



determination of the propriety of re-certification of the conditions contained in the Commission's Amended Final Decision and Order dated June 29, 2010 (the "Original Permit"), and by staying the proceedings pending federal action, in the event the United States government denies TransCanada a permit to build the Pipeline across the US/Canadian border, the time, money, energy, and effort spent by the Commission and all parties to these proceedings will have been wasted.

### **A Stay of Proceedings Pending Federal Action is Appropriate**

Final approval by the President of the United States for the proposed cross-border Pipeline is a prerequisite to TransCanada's ability to construct the proposed Pipeline in the United States, including South Dakota. For proposed petroleum pipelines that cross international borders of the United States, the President, through Executive Order 13337, directs the Secretary of State to decide whether a project serves the national interest prior to the President making a final decision whether to grant or deny a Presidential Permit. No decision has been made and, depending on the source, whether or not the Presidential Permit will be approved or denied is an open-ended question.

Given the fact that pipelines are long-term assets forming part of our nation's energy infrastructure and, once in service, typically remain in service for decades, a permitting decision is not one that is lightly made. TransCanada's first application for the Pipeline was submitted to the federal government on September 19, 2008, and the US State Department's Final EIS was published on August 26, 2011. The proposed route included the same US-Canada border crossing as is currently proposed, but had a different pipeline route through the United States, which included crossing the Sand Hills Region of Nebraska. On May 4, 2012, TransCanada filed a new Presidential Permit application for the Pipeline. The proposed Pipeline has a new route and a new

stated purpose and need (see US Dept. of State, *Final Supplemental Environmental Impact Statement*, January 2014, p. ES-3).

The Movants suggest that due to the uncertainty of when, if ever, a national interest finding from the US State Department may be issued, not to mention when, if ever, a decision as to issuance or denial of a Presidential Permit is made, there is no way of knowing how many months or years will transpire prior to any federal approval of the Pipeline. The intervenors filing this motion therefore move the Commission to stay further proceedings in HP 14-001 because moving forward with TransCanada's petition for certification is not justified in that it defies the principle of judicial economy in that significant time, energy, effort and resources will have been wasted by all parties in the event of non-approval. On this basis, the Commission's best course of action is to stay the proceedings pending final federal action with respect to the grant or denial of a Presidential Permit.

### **A Stay of Proceedings Pending the Outcome of Canadian National Energy Board**

#### **Investigation of TransCanada is Appropriate**

Of critical importance for the Commission in its re-certification determination is whether the evidence shows TransCanada can and will comply with the Amended Conditions set forth in the Original Permit. The safety and integrity of the proposed Pipeline is a key issue the Commission needs to carefully examine in making its decision. The safety of TransCanada's pipelines, and the proposed Pipeline in particular, has been called into serious question. The testimony of Evan Vokes, a former TransCanada pipeline engineer, which was filed by DRA in these proceedings, details how TransCanada's corporate culture values profits over pipeline safety. See Testimony of Evan Vokes, attached hereto as **Exhibit 1**. TransCanada's corporate culture is a significant issue in these proceedings and should be of concern to the Commission. Mr. Vokes, in

testifying before the Canadian Standing Senate Committee on Energy, the Environment and Natural Resources on June 6, 2013, stated that:

“I found that TransCanada had a culture of noncompliance, deeply entrenched business practices that ignored legally required regulations and codes. What I have documented is a mix of politics and commercial interests that has resulted in the false public claims of exceptional industry practice.” See, **Exhibit 2**, p. 1.

Although Mr. Vokes’s findings resulted in a NEB investigation of TransCanada’s practices, apparently not much changed at TransCanada. Just within the past few weeks, on March 25, 2015, Reuters reported in an exclusive story that the NEB was launching yet another investigation into TransCanada over its safety practices, these concerns having been flagged by yet another TransCanada employee. Reuters news service reported that:

“Canada’s energy regulator is investigating up to **a dozen new allegations** of natural gas pipeline **safety-code violations** at TransCanada Corp (TRP.TO), according to documents reviewed by Reuters. The regulator, the National Energy Board (NEB), and the company confirmed an investigation is under way but offered few details of the allegations. It marks the **second time in recent years the regulator has probed safety practices** at Canada’s second largest pipeline company following complaints by a whistleblower.” See **Exhibit 3**, p. 1 (emphasis added).

These allegations are serious, as they go to the heart of TransCanada’s public statements about the safety of the proposed Pipeline and the ability, or for that matter, even the willingness of TransCanada to really do what it takes to build a pipeline that will not put the land and scarce water resources of South Dakota at risk.

The people of South Dakota and Commission should have the benefit of examining the evidence being uncovered by Canada’s NEB in its investigation of TransCanada, because it directly implicates the safety and integrity of the proposed Pipeline, a subject that is squarely within the scope of the conditions to the Original Permit. The Commission owes it to the citizens of South Dakota to examine these issues in light of the risks posed by pipeline leaks and spills to the state’s land and increasingly scarce water resources. Because it is unrealistic for the

Commission to examine all of the evidence various former TransCanada employees have provided or are currently providing to the NEB within the time frame set by the Commission for these proceedings, a stay of these proceedings is warranted until such time as the NEB completes its investigation into TransCanada's practices and makes the evidence uncovered from that investigation available for examination.

### **Conclusion**

The Commission has the authority to stay these proceedings and should do so in light of two compelling reasons. First, it makes no sense for the Commission or the intervenors in this matter to expend the time and resources preparing for and conducting what will inevitably be a large-scale discovery fight, evidentiary hearing, and appeal to South Dakota's courts when we have no idea whether or not a Presidential Permit will even be granted. Under these circumstances, going forward with these proceedings would violate the key jurisprudential precept of judicial economy. Second, the existence of what is now a second NEB investigation into TransCanada's safety practices and an alleged corporate culture that values money over safety warrants staying these proceedings until such time as the parties and the Commission can examine evidence uncovered by the NEB's investigation.

Respectfully submitted,

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