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

HP 14-001

IN THE MATTER OF THE APPLICATION
BY TRANSCANADA KEYSTONE
PIPELINE LP FOR A PERMIT LINDER THE

PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL

PROJECT,

APPLICANT'S OPPOSITION TO JOINT MOTION TO VACATE OR AMEND THE PROTECTIVE ORDER

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Intervenors Dakota Rural Action, the Rosebud Sioux Tribe, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, the Indigenous Environmental Network, and BOLD Nebraska have filed a joint motion asking the Commission to vacate or amend the Protective Order issued on April 17, 2015. For the following reasons, Keystone respectfully requests that the motion be denied.

1. The Commission drafted and entered the Protective Order. The Protective Order is the result of the Commission granting several motions to compel at the hearing held on April 14, 2015. Because the time for compliance was April 17, the Commission directed its General Counsel to prepare a protective order and stated on the record that documents that were designated as confidential would be subject to the terms of the protective order. The Commission recognized during the hearing that certain documents would need protection. General Counsel for the Commission stated that it was longstanding practice that confidential documents be produced subject to the terms of a protective order. Keystone did not make its {01922833.1}

April 17, 2015. It produced its documents in reliance on the Protective Order that some of the Intervenors now argue should be summarily vacated. It would be patently unfair to strip, after the fact, the protections afforded by the Protective Order from the documents produced in reliance on the Protective Order. Moreover, the Protective Order allowed Keystone to designate documents as confidential, subject to challenge. (Order, ¶¶ 4, 11.)

- 2. The categories of documents subject to the Protective Order are limited relative to the overall production. While the motion states that Keystone exercised its opportunity to designate documents as confidential "to the fullest" and that the confidential documents are 2,508 files in 222 folders, consisting of 35.7 gigabytes of data (Joint Motion at 7), this is misleading. Keystone identified only ten documents or categories of documents as confidential. It included only the following documents in the confidential sites:
  - Biological Survey Reports
  - Cultural Survey Reports
  - The Integrity Management Plan for the Keystone Pipeline
  - The Operations and Maintenance Manual for the Keystone Pipeline
  - The SCADA specification for the Keystone XL Pipeline
  - TransCanada's Material Grade Selection Guiding Principle
  - TransCanada's Underground Coating Directive
  - The Paleontological Monitoring Plan
  - Worst-case discharge calculations
  - Issued For Construction Drawings

As explained below, all of these documents are properly subject to the Protective Order.

- 3. Keystone's confidential designations are appropriate. The basis for confidentiality for each of the documents designated as confidential is as follows:
  - Biological Survey Reports. These reports contain the location of threatened and endangered species and critical habitat that supports those species. Making that locational information publicly available would put those species at risk. That would be directly contrary to the purposes of the federal Endangered Species Act, which was enacted to protect such species from jeopardy.

- Cultural Survey Reports. These reports are prepared in connection with the Section 106 Consultation Process required by the National Historic Preservation Act. The purpose of the surveys is to identify cultural or archaeological sites that should be protected. The location of any such sites is statutorily protected. SDCL § 1-20-21.2 states that "[a]ny records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site shall remain confidential to protect the integrity of the archaeological site." Keystone previously cited this statute to the Commission. General Counsel for the Commission stated during the hearing on April 14, 2015, that such records should be treated as confidential and had previously been considered confidential by the Commission. Condition No. 44(e) in the Amended Final Decision and Order requires that "[t]o the extent that Keystone or its contractors or agents have control over access to such [paleontological or cultural] information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information."
- Keystone's Integrity Management Plan. This plan represents valuable proprietary information developed by TransCanada at great time and expense to ensure safe and reliable operation of the Keystone Pipeline. Making this information available to the public, including potential competitors, would place TransCanada at a commercial and competitive disadvantage. TransCanada takes pains to protect this information from disclosure in the course of its business. (White Affidavit ¶ 2.) As previously stated by Keystone, the IMP for the Keystone Pipeline is on file with the Commission as a confidential document in HP07-001. The Amended Final Decision and Order in this case similarly requires that when it is completed and submitted to PHMSA, the IMP for the Keystone XL Pipeline can be filed with the Commission as a confidential document. (Final Order Condition No. 36.) Because the Commission has previously recognized it as a confidential document, it is appropriately subject to the Protective Order.
- The O&M Manual. This is essentially a description of how TransCanada conducts its liquids pipeline business. It contains proprietary technical information about how TransCanada manages and operates its pipelines. The manual is maintained as confidential by TransCanada. It has substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors. (White Affidavit ¶ 3.)
- The SCADA specification. This is a highly sensitive and proprietary document developed by TransCanada's engineering personnel at a substantial cost. It is maintained as a confidential document. It has substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors. (White Affidavit ¶ 4.)
- TransCanada's Material Grade Selection Guiding Principle. This is one of TransCanada's engineering standards. These standards are proprietary. They are developed by TransCanada based on thousands of hours of engineering work and experience. They are maintained by TransCanada as confidential. They are not

- disclosed to competitors. They have substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors. (White Affidavit  $\P$  5.)
- TransCanada's Underground Coating Directive. This is one of TransCanada's engineering standards and is confidential for the same reasons as the Material Grade Selection Directive. (White Affidavit ¶ 6.)
- Keystone's Paleontological Monitoring Plan. The appendix to this plan contains information on the location of paleontological resources. These resources have value to landowners. The BLM survey protocols, which Keystone follows, require confidentiality of the location of significant paleontological resources found during the surveys. Making this information publicly available would place these resources at risk and would potentially disadvantage and disturb the landowners on whose property they lie.
- Worst Case Discharge calculations. These are calculations of a worst-case spill at a particular location. The Department of State has treated this information as confidential. Appendix B to the Keystone XL Risk Assessment, which is Appendix P to the Final Supplemental Environmental Impact Statement, contains this information, but it has been redacted on the DOS website as confidential. It would obviously create safety and security issues to publicly disclose exact locations on the pipeline where an attack intended to damage the pipeline would have the most consequence.
- Issued For Construction drawings. These drawings provide construction compliance direction on a site-specific basis for the pipeline. They are the result of thousands of hours of engineering, surveys, and design, at a cost of hundreds of millions of dollars. TransCanada would be substantially injured if they were publicly disclosed and made available to competitors. They also contain locational information regarding sensitive biological and cultural resources. (White Affidavit ¶ 7.)

All of these bases have been previously stated by Keystone. It is evident from Keystone's production what documents Keystone has designated as confidential. Yet in their joint motion to vacate, the Intervenors fail to acknowledge either the particular documents designated by Keystone as confidential or the reasons stated by Keystone for the designation.

4. The terms of the Protective Order are appropriate. Given the number of Intervenors to this proceeding, the number of Intervenors who are pro se, the obvious animosity of many of the Intervenors to the Keystone XL Pipeline, and Keystone's and the public's legitimate and {01922833.1}

recognized interest in confidentiality, the terms of the Protective Order entered by the Commission are appropriate. As addressed in paragraph 5 below, the documents can be used by counsel and experts who agree to be bound by the terms of the Protective Order. The joint motion does not identify any other specific reasons why the terms of the Protective Order are unfair or oppressive.

- 5. Keystone agreed to greater access to the documents than the motion suggests. The joint motion states that they are "left in a situation where only their counsel of record" (Joint Motion at 7) are able to review documents designated as confidential. As identified in the Affidavit of William G. Taylor submitted in connection with this motion, on April 21, 2015, Keystone advised counsel for DRA, BOLD Nebraska, the Rosebud Sioux Tribe, the Yankton Sioux Tribe, the Standing Rock Sioux Tribe, and Staff that it agreed that their experts could review the confidential documents provided that each agreed to be bound by the terms of the Protective Order. (Taylor Aff. ¶ 2, Ex. A.) Keystone also agreed that lawyers granted access to confidential documents could share them with co-counsel in their firms. (Id.) Keystone agreed that Faith Spotted Eagle with the Yankton Sioux Tribe could have the same access. (*Id.*) Finally, Keystone agreed to provide access to the Standing Rock Sioux Tribe's Historic Preservation Office. (Id. ¶ 3.) Movants are aware that this access is available. It is unclear why they failed to advise the Commission of this in their motion (the statement that "TransCanada appears to have concurred with the solution" (Joint Motion at 9) is not full disclosure) or why further relief is necessary given these agreements.
- 6. The suggestion that the same access should be provided to pro se intervenors is unwarranted. The statement that they need access to effectively prepare their case is unsupported. No pro se intervenor is a party to the motion. Providing access to pro se

intervenors would be antithetical to the basis for an attorney-eyes-only protective order and would create obvious enforcement issues.

#### Conclusion

Keystone designated a limited number of documents as confidential. The basis for confidentiality is either (1) statutory; (2) proprietary; (3) or previously recognized by the Commission or another regulatory body. Keystone has previously agreed with counsel to more liberal use of the documents than provided in the Protective Order. Because the joint motion offers no compelling reason that the terms of the Protective Order are inappropriate or that Keystone's designations were not appropriate, Keystone respectfully requests that the motion be denied.

Dated this 27<sup>th</sup> day of April, 2015.

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#### CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Opposition to Joint Motion to Vacate or Amend the Protective Order, to the following:

 $\{01922833.1\}$ 

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<u>/s/ James E. Moore</u> One of the attorneys for TransCanada

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

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HP 14-001

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,

AFFIDAVIT OF WILLIAM TAYLOR IN OPPOSITION TO MOTION TO VACATE PROTECTIVE ORDER

STATE OF SOUTH DAKOTA ) :SS COUNTY OF MINNEHAHA )

William Taylor, being first duly sworn, states as follows:

- 1. I am one of the lawyers for Applicant TransCanada Keystone Pipeline, LP. I have personal knowledge of the facts stated in this affidavit.
- 2. After a conference call that occurred with some opposing counsel on April 20, 2015, Keystone advised counsel for Dakota Rural Action, BOLD Nebraska, the Rosebud Sioux Tribe, the Standing Rock Sioux Tribe, the Yankton Sioux Tribe, and Staff that it agreed that their experts could review the confidential documents designated by Keystone provided that each expert agreed to be bound by the terms of the Protective Order. A copy of my e-mail to counsel dated April 21, 2015, is attached as Exhibit A.
- 3. Based on information provided by Peter Capossela that the Standing Rock Sioux Tribe's Historic Preservation Office has a special designation from the Department of the {01922710.1}

Interior, I advised Mr. Capossela that Keystone agreed that persons from the Tribe's Historic Preservation Office could have access to the confidential documents subject to the terms of the Protective Order.

Dated this 27<sup>th</sup> day of April, 2015.

Subscribed and sworn to before me

this 27<sup>th</sup> day of April, 2015.

Notary Public - South Dakota

My commission expires:

#### CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Affidavit of William Taylor in Opposition to Motion to Vacate Protective Order, to the following:

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**Sent:** Tuesday, April 21, 2015 10:55 AM

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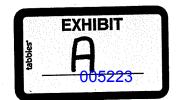
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**Subject:** Yesterday's conference call

We discussed the matters raised in yesterday's conference call with Keystone. Our response to the matters discussed follows.

- 1. The non-protected materials have been posted to a Hightail site, which is up and running. By separate email I'll send connecting information and passwords. The protected materials will be posted to another Hightail site today, which should be available by late afternoon. In the meantime, the FTP sites continue in operation.
- 2. We look forward to DRA and Standing Rock reviewing their interrogatory/document requests and narrowing the scope of the broader inquiries.
- 3. As you peruse the documents, please let us know of any specific documents you think should not be denominated confidential and the reasons why, and we will review and consider your requests.
- 4. Keystone agrees that experts may review the confidential documents, provided that each agrees to be bound by the terms of the extant order(s) to the extent they govern document management, confidentiality, security, use and return of the documents. Keystone requires that you identify the experts to whom the documents will be shown in advance, that experts make their commitment in writing, and Keystone receive a signed copy of the commitment.
- 5. Keystone believes it is appropriate for lawyers who have permission to see the confidential documents to show them to co-counsel within their firms, provided co-counsel agree to be bound by the terms of the order(s). Presumably they are ethically bound to the terms of the order(s) anyway.
- 6. Keystone will extend points four and five above to Ms. Spotted Eagle, with respect to the cultural surveys.
- 7. Keystone has separately addressed Standing Rock's request with respect to its HPO, through Mr. Caposella.
- 8. Ms. Edwards suggestion that the Commission enter an order memorializing our agreement to postpone witness/exhibit lists until the 28<sup>th</sup> is acceptable to Keystone, and I understand, acceptable to all other parties to yesterday's call.
- 9. Keystone will not agree to extend the date for hearing, or other milestone dates in the run-up to the hearing.



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

:

HP 14-001

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,

AFFIDAVIT OF JAMES P. WHITE REGARDING CONFIDENTIAL DOCUMENTS

STATE OF VIRGINIA

:SS

COUNTY OF PRINCE WILLIAM )

James P. White, being first duly sworn, states as follows:

- I am Associate General Counsel for TransCanada Corporation. I have personal knowledge of the facts stated in this affidavit.
- 2. The Integrity Management Plan for the Keystone Pipeline represents valuable proprietary information developed by TransCanada at great time and expense to ensure safe and reliable operation of the Keystone Pipeline. Making this information available to the public, including potential competitors, would place TransCanada at a commercial and competitive disadvantage. TransCanada takes pains to protect this information from disclosure in the course of its business.
- 3. The O&M manual for the Keystone Pipeline is essentially a description of how TransCanada conducts its liquids pipeline business. It contains proprietary technical information (01922708.1)

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about how TransCanada manages and operates its pipelines. The manual is maintained as confidential by TransCanada. It has substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors.

- 4. The SCADA specifications for the Keystone and Keystone XL Pipelines is a highly sensitive and proprietary document developed by TransCanada's engineering personnel at a substantial time and cost. It is maintained as a confidential document. It has substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors.
- 5. TransCanada's Material Grade Selection Guiding Principle is one of TransCanada's engineering standards. These standards are proprietary. They are developed by TransCanada based on thousands of hours of engineering work and experience. They are maintained by TransCanada as confidential. They are not disclosed to competitors. They have substantial commercial value and would place Keystone at a competitive disadvantage if publicly disclosed and made available to competitors.
- 6. TransCanada's Underground Coating Directive is one of TransCanada's engineering standards and is confidential for the same reasons addressed in paragraph 5.
- 7. TransCanada's Issued For Construction drawings provide construction compliance direction on a site-specific basis for the pipeline. They are the result of thousands of hours of engineering, surveys, and design, at a cost of hundreds millions of dollars.

  TransCanada would be substantially injured if they were publicly disclosed and made available to competitors. They also contain locational information regarding sensitive biological and cultural resources areas. This information also should not be made publicly available for the

reasons set forth in the accompanying response to the motion to lift the protective order in this case.

Dated this 27 day of April, 2015.

James P/White

Subscribed and sworn to before me

this 27 day of April, 2015.

TODD ETHAN MCCASLIN
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION & 7185887
COMMISSION # 7185887

Notary Hublic - County of Prince William My commission expires: 02 28 18

### CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Affidavit of James P.

White Regarding Confidential Documents, to the following:

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