waiving the objection, Keystone previously filed with the PUC a response dated June 1, 2009, to an inquiry concerning the advisory bulletin. A copy of the response is attached as Exhibit F.

**DRA ARGUMENT:**

DRA is aware that the quality control mechanisms of a number of pipeline development companies failed with the result that recently constructed pipelines have failed hydrostatic tests. DRA is also aware that the cause of these failures is related to defects in either the metallurgical formulation by steel mills of the steel plate used in pipe or the fabrication by pipe mills of the steel plate into pipes, which defects escaped existing quality control standards. DRA believes that the identity of the steel and/or pipe mills that supplied the defective pipe is known to Applicant or TransCanada. Since Applicant places great weight on the reliability of its quality control mechanisms as a means of protecting the lives, families, and businesses of DRA's members, DRA seeks to know whether Applicant has procured or plans to procure pipe produced by the mills that provided the defective pipe at issue in the Advisory Bulletin. Also, DRA seeks to understand the nature of the quality control failures and Applicant's investigation into whether its quality control mechanisms have also been or could be compromised.

The Commission has jurisdiction to investigate Applicants compliance with federal pipeline fabrication standards under SDCL § 49-41B-22(1) (compliance with federal law); § 49-41B-24 (permit conditions); and SDAR §20:10:22:37 (pipeline standards).

In response to this Request, Applicant provided DRA with a single document, specifically its letter to the Commission dated June 1, 2009, in which it responds to a Commission inquiry on this matter and assures the Commission that its quality control mechanisms are adequate and that it complied with the Advisory Bulletin. In this letter, Applicant mischaracterizes the Advisory Bulletin as requesting only a review of quality control procedures and compliance with existing regulatory requirements. Applicant failed to discuss the central purpose of the Advisory Bulletin, which was to request that pipeline owners, including Applicant, investigate whether or not their particular pipelines might contain defective pipe as was provided to other pipeline owners. Specifically, PHMSA stated that it "wants to ensure that owners and operators of recently constructed pipeline systems are aware of the <u>need</u>

to investigate whether their pipelines contain joints of pipe that do not meet minimum specification requirements." In other words, PHMSA saw that defective pipe had in fact slipped through the quality control nets of some pipeline owners and therefore requested that pipeline owners confirm that specific "joints of pipe" actually used in construction were not provided by mills that might have failed to comply with fabrication standards. PHMSA did not merely ask pipeline owners to review their quality control procedures and ensure ongoing compliance with existing regulations.

A part of this needed investigation would be to determine whether or not Applicant procured pipe from one of the implicated steel or pipe mills. DRA seeks information that confirms that TransCanada conducted this necessary investigation, determined whether or not it procured pipe from an implicated mill, and confirmed not just that it has quality control mechanisms in place, but that the particular "joints of pipe" it has installed and procured do in fact meet safety standards.

DRA believes that TransCanada has more documentation related to this issue than contained in its letter to the Commission. Specifically, DRA believes that Applicant investigated the nature of the pipe failures referenced in the Advisory Bulletin, determined the risk that it had procured defective pipe from particular pipe suppliers, responded to PHMSA, and participated in processes to investigate the causes of the pipe failures and improve quality control mechanisms. Applicant must provide more than a single self-serving document to verify its compliance with federal law.

In Section 2.2 of its Application, Applicant relies heavily on its quality control procedures to meet its burden of proof. Also, the Commission has already requested a report on this matter. Therefore, Applicant's compliance with the Advisory Bulletin is relevant to this proceeding. As previously noted, federal law does not preempt the Commission from investigating whether Applicant may be out of compliance with federal law, even if the Commission cannot change federal standards. Therefore, discovery of information about whether Applicant may have used defective steel pipe and its efforts to avoid a possible future use of defective steel pipe are relevant to this proceeding and discoverable.

**DRA REQUEST 8:** Produce all documents concerning whether a design factor of 0.80 is appropriate for use in crude oil pipelines instead of the 0.72 design factor contained in 49 C.F.R. § 195.106, including but not limited to: management of pressure fluctuations; modeling of

rupture characteristics of crude oil pipelines in pressure surge events; the operational differences between crude oil pipelines and natural gas pipelines as these differences relate to the appropriate design factor for crude oil pipelines; the differences between crude oil and natural gas pipelines with regard to the different environmental impacts of leaks and ruptures of natural gas pipelines in comparison to crude oil pipelines; and documents related to the risks of operating a crude oil pipeline with a design factor of 0.80. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand the risks of operating a crude oil pipeline built with a 0.80 design factor, as well as the means of mitigating these risks.

**OBJECTION AND RESPONSE:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. In addition, this request seeks information concerning issues that are governed by federal law, and over which the PUC's jurisdiction is therefore preempted. *See* 49 U.S.C. § 60104(c). This request is also unduly burdensome because it requests all documents associated with the Special Permit application that Keystone filed with PHMSA. Moreover, many documents related to the Special Permit application have proprietary value to Keystone. Without waiving the objection, a copy of the Special Permit application and amendment thereto, with the appendices, are attached as Exhibit G.

**DRA ARGUMENT:**

DRA members are concerned that the Special Permit sought by Applicant will increase the risks created by the proposed pipeline. The Commission has jurisdiction to investigate Applicants compliance with federal pipeline strength standards under SDCL § 49-41B-22(1) (compliance with federal law); § 49-41B-24 (permit conditions); and SDAR §20:10:22:37 (pipeline standards).

Further, Applicant makes the following statement in Section 2.2 of its application:

> Keystone has filed an application with Pipeline and Hazardous Materials Safety Administration (PHMSA) for a Special Permit authorizing Keystone to design, construct, and operate the project at up to 80 percent of the steel pipe specified minimum yield strength for most locations.

Moreover, the Commission has discussed Applicant's application for a Special Permit in a number of public hearings. Therefore, the issue of the potential impact of a Special Permit on the safety and welfare of South Dakotans is relevant to this proceeding and discoverable.

As previously noted, federal law does not preempt the Commission from investigating the appropriate application of federal law to matters before the Commission, even if the Commission cannot change or enforce federal standards. Further, the Commission has authority to implement state requirements that do not frustrate the intent of federal law but nonetheless

provide additional protection to South Dakotans. Therefore, discovery of information about the Special Permit and its potential impacts on South Dakotans is relevant and discoverable.

**DRA REQUEST 9:** Produce all documents concerning the composition of the materials to be transported by the proposed Keystone XL pipeline, including but not limited to: the chemical and physical composition or characteristics of such materials; the capacity of such materials to corrode, abrade, or wear components such as the pipe walls, valves, or pumps of the proposed Keystone XL pipeline; comparisons of corrosion or abrasion characteristics of such material to the corrosion or abrasion characteristics of crude oil not derived from the tar or oil sands of Canada; the rate of internal corrosion or mechanical erosion of internal components of the pipeline by such material; and other documents concerning the effect of transportation of such material on the operational life of the proposed Keystone XL pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand how the material to be transported may or will affect the internal components of the proposed Keystone XL pipeline.

**APPLICANT OBJECTION AND RESPONSE:** Keystone objects to this request on the grounds that it pertains to matters that are preempted by federal law and not relevant to the PUC's determination. Notwithstanding this objection, Keystone states that it cannot definitively identify the components of the crude oil to be transported through the pipeline, as the specific crude oil to be shipped through the Keystone XL Pipeline will be controlled by Keystone's shippers. A range of crude oil may be transported by the pipeline from time to time. The crude oil must meet the quality specifications contained in Keystone XL's Federal Energy Regulatory Commission tariff, which is still under development. Without waiving the objection, attached as Exhibit H is Article 4 of the current version of the US Tariff for the Keystone Pipeline. The tariff is still under development and has not yet been filed with FERC. The Keystone tariff, including the quality specs, will also apply to Keystone XL.

**DRA ARGUMENT:**

This Request relates to the physical and chemical composition of the materials to be transported by the proposed pipeline. DRA members are aware that the oil industry has little experience transporting heavy bitumen or bitumen blends from the tar sands of Canada long distance through pipelines. Most of the crude oil transported from Canada to the US to date has been syncrude, which is a partially refined product with different physical and chemical characteristics from the heavy crude oil that Applicant will transport. DRA members seek to understand how the chemical and physical characteristics of heavy bitumen or bitumen blends will impact internal corrosion of the proposed pipeline and the operational life of the pipeline.

The Commission has jurisdiction to investigate the composition of the material to be transported by the pipeline under SDCL § 49-41B-22 (compliance with federal law); SDCL § 49-41B 24 (permit conditions); and SDAR 20:10:22:13-17 (effect on environment). Further, the

composition of the material transported determines much about the severity of oil spills such that the Commission may consider issues related this issue in the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7.

In response to this Request, Applicant has provided one document, specifically Article 4 of the current version of the Federal Energy Regulatory Commission ("FERC") Tariff for the Keystone Pipeline. This response is inadequate.

For the reasons previously discussed, the Commission has jurisdiction to investigate whether or not Applicant will be in compliance with federal law, and the Commission has jurisdiction to investigate the potential risks and impacts of pipelines, even if the safety standards for such pipelines are determined by federal law. The chemical nature of crude oil to be shipped is directly related to the operation and wear of the proposed pipeline and, should the oil leak, to the nature of environmental impacts. Therefore, such information is relevant to this proceeding.

Although the FERC will approve a tariff containing minimum quality specifications to ensure that product does not unduly interfere with the commercial operation of the interstate crude oil pipeline system, this tariff is not designed, nor is it within FERC's jurisdiction, to determine the impacts of the shipped crude oil on pipeline safety or the environment. Rather, PHMSA regulates pipeline safety including protection of pipelines from internal corrosion.

Also, Applicant's refusal to provide additional information here is inconsistent with its response to Request 1 in which it provides information related to the chemical and physical properties of a wide variety of Canadian crude oils (indexed as documents 4 to 15 and 141). DRA does not understand how Applicant can object to Request 9 yet provide such information in response to Request 1. Since Applicant knows the identity of some of its shippers, it should also be able to provide some specificity about which types of Canadian crude oil it is likely to transport rather than merely provide a list of all types of Canadian crude oil.

None of the materials provided by Applicant in response to Requests 1 or 9 address the rate of internal erosion or corrosion of the pipeline caused by the material being transported. However, Applicant's response to Request 10, Keystone's *Analysis of Frequencies and Spill Volumes for Environmental Consequence Estimation for the Keystone XL Project* ("Spill Frequency Report"), contains the following statement on internal corrosion in section 2.1.1.2:

> In a hazardous liquid pipeline, internal corrosion can occur for a number of reasons (product corrosivity, water drop out due to flow conditions, suspended

solids). On a new pipeline, internal corrosion is not considered to be a primary threat; however, it must be considered.

Page a-4. DRA notes that Applicant asserts that internal corrosion is not a "primary threat" only for new pipelines. DRA's landowner members are concerned about internal corrosion over time. DRA believes that Applicant bases this summary opinion on other documents and information related to internal corrosion and seeks information that will help landowners and the Commission assess the risk of internal corrosion faced by the proposed pipeline and the affects of internal corrosion on the maximum operational life of the proposed pipeline. Since the information sought here is relevant and Applicant has failed to provide but likely has information about the rate of internal corrosion of the proposed pipeline, the Commission should order Applicant to comply with this Request.

**DRA REQUEST 10:** Produce all documents concerning a worst case spill assessment for the proposed Keystone XL pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand where a worst case spill might occur and the volume of oil that might be spilled so that an assessment may be made of the adequacy of your Emergency Response Plan.

**APPLICANT OBJECTION AND RESPONSE:** This request is unduly burdensome because it requests all documents reviewed in connection with the risk assessment prepared by AECOM for the United States Department of State in connection with Keystone's application for a Presidential Permit. This request also seeks information that is confidential because the risk assessment contains information related to High Consequence Areas that PHMSA requires operators to keep confidential. Without waiving the objection, that part of the risk assessment addressing estimated spill volumes, which was previously filed with the Department of State, is attached as Exhibit I.

**DRA ARGUMENT:**

Request 10 relates to identification of where a worst case spill would occur and the volume of oil that would be released.

The Commission has jurisdiction to investigate worst case oil spills under SDCL § 49-41B-22(1) (compliance with federal law); § 49-41B-24 (permit conditions); SDAR 20:10:22:13-17 (effect on environment), and SDAR 20:10:22:37 (pipeline standards). Further, preparation and planning for a worst-case oil spill is a form of mitigation such that the Commission may consider issues related this issue in the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7.

In response, Keystone provided only its Spill Frequency Report. Despite its title, this document does not provide any estimate of the worst case spill volume but rather discusses only the theoretical methodology for making such an assessment. Therefore, Keystone has provided no information on the volume or location of a worst case spill assessment for the proposed pipeline. DRA agrees that precise information about the specific location for a South Dakota worst case breach is sensitive information. However, disclosure of the volume of oil that might be released and the general location of such a spill would not be sensitive information but rather should be known so that local communities and landowners may adequately plan for this contingency. Since Applicant has provided no information related to projected volume or location of a worst-case oil spill, it has not fully responded to this Request.

**DRA REQUESTS 12 TO 19**

Requests 12 to 19 relate to the projected demand for the proposed pipeline and seek information about:

Request 12 – Western Canadian Production Forecasts
Request 13 – Canadian Crude Oil Export Capacity to US
Request 14 – US Crude Oil Demand
Request 15 – Binding Shipper Agreements
Request 16 – Use of Pipeline by Shippers
Request 17 – Impact of CAPP 2009 Report (Canadian tar sands production forecast)
Request 18 – Impact of AEO 2009 (US domestic oil consumption forecast)
Request 19 – Impact on Domestic Production

DRA members are aware that the recent economic slowdown has resulted in a substantial decrease in current demand, and are also aware that the most recent federal oil demand projects indicate the US consumption of oil through approximately 2030 will likely be flat. They are also aware that the Canadian Association of Petroleum Producers 2009 forecast shows a dramatic slowdown in crude oil production capacity additions. Finally, DRA is aware that Applicant has acquired sufficient commitment from shippers to justify proceeding with regulatory approvals, but has not stated that these commitments are sufficient to justify construction. Given these circumstances, DRA seeks an explanation about whether and when demand for the Proposed Pipeline is or will be sufficient to justify imposing it on landowners.

The Commission has jurisdiction to investigate demand under SDCL § 49-41B-11(3)(8)(9) (time of construction, purpose of facility, estimated consumer demand); and SDAR

20:10:22:10 (demand for facility). Further, a lack of demand for the Proposed Pipeline is relevant to the no-action alternative required to be included in Environmental Impact Statement, and therefore the Commission may consider the demand for the facility as part of its consideration of the Environmental Impact Statement being prepared pursuant to SDCL § 34-9-7(4).

Applicant presents the following objections to these Requests:

- Beyond the scope of the PUC's jurisdiction (Requests 12 to 19);
- Beyond the scope of Applicant's burden of proof under SDCL § 49-41B-22 (Requests 12 to 19);
- Confidential business information (Request 15); and
- Matter preempted by Executive Order (Requests 16-19).

Since these Requests share many of the same objections, they are addressed here together.

Scope of PUC's Jurisdiction Over Demand for Proposed Pipeline

South Dakota law specifically makes matters related to demand for the pipeline relevant to this proceeding. Specifically, § 49-41B-11(9) requires that applications include information related to:

> Estimated consumer demand and estimated future energy needs of those consumers to be directly served by the facility . . . .

Also, ARSD § 20:10:22:10, entitled "Demand for facility" states:

> The applicant shall provide a description of present and estimated consumer demand and estimated future energy needs of those customers to be directly served by the proposed facility. The applicant shall also provide data, data sources, assumptions, forecast methods or models, or other reasoning upon which the description is based. This statement shall also include information on the relative contribution to any power or energy distribution network or pool that the proposed facility is projected to supply and a statement on the consequences of delay or termination of the construction of the facility.

As previously discussed, relevancy here is not limited to the Applicant's burden of proof in SDCL § 49-41B-22, but rather is defined by a number of provisions in SDCL Chapter 49-41B, which in any case is broad enough to encompass consideration of whether demand for a facility is great enough to justify burdening landowners with it. Presumably in response to this

requirement the Applicant included Section 3.0 in its application. Section 3.0 includes five subsections entitled:

> 3.1 - WCSB [Western Canadian Sedimentary Base] Crude Oil Supply (related to Requests 12, 13, and 17)
>
> 3.2 - Increasing Crude Oil Demand in the US (related to Requests 14 and 18)
>
> 3.3 - Decreasing Domestic Crude Oil Supply (related to Request 19)
>
> 3.4 - Further Supply Diversification to Canadian Crude Oil (not related to any Requests)
>
> 3.5 - Binding Shipper Interest (related to Requests 15 and 16)

These sections of the Application contain conclusory statements about demand for the Proposed Pipeline, some of which are based on out-of-date government and industry forecasts.

Applicant argues that material required by law to be in the Application is beyond the scope of the Commission's jurisdiction, such that the Commission is without jurisdiction to require that Applicant provide evidence supporting Section 3.0's conclusory statements.

As discussed above, if statute and regulation require that information about demand for a facility be included in an application for a permit, then the Commission must consider such information such that it is relevant to the permit decision and within the scope of the Commission's jurisdiction. Also, Applicant has asserted that future demand for the Proposed Pipeline justifies its construction, but it appears that future demand is down suggesting that Applicant intends or will need to delay construction of the Proposed Pipeline. The effect of lowered demand on the start of construction is of relevance to the Commission and of critical importance to impacted landowners. The Commission should investigate the affect of the economic downturn on demand and the effect of such lessened demand on the construction start date. A Commission action that allows Applicant to rely on out-of-date information about demand in its Application and limit discovery on demand would be unjust.

Confidential Business Information

Applicant objects to Request 15 on the grounds that a disclosure of certain information in binding shipper agreements would disclose confidential business information. This is

undoubtedly true. However, the question faced by the Commission is whether this information is relevant, whether some of it is not sensitive, and whether some information about binding shipper agreements can be protected from harmful disclosure through protective orders. Absent review by the Commission of the agreements, it is not possible to determine whether some of the information might be disclosed with or without a protective order.

Preemption by DOS Presidential Permit Authority

Applicant objects to Requests 16 to 19 because: "It is within the purview of the United States Department of State to make a determination whether the proposed project is in the national interest, under the applicable Presidential Executive Order." This objection appears to be an argument that state authority to consider demand for the pipeline is preempted.

Such argument is incorrect. The Department of State ("DOS") purports to approve only the border crossing portion of the proposed pipeline, not the project as a whole. Executive Order 13337 ("EO 13337") empowers the DOS to issue Presidential Permits for energy-related facilities. EO 13337 is entitled "Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States" (emphasis added). The purpose of EO 13337 contained in its first paragraph is "to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings for land transportation . . . ." (Emphasis added). Likewise, Section 1 of EO 13337 states that the DOS is:

> empowered to receive all applications for Presidential permits . . . for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.

(Emphasis added.) Thus, the DOS does not have authority to approve the entire pipeline project or to find that all of it is in the national interest. Rather, it is empowered only to determine whether the border crossing for the pipeline is in the national interest. Absent an Act of Congress, the President does not have authority to approve the construction of the Keystone Pipeline between the proposed crossing of the border with Canada and its terminals at the Gulf Coast or to determine the need for any particular pipeline configuration within the US. Since Congress has not delegated this authority to the President, it remains with the States.

With regard to the meaning of the term "national interest," the only guidance on what this means is found in a DOS Fact Sheet, dated March 11, 2008, entitled "Applying for Presidential Permits for Border Crossing Facilities (Canada)," which states that an application for a Presidential Permit "should" contain a statement on national interest that includes:

> An explanation of how the proposed facility would serve the national interest. This explanation may be supported by any reports, Applying for Presidential Permits for Border Crossing Facilities (Canada) correspondence, and other material indicating the desirability and feasibility of the proposed facility.

The Fact Sheet does not contain language that could be read to preempt state law to determine demand for the facility, and even if it did, the Fact Sheet is not operative federal law and the President is not empowered, absent an Act of Congress, to issue a permit for a facility at other than the border.

Since there is no federal law that examines the demand for the facility other than at the border, federal law does not preempt the Commission from determining whether there is adequate demand for the facility. Therefore, Applicant's objection that federal law preempts the Commission from investigating demand is without merit.

Since none of Applicant's objections to Requests 12 to 19 have merit, and since Applicant's responses are wholly insufficient, the Commission should order Applicant to fully respond to these Requests.

**DRA REQUEST 23:** Produce all documents related to and provide a description of your efforts to identify a alternative routes for the Keystone XL Pipeline that do not require a new right of way in South Dakota, including but not limited to: routes that parallel the Keystone Pipeline currently under construction or other routes that pass north of South Dakota; and routes that pass west and south of South Dakota, including routes that parallel existing pipelines in Montana and Wyoming including but not limited to the Express, Platte, West Corridor, Bridger, Butte, and Belle Fourche pipelines, as well as natural gas pipelines west and south of South Dakota; provide an explanation of why these alternative routes were either not considered or considered and rejected. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their understanding of why you need a new right of way through South Dakota when multiple existing pipeline rights of way exist between Alberta and the Gulf Coast.

**OBJECTION AND RESPONSE:** This request seeks information beyond the scope of the PUC's jurisdiction. Without waiving the objection, alternative routes and Keystone's iterative process in determining the preferred route for the Keystone XL Pipeline are discussed in Keystone's application for a Presidential Permit and in the prepared direct testimony of its

witness Richard Gale. A copy of the relevant portion of the Presidential Permit application is attached as Exhibit K. The testimony of Richard Gale is available on the PUC's website.

**DRA ARGUMENT:**

The purpose of this Request is to determine whether other routes are available that would avoid impacting South Dakota landowners altogether or that would minimize impacts on South Dakotans.

The Commission has jurisdiction to investigate alternatives under SDCL § 49-41B-11(6) (reasons for location of facility); SDCL § 49-41B-11(11) (environmental studies); and SDAR § 20:10:22:12 (alternative sites). Further, the Commission has jurisdiction to consider and is required to consider alternatives to the Proposed Pipeline under SDCL § 34A-9-5 and SDCL § 34-9-7(4).

In response to this Request, Applicant provided one document, specifically a portion of its application for a Presidential permit that discusses its alternatives analysis. Applicant also refers DRA to the testimony of Richard Gale. Both of these documents are conclusory and self-serving and do not discuss all reasonable alternatives.

Under SDCL § 49-41B-36, the Commission does not have authority to route the Proposed Pipeline. However, Commission regulation ARSD § 20:10:22:12 and the environmental review being performed for the proposed pipeline pursuant to SDCL Chapter 34A-9, require the Commission to receive and consider information related to alternative routes for the proposed pipeline. In particular, § 20:10:22:12 states:

> The applicant shall present information related to its selection of the proposed site for the facility, including the following:
> (1) The general criteria used to select alternative sites, how these criteria were measured and weighed, and reasons for selecting these criteria;
> (2) An evaluation of alternative sites considered by the applicant for the facility;
> (3) An evaluation of the proposed plant, wind energy, or transmission site and its advantages over the other alternative sites considered by the applicant, including a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site, alternative generation method, or alternative waste handling method.

In response to SDAR § 20:10:22:12, Applicant included substantial information about route alternatives in its Application, which indicates that Applicant believes that information about alternative routes is relevant to this proceeding. Also, it would not be possible for the Commission to determine under SDCL § 49-41B-28 whether county or municipal land use rules,

regulations, or ordinances are unreasonable as applied to the Applicant's proposed route absent an ability to investigate route alternatives. Finally, the Commission is required by SDCL § 34A-9-7 to consider alternative routes in the project's Environmental Impact Statement.

Therefore, alternative routings for the proposed pipeline are relevant to the Commission's permit process and the Commission has the authority to investigate alternative routes. Since route alternatives are relevant to this proceeding, information about Applicant's efforts to evaluate different routes is discoverable.

## IV. CONCLUSION

For all of the above reasons, DRA requests that the Commission direct Applicant to respond fully to Requests 1-3, 5-10, 12-19, and 23 contained in its FIRST SET OF INTERROGATORIES AND REQUEST FOR DOCUMENTS dated July 31, 2009.

Respectfully submitted,

Dated September 21, 2009.

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## CERTIFICATE OF SERVICE

I hereby certify that the above **MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS ADDRESSED TO TRANSCANADA KEYSTONE PIPELINE, LP PROPOUNDED BY DAKOTA RURAL ACTION** was served upon all of the parties listed on the attached Service List on the 21st day of September, 2009, either electronically or by mailing a true and correct copy thereof to them by first class mail, postage prepaid, at their last known address.

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