

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION :  
BY TRANSCANADA KEYSTONE : HP 14-001  
PIPELINE, LP FOR A PERMIT UNDER :  
THE SOUTH DAKOTA ENERGY :  
CONVERSION AND TRANSMISSION : KEYSTONE'S RESPONSE TO  
FACILITIES ACT TO CONSTRUCT THE : APPLICATIONS OF PARTY  
KEYSTONE XL PROJECT : STATUS OF CINDY MYERS,  
 : R.N., JANE KLEEB, DIANA L.  
 : STESKAL, BYRON T. STESKAL,  
 : BENJAMIN D. GOTSCHALL,  
 : AMY SCHAFFER, ROBERT G.  
 : ALLPRESS, CAROLYN P. SMITH,  
 : ARTHUR R. TANDERUP, TERRY  
 : AND CHERYL FRISCH, LOUIS T.  
 : (TOM) GENUNG, BRUCE  
 : BOETTCHER, WREXIE LAINSON  
 : BARDAGLIO, ROXANN  
 : BOETTCHER, AND BONNY  
 : KILMURRY

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Cindy Myers, R.N., Jane Kleeb<sup>1</sup>, Diana L. Steskal, Byron T. Steskal, Benjamin D.  
Gotschall, Amy Schaffer, Robert G. Allpress, Carolyn P. Smith, Arthur R. Tanderup,

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<sup>1</sup> Kleeb filed her application in her own name. The “applicant” is listed as Jane Kleeb. While she notes that she works with BOLD Nebraska and the Cowboy Indian Alliance, the application does not indicate that it is made on behalf of either one, nor does it disclose that Kleeb has authority to act for either. Similarly, Benjamin D. Gotschall filed an application in his own name, even though he refers to his work with BOLD Nebraska and the Cowboy Indian Alliance in the application. Both applications should be treated as requests by an individual for party status.

Terry and Cheryl Frisch, Louis T. (Tom) Genung, Bruce Boettcher<sup>2</sup>, Wrexie Lainson Bardaglio, RoxAnn Boettcher, and Bonny Kilmurry have all filed applications for party status. Most are residents of Nebraska, and all reside out of state. TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that these applications be denied.

To be allowed party status, an applicant must be either (1) a person residing in the area where the facility is proposed to be sited; (2) a nonprofit organization promoting certain interests enumerated in the statute; or (3) an interested person. SDCL § 49-41B-17(3). Out-of-state residents do not meet either of the first two criteria<sup>3</sup>, so they can be granted party status only if they establish that they are "interested persons" within the meaning of the statute.

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<sup>2</sup> Like Jane Kleeb and Benjamin Gottschall, Bruce and RoxAnn Boettcher filed individual applications, even though they identify Boettcher Organics as an organization with which they are affiliated. Boettcher Organics bills itself on the internet as an organic beef producer at Bassett, Nebraska; i.e. a commercial enterprise.

<sup>3</sup> The jurisdiction of the Commission is limited to consideration of transmission facilities located "in this state." SDCL § 49-41B-1. The Commission's jurisdiction does not extend to Nebraska or Montana portions of the pipeline. The applicants who live near the pipeline *in Nebraska* do not live ". . . near the area where the facility is proposed to be sited" within the jurisdiction of the South Dakota Commission. A Nebraskan's recourse is in the Nebraska regulatory system or the on-going federal review process. Moreover, of the Nebraska landowners, only Byron Steskal and Arthur Tanderup identify themselves as living on or near the Nebraska right of way.

“Interested person” is not defined in Chapter 49-41B. However, “interested person” must mean more than a person simply curious about or attentive to the project. If it does not, then the first two provisions of § 49-41-17(3) affording party status to area residents and certain non-profits are pointless and unnecessary. Courts generally avoid defining statutory terms in a way that makes other terms meaningless. *See, e.g., Schnellke v. Belle Fourche Irrigation Dist.*, 840 N.W.2d 669, 675 (S.D. 2013). There is no reason for area residents and non-profits to be mentioned in the statute if any curious person can become a party for the asking.

South Dakota’s administrative procedures act, SDCL Ch. 1-26, applies to proceedings before the Commission.<sup>4</sup> Under SDCL § 1-26-17.1, a person “. . . *whose pecuniary interests* would be directly and immediately affected by an agency’s order made upon the hearing may become a party to the hearing by intervention.” The statute clearly contemplates more than a general interest as a precursor to intervention.

Under the Commission’s own administrative rules, an “interested person” is someone with a particular interest in the project, as distinguished from the general public.

Per ARSD 20:10:01:15.05,

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<sup>4</sup> SDCL § 1-26-1(1) defines agencies as “. . . each . . . commission of the state vested with authority to exercise any portion of the state’s sovereignty. . . .” The Public Utilities Commission is clearly exercising the State’s sovereignty, and accordingly is governed by the Administrative Procedures Act. Nothing in SDCL Ch. 49-1 exempts the PUC from the application of SDCL Ch. 1-26.

[a] petition to intervene shall be granted by the commission if the petitioner . . . will be . . . affected either favorably or adversely *with respect to an interest peculiar to the petitioner* as distinguished from an interest common to the public or to taxpayers in general.

*Id.* (emphasis added). The rule clearly requires that a petitioner's interest be distinct from that of the general public or taxpayers, and is consistent with an intervention standard higher than curiosity or general interest.<sup>5</sup> Thus, an applicant for party status who does not reside in the siting area within the Commission's jurisdiction, and who is not a nonprofit entity, must show a particularized interest in the project distinct from the public.

PUC rules allow persons to appear and be heard without formal intervention and full party status. ARSD 20:10:01:15.06 addresses an individual's right to appear, as opposed to a right to intervene. The rule provides that an individual may appear, disclose their identity and interest in the proceeding, and, "if the contentions of the person are reasonably pertinent to the issues presented and the right to broaden the issues is disclaimed," speak to the Commission. Their comments become part of the record. ARSD 20:10:01:15.06. The rule supports Keystone's understanding of "interested person" for two reasons. First, it would be illogical if the standard for being heard while

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<sup>5</sup> The regulation cites SDCL § 1-26-17.1 as the "law implemented," so it is clear that the Commission adopted the rule with § 1-26-17.1 in mind. The Commission's interpretation of its own rules is entitled to deference, and its rules have the force of law. *Krsnak v. South Dakota DENR*, 824 N.W.2d 429, 436 (S.D. 2012).

not being granted party status (a person making contentions that are “reasonably pertinent to the issues”) were more stringent than the standard for intervention (any interested person). Second, a denial of party status does not mean that a person may not be heard. It merely means that a person may not participate in discovery or examine witnesses at a formal hearing.

An “interested person” under SDCL § 49-41B-17(3) is therefore a person with a pecuniary interest in the outcome of the proceeding or a person affected by the outcome in a way not shared by the general public. *See* SDCL § 1-26-17.1; ARSD 20:10:01:15.05. The out-of-state residents do not meet this standard. They are concerned about the health and environmental issues presented by the project, but as residents of some other state, they do not live in the siting area within the jurisdiction of the South Dakota PUC. Their opposition to the project is based on the same interests as other members of the public.

The out-of-state residents can all express their pertinent views and be heard by the PUC under ARSD 15:10:01:15.06, but their applications do not meet the statutory test for party status. Accordingly, Keystone respectfully requests that their applications be denied.

Dated this 22<sup>nd</sup> day of October, 2014.

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### CERTIFICATE OF SERVICE

I hereby certify that on the 22<sup>nd</sup> day of October, 2014, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Response to Applications of Party Status of Cindy Myers, R.N., Jane Kleeb, Diana L. Steskal, Byron T. Steskal, Benjamin D. Gotschall, Amy Schaffer, Robert G. Allpress, Carolyn P. Smith, Arthur R. Tanderup, Terry and Cheryl Frisch, Louis T. (Tom) Genung, Bruce Boettcher, Wrexie Lainson Bardaglio, RoxAnn Boettcher, and Bonny Kilmurry, to the following:

Case Number: HP 14-001

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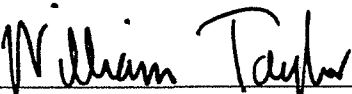
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