ATTACHMENT G

BOLD LETTER TO TRANSCANADA SEEKING INFORMAL RESOLUTION OF DISCOVERY DISPUTES

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VIA EMAIL

March 26, 2015

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Re: In the Matter of the Application by TransCanada Keystone Pipeline, LP
HP 14-001: Informal Discovery Resolution

Dear Mr. Moore:

The purpose of this letter is to attempt to informally resolve a number of discovery disputes in South Dakota Public Utilities Commission ("Commission") Docket HP14-001 related to the spill response planning of TransCanada Keystone Pipeline, LP ('TransCanada") for spills of petroleum products from the proposed Keystone XL Pipeline in South Dakota ("Project"), which planning is required by the Oil Pollution Act, ("OPA"), 33 U.S.C. § 1321 (2015) and 33 USCS §§ 2701 *et seq.* (2015), and the OPA's implementing regulations at 49 C.F.R. Part 194. Specifically, Bold Nebraska ("Bold") seeks to discuss TransCanada's objections to interrogatories 45, 46, 48, and 49 and 71 to 79.

OBJECTIONS TO BOLD INTERROGATORIES 45, 46, 48, AND 49

Since TransCanada's objections to Bold's interrogatories 45, 46, 48, and 49 are similar, these objections are addressed together.

Objection Based on the Scope of the Commission's Jurisdiction

TransCanada generally asserts that all matters related to its required response to spills of crude oil from the proposed Project under the OPA are outside of the Commission's jurisdiction.

It is difficult to understand TransCanada's non-specific objection here given that:

1) the Commission accepted testimony from TransCanada witness Hayes on TransCanada's spill response planning under the OPA in the evidentiary hearing in Docket HP09-001, Transcript of November 2, 2010 at 97 *et. seq.*;
2) the Commission's Amended Final Decision and Order dated June 29, 2010 in Docket HP09-001 ("Final Order") specifically discusses TransCanada's obligations under the OPA at findings of fact paragraphs 98 through 100, and 103;
3) the Commission's Final Order condition paragraphs 36 and 42 rely on TransCanada's commitment to file an oil spill response plan under 49 C.F.R. Part 194 and require that TransCanada file such plan with the Commission; and
4) TransCanada has stated in its discovery responses in the current docket that it intends to offer the following testimony of Jon Schmidt related variously to "environmental issues" and may offer the rebuttal testimony of Danielle Dracy related to "emergency response."

It seems clear that the Commission has previously considered investigation of TransCanada's compliance with the OPA to be within the Commission's jurisdiction. Should you wish to continue this objection, Bold requests that you clarify your basis for it.

Objection that the Requested Information is Beyond Keystone's Burden Under SDCL § 49-41B-27

TransCanada generally asserts that interrogatories related to emergency response under the OPA are beyond Keystone's Burden Under SDCL § 49-41B-27. In relevant part, this section states:

> provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

Since the Commission expressly conditioned the Final Permit on TransCanada's compliance with the response planning requirements of the OPA and its implementing regulations at 49 C.F.R. Part 194, it appears to Bold that TransCanada's burden of proof includes proof of its continued compliance with applicable spill response planning requirements. Therefore, evidence related to such compliance is within the scope of S.D.C.L § 49-41B-27. Should you disagree, Bold requests that you clarify the basis for this objection.

Objection that the Commission's Jurisdiction Over the Emergency Response Plan Is Preempted by Federal Law

Your objection states:

> This request also seeks information addressing an issue that is governed by federal law and is within the exclusive province of PHMSA. The PUC's jurisdiction over the emergency response plan is preempted by federal law, which has exclusive jurisdiction over issues of pipeline safety. See 49 C.F.R. Part 194; 49 U.S.C. § 60104(c).

Your understanding of federal spill response planning law preemption is incorrect. PHMSA's spill response planning requirements are mandated by the OPA and not the Pipeline Safety Act ("PSA"), 49 U.S.C. § 60101 *et. seq*. 49 C.F.R. Part 194 was promulgated pursuant to the OPA and not the PSA. The PSA merely requires that pipeline companies make the spill response plan required by the OPA available to PHMSA. Neither the PSA itself nor the hazardous liquid pipeline regulations promulgated pursuant to it in 49 C.F.R. Part 195 include detailed standards for spill response, nor do they require that PHMSA approve a spill response plan. Instead, such requirements are contained only in the OPA and its implementing regulations at 49 C.F.R. Part 194.

The OPA includes multiple provisions stating that state action related to oil spill response are not preempted. First, 33 U.S.C. § 1321(o) states:

> (o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected.
> (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or

> hazardous substance or from the removal of any such oil or hazardous substance.
> (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.
> (3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act [33 USCS §§ 1251 et seq.] or any other provision of law, or to affect any State or local law not in conflict with this section.

Second, 33 U.S.C. § 2717 also expressly preserves state authority to regulate spill response:

> SEC. 1018. Relationship to Other Law.
> (A) Preservation of State Authorities; Solid Waste Disposal Act.—Nothing in this Act or the Act of March 3, 1851 shall—
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
> (A) the discharge of oil or other pollution by oil within such State; or
> (B) any removal activities in connection with such a discharge; or
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*) or State law, including common law.
> (b) PRESERVATION OF STATE FUNDS.—Nothing in this Act or in section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall in any way affect, or be construed to affect, the authority of any State—
> (1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or
> (2) to require any person to contribute to such a fund.
> (c) Additional Requirements and Liabilities; Penalties.— Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 *et seq.*), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—
> (1) to impose additional liability or additional requirements; or
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
> relating to the discharge, or substantial threat of a discharge, of oil.

Thus, it is abundantly clear that Congress expressly allows states to regulate oil spill response beyond the requirements of federal law.

In addition, a number of states have enacted and for years have implemented their own oil spill planning requirements that exceed federal requirements, including at least the states of:

- Alaska, Alaska Stat. § 46.03.010 *et seq.* (http://dec.alaska.gov/spar/statutes_regs.htm#perp);
- Maine, 38 MSRA §541 *et seq.* (http://www.maine.gov/dep/spills/emergspillresp/index.html);
- Minnesota, Minn. Stat. Ch. 115E; and
- Washington, RCW Ch. 90.56 (http://www.ecy.wa.gov/programs/spills/spills.html).

The industry has not successfully challenged any of these laws on the grounds that state regulation of oil spill response is preempted by the PSA – because such challenge would be meritless.

Accordingly, Commission action on oil spill response is not preempted by federal law, such that your objection on these grounds appears to be baseless. Should you disagree, please provide Bold with an explanation of the grounds for this objection.

Objection that Information about Oil Spill Response Planning is Confidential and Proprietary

You have generally asserted that information about TransCanada's spill response planning is "confidential and proprietary" and refer to Final Order Condition 36. You also generally allege that public disclosure of TransCanada's response plan would commercially disadvantage your client.

PHMSA has already released unabridged versions of the base Keystone response plan. Likewise, the State of Washington releases unabridged versions of response plans required under state law, including data beyond that required under federal law. Therefore, TransCanada's claims of confidentiality for its spill response plan seem to not be grounded in actual need for confidentiality.

Accordingly, Bold requests that you clarify your claim that response plans are confidential, particularly identifying which specific pieces of information must remain non-public and why. To the extent that the Commission finds that portions of TransCanada's response plan are confidential, Bold and its witness are willing to enter into a nondisclosure agreement pursuant to a Commission confidentiality order, as contemplated by Condition 36.

Likewise, Bold requests that you explain how disclosure of a response plan for the proposed Project would "commercially disadvantage Keystone." Since all interstate crude oil pipelines are required to prepare response plans for approval to PHMSA, presumably all of these entities are impacted equally by these requirements. Moreover, TransCanada's commercial relationships with its customers are defined through both its Transportation Service Agreements and federal tariffs, neither of which appear to be impacted by spill response planning. Disclosure or nondisclosure of TransCanada's spill response plans would seem to have no impact on TransCanada's commercial relationships. Thus, Bold would appreciate clarification of your grounds for this objection, including an explanation about how disclosure of a spill response plan would commercially disadvantage TransCanada.

Objection that TransCanada "Is Not Required to Submit Its Emergency Response Plan to PHMSA Until Sometime Close to When the Keystone Pipeline Is Placed into Operation"

You have also objected to discovery requests related to a spill response plan for the Project based on PHMSA's lax rules about when TransCanada is required to submit a spill response for its review. PHMSA's rule does not preempt South Dakota's authority to require disclosure of a draft spill response plan earlier than required by PHMSA.

As for the practicality of providing a spill response plan earlier, in Docket HP09-001, TransCanada witness Hayes testified that TransCanada typically prepares a spill response plan 12 months before the start of operations. He also testified that "80 percent of our base Keystone plan applies to

KXL" and that he also expected TransCanada to have a draft plan finished in July of 2010 – now almost five years ago. Transcript in Docket 09-001, November 2, 2009, at 98-100. Moreover, the redacted emergency response plan in the FSEIS is similar to the un-redacted versions of TransCanada's Keystone System plan previously released by PHMSA.

Finally, TransCanada's responses to discovery to date have not disclosed the types of substantial design or route changes that would significantly change worst case discharge amounts or spill response planning for these discharges. Therefore, disclosure of a draft plan would provide useful information, even if it is subject to future minor modifications.

It seems likely to Bold that TransCanada has prepared or could without difficulty prepare a draft spill response plan for the Project for consideration by the Commission. Accordingly, Bold would appreciate a description of why TransCanada is unable to provide a draft spill response plan and why disclosure of such draft plan would be unreasonable.

Objection Based on Irrelevance and Unlikelihood of Leading to Admissible Evidence

TransCanada has also stated general objections to disclosure of its full spill response equipment and personnel capacity by asserting that such information is irrelevant and unlikely to lead to admissible evidence. Since the Commission has jurisdiction over spill response matters, has investigated them in the past, made findings of fact related to them, and included conditions in the 2010 Final Permit related to them, it is difficult to see how questions about TransCanada's on-the-ground spill response capacity are irrelevant to this proceeding or likely to lead to inadmissible evidence.

This being said, due to the extremely broad nature of these objections it is not possible for Bold to understand TransCanada's reasoning for these objections. Accordingly, Bold requests that you explain these objections as they relate to the specific information requested.

Objection Based on Seeking Information Outside of South Dakota

TransCanada has objected that information about its spill response capacity is outside of South Dakota and therefore beyond the Commission's jurisdiction. Since this objection is vague, the basis for TransCanada's objection is not clear. It may be that your objection is based on a belief that the Commission has no jurisdiction to know about spill response resources outside of South Dakota that TransCanada would rely on to respond to a spill inside South Dakota. If this is your argument, Bold disagrees because the Commission should know about the resources available to TransCanada that could be moved to South Dakota in the event of a major spill. This being said, you may have a different basis for this objection. Therefore, Bold requests that you provide a more detailed explanation of it.

OBJECTIONS TO BOLD INTERROGATORIES 71 TO 79

Objection Based on Security Reasons

TransCanada has asserted that Bold's information requests 71 to 79 seek information that is confidential for security reasons, but has not otherwise explained why disclosure of the information creates a security risk. Therefore, Bold requests that TransCanada provide a more detailed explanation about why disclosures requested by these interrogatories creates a security risk. To the extent that TransCanada proves that disclosure of some or all of this information creates a security risk, Bold is willing to enter into a non-disclosure agreement pursuant to a confidentiality order issued by the Commission.

Objection Based on the Relevancy or Unlikelihood of Leading to Admissible Evidence

TransCanada has asserted that Bold Interrogatories 71 and 72 seek irrelevant information or information that is not likely to lead to the discovery of admissible evidence. However, TransCanada has not provided any explanation for these objections. Bold seeks this information in order to conduct an independent analysis of the potential worst case discharges at a number of locations in South Dakota. As previously discussed, Bold asserts that information related to potential worst case discharges in South Dakota is both relevant and likely to lead to discovery of admissible evidence. Therefore, Bold requests that TransCanada provide its rationales for these objections.

ADEQUACY OF RESPONSES PROVIDED

To the extent that TransCanada has provided substantive responses, Bold finds them inadequate.

In response to Bold Interrogatories 45, 46, 48, and 49, TransCanada points to the Emergency Response Plan ("ERP") in the Final Supplemental Environmental Impact Statement ("FSEIS"). This information is heavily redacted to the point that it is not possible to evaluate TransCanada's on-the-ground ability to comply with the OPA. Therefore, Bold continues to request access to a current un-redacted draft spill response plan applicable to the Project in South Dakota.

In response to Bold Interrogatory 72, TransCanada states that all of the Project's mainline valves will be remotely operated, but fails to provide the milepost locations for each pump station and valve, which information is necessary to prepare accurate worst case discharge analyses for various locations in South Dakota. Therefore, Bold continues to request this information. To the extent such information is found by the Commission to be confidential, Bold is willing to enter into a non-disclosure agreement.

In response to Bold Interrogatory 74, TransCanada states that the maximum operating pressure of the Project will be 1,307 psig, and that at "select locations" the pressure will be as high as 1,600 psig. Since accurate evaluation of worst case discharges requires information about the pressures in each segment of pipeline in South Dakota, Bold continues to seek pressure information for each segment.

In response to Bold Interrogatory 76 related to TransCanada's approach to remote determination of possible pipeline releases, TransCanada merely states that it will remotely monitor the pipeline on a continuous basis without any description of its equipment or personnel training or its leak detection and response protocols. Evaluation of TransCanada's spill response capacity requires access to such information. Therefore, Bold continues to request such information.

In response to Bold Interrogatory 78 related to possible slack line operation of the Project, TransCanada states that it will not operate the Project in a slack line condition, but its explanation for how it intends to prevent such condition says only that "automated controls are in place to maintain minimum line pressures during operation." Bold seeks a detailed description of such controls.

Should you wish to talk through any of the foregoing, please call 612-599-5568 at your earliest convenience. Thank you for your time and attention to this matter.

Very truly yours,

Paul C. Blackburn