BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	* * * * * * * * *	**STAFF'S RESPONSE TO DAKOTA RURAL ACTION'S MOTION TO COMPEL DISCOVERY FROM STAFF** **HP14-001**

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this response to the motion to compel ("motion") filed by Dakota Rural Action ("DRA"). DRA filed its motion requesting an order from the Commission compelling Staff to provide documents requested by DRA in its First Request for Production of Documents. The request at issue is a request for all correspondence between the Commission or Commission Staff and TransCanada Keystone Pipeline, LP ("Keystone") and its affiliates. Staff respectfully requests that the motion be denied.

1. **Dakota Rural Action failed to make an attempt to resolve this matter in good faith.**

In its Motion, DRA claims that, in compliance with SDCL § 15-6-37(a)(2), counsel for DRA made an attempt in good faith to "confer with counsel for PUC Staff in an effort to secure the information or material sought through discovery requests prior to filing this motion." (Motion at ¶ 2) That is patently false. Even though DRA received Staff's answers, which include the objection at issue, on February 6, 2015, it was April 7, 2015, two hours before the Motion was filed, that Staff first heard of any interest DRA still had in obtaining the requested documents. This in no way satisfies the requirements of SDCL § 15-6-37(a)(2), which provides:

> If a deponent fails to answer a question propounded or submitted under § 15-6-30 or 15-6-31, or a corporation or other entity fails to make a designation under subdivision 15-6-30(b)(6) or § 15-6-31(a), or, a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

Because, per Commission order, all motions to compel were due by the end of the day on April 7, 2015, there was absolutely no way in which Staff could have meaningfully participated in a good faith effort to resolve this issue prior to a motion to compel being filed.

2. Staff's objections should not be overruled.

Staff's first objection was that Staff could not produce any communications between the Commission and Keystone. This object remains true. As Staff stated in its objection, Staff operates as a party, separate from the Commission and does not have access to or knowledge of Commission communications. This remains true. This data request is akin to asking the State's Attorney in a criminal proceeding to produce the emails between the judge and defendant.

Staff's second objection was that all communications were the subject of attorney work product. Following receipt of this Motion, Staff again made a diligent search of all communications to confirm that all communications between Keystone and Staff were conducted exclusively between attorneys for the parties. Staff is a party to this docket and, therefore, has just as much right to work with another party to formulate its positions as any other party. To not allow Staff the privilege of communicating with parties to work toward understanding,

narrowing, or, in some cases, settlement of the issues undermines the task of attorneys and the judicial process as a whole.

In its Motion, DRA claims that Staff did merely asserted that the basis for its objection was that the communication was between attorneys, but did not claim that the communications were work product. (Motion at ¶ 9) This statement is false, as shown in Exhibit 1, attached to Affidavit of Kristen Edwards. Staff objected on the "grounds of attorney work product. All communications between Staff and [Keystone] have been conducted by attorneys and are, therefore, the subject of attorney work product." (See Exhibit 1) DRA cites *Kaarup v. St. Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17 (S.D. 1989), as authority for its argument. DRA claims that this case stands for the proposition that communications between an attorney and a company are discoverable. (Motion at ¶ 9) DRA's statement is a misreading and misapplication of *Kaarup*. *Kaarup* was a distinguishable case in that the defense raised in the case was that the client had relied in good faith on advice from counsel. Thus, advice and communications of counsel became material to that case. The Court, therefore, held that "the defense of advice of counsel waives the nearly absolute protection afforded an attorney's opinion work product." *Id.* at 22. "A recognized exception to the protection afforded opinion work product is the established rule that a party cannot affirmatively assert reliance upon an attorney's advice and then refuse to disclose such advice." *Id.* (citing, *Duplan Corp. v. Moulinage et Retorderie de Chavnoz,* 509 F.2d 730, 735 (4th Cir.1974)). This is absolutely not the circumstance in the current proceeding. In fact, the *Kaarup* case included a malpractice action brought against the attorney. *Id.* at 18. St. Paul Fire and Marine was the attorney's liability carrier. *Id.* The relevancy in discovery of the correspondence in *Kaarup* was to "determine the nature of counsel's advice" because of the affirmative defense of acting upon the advice of counsel. *Id.* at

20 (Court holding that "St. Paul's reliance upon the defense of advice of counsel waives the nearly absolute protection afforded an attorney's opinion work product."). Furthermore, *Kaarup* is distinguishable from this case because there was never any indication that the communications involved in *Kaarup* between the attorney and the company were from an attorney to an attorney, nor was there any indication that those communications were made during a pending proceeding, thus making them communications conducted while the attorney was establishing his case or formulating his position.

SDCL 15-6-26(b)(3) provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney...) **only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.** In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

DRA has made no such showing that they have a substantial need, or any need at all, for the requested correspondence.

The test for determining whether a document is work product is whether "in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtain because of the prospect of litigation." *Id.* at 21 (quoting, 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2024 at 198 (1970)). The legislature and Court intended for the work product protection to be very broad. "The protection afforded by the work product doctrine is broader than that created by attorney/client privilege." *Id.*

The Court has stated that "in giving effect to the phrase 'the court *shall* protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney…' courts have imposed a nearly absolute protection upon an attorney's opinion work product." *Id.* at 22 (internal citations omitted).

3. Access to Staff communications would not advance the ability of any party to engage in meaningful and complete discovery.

DRA argues as support for its Motion that they should be allowed to engage in meaningful and complete discovery. (Motion at ¶ 4) Staff is in complete agreement with the statement the DRA, and all other parties have this right. However, Staff cannot fathom how access to Staff's communications in any way advances the ability to accomplish that task. DRA has failed to provide any argument whatsoever to establish what they intend to accomplish by gaining access to Staff communications or how that would assist in the discovery process.

4. The information sought is not relevant.

DRA also argues that the proper standard for ruling on a discovery motion is "whether the information sought is relevant to the subject matter involved in the pending action." (Motion at ¶ 6) DRA goes on to state that "relevancy" is defined as information that may lead to admissible evidence at trial. (Motion at ¶ 6) Again, Staff is in agreement with this statement. However, nothing in Staff's communications could possibly lead to anything that is admissible in the evidentiary hearing. DRA makes no claim of what they believe would be found by viewing these emails and how any of this information could lead to the discovery of admissible evidence.

Conclusion

For the above-mentioned reasons, Staff respectfully requests the Commission deny DRA's motion to compel. Should the Commission decide, as DRA requests, to do an *in camera*

review of the correspondence, a request to which Staff objects, Staff requests that the *in camera* review be conducted, and then the correspondence be returned to Staff, rather than having all correspondence sealed and maintained in the record, as DRA suggests.

Dated this 9th day of April, 2015.

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