



confidential documents available until the Protective Order had been issued late in the day on April 17, 2015. It produced its documents in reliance on the Protective Order that some of the Intervenor 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 ¶ 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 Intervenor 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 Intervenor to this proceeding, the number of Intervenor who are pro se, the obvious animosity of many of the Intervenor to the Keystone XL Pipeline, and Keystone's and the public's legitimate and

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:

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