

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE PIPELINE PROJECT	* * * * * * *	HP 07-001  INTERVENER WEB WATER DEVELOPMENT ASSOCIATION'S POST HEARING BRIEF
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This Brief is submitted by Intervener WEB Water Development Association in opposition to the application as proposed by TransCanada Keystone Pipeline, LP for issuance of a permit from the South Dakota Public Utilities Commission pursuant to SDCL 49-41B-4. WEB has submitted detailed proposed Findings of Fact which set forth pertinent facts that demonstrate TransCanada's failure to meet its burden of proof under SDCL 49-41B-22. Those facts will not be restated in this Brief.

TransCanada plans to transport up to 591,000 barrels of tar sands crude oil per day through its pipeline that is proposed to travel over 200 miles through South Dakota. At the hearing, it was evident TransCanada wanted to convince the PUC that its pipeline would not leak. The history of pipelines and the DNV study presented by TransCanada, along with the testimony of a number of witnesses, clearly establish that no such assurance can be made. There is a real possibility a leak could occur in South Dakota and such a leak could go undetected for a considerable period of time. One of the most concerning things about this prospect is the fact little has been done with regard to planning for such an eventuality. TransCanada has not yet developed an emergency response plan nor an integrity management plan. These are things it intends to do after a permit has been granted. Other than a maintenance facility to be located in

Yankton, TransCanada was unable to provide any information as to where persons who would respond to a leak would be located and no bond or cash reserve has been offered to cover the cost of cleaning up an oil spill. Without more detailed information as to how TransCanada intends to respond to an emergency, the PUC is in no position to grant a permit.

Although the evidence at the hearing indicated TransCanada has been working on its project for two or three years, the public only just recently became aware of the project. The company seems to be in a rush and does not seem to be willing to take the time needed to ensure the safety of the South Dakota environment and South Dakota's inhabitants. A prime example of this has to do with the proposed location of the pipeline in Marshall County. Originally, the pipeline was to run through an area in Brown County. When the U.S. Fish and Wildlife Service objected to the pipeline route, TransCanada recently moved over 25 miles of the pipeline to the east into Marshall County. There was substantial evidence at the hearing to the effect that the route chosen in Marshall County runs through ecologically sensitive areas with surficial and shallow aquifers. Despite this fact, TransCanada's environmental toxicologist, Heidi Tillquist, who had limited information about Marshall County and had never visited the area, made the determination no sensitive environmental resources would be impacted. WEB presented two respected South Dakota geologists, Drs. Perry Rahn and Arden Davis, who both testified that, from a geologic point of view, TransCanada had not done an adequate review and an alternate route to the east would be much safer. It does not appear as if TransCanada even looked for an alternate route in Marshall County. When their original route was rejected by the U.S. Fish and Wildlife Service, it appears as if a hasty decision was made to move the pipeline into ecologically sensitive areas in Marshall County.

Further evidence of TransCanada's unwillingness to thoroughly protect South Dakota resources is evidenced by their cultural resource survey. Although Paige Hoskinson Olson from

the South Dakota State Historic Preservation Office indicated that, if asked, South Dakota would recommend a 100% pedestrian survey of the entire pipeline route to look for cultural resources, TransCanada surveyed only 17% of the route.

Under SDCL 49-41B-22, the applicant must first show that the proposed facility will comply with all applicable laws and rules. In large part, TransCanada's presentation of the hearing was based upon promises that they would comply with applicable state and federal rules. Their past actions do not, however, give one much confidence that will occur. To save construction costs, TransCanada sought and obtained a special permit allowing for the use of thinner pipe. No study was done to determine the increased risk placed on South Dakota. As noted previously, TransCanada has not yet prepared an emergency response plan. What assurance does the PUC and the people of South Dakota have that TransCanada will develop a plan that adequately protects South Dakota?

Under SDCL 49-41B-22(2), TransCanada must show that the pipeline will not pose a threat of serious injury to the environment. Again, TransCanada failed to meet its burden of proof. There is substantial evidence about possible injury to the environment in several areas along the proposed pipeline route. The same holds true for subparagraph 3 of SDCL 49-41B-22. Because of the possible damage to water resources, TransCanada failed to establish that its pipeline will not substantially impair the health, safety or welfare of South Dakota residents.

Finally, SDCL 49-41B-22(4) requires that TransCanada prove that its pipeline will not unduly interfere with the orderly development of the region. The statute provides that due consideration must be given to the views of governing bodies of affected local units of government. No evidence was presented at the hearing as to the views of affected local units of government with the exception of the resolution from the Marshall County Commission raising serious questions about the pipeline.

Based upon the major concerns that remain regarding the safety of the proposed pipeline, the PUC should deny TransCanada's permit application as presented. Alternatively, should the PUC decide TransCanada has met its burden of proof, the Commission has the responsibility to impose a number of conditions upon TransCanada's permit to protect South Dakota. Under SDCL 49-41B-24, the PUC has the authority to grant a permit "upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission may deem appropriate." *See also In re Nebraska Public Power District, etc.*, 354 N.W.2d 713, 718 (S.D. 1984). During the course of the hearing, a number of recommendations were made regarding possible conditions which would be imposed concerning the construction, operation or maintenance of the pipeline. WEB's primary concern has to do with its water lines and groundwater aquifer resources. The proposed pipeline will cross a number of rural water lines, some of which are owned and operated by WEB. The South Dakota Rural Water Association passed a resolution encouraging the PUC to require TransCanada to use thicker pipe where it crosses rural water lines (*See* WEB EX 8). The managers of both WEB and the BDM Rural Water System requested that TransCanada use thicker pipe when crossing their water pipelines and shallow aquifers. WEB and BDM also asked that TransCanada relocate WEB's and BDM's water lines and encase them in steel or ductile iron to protect those lines where they are crossed by TransCanada's pipeline. Should TransCanada's permit be granted, the PUC is requested to impose a condition requiring TransCanada to use thicker pipe where it crosses rural water lines and aquifers and to relocate the rural water lines in accordance with the suggestions made by WEB and BDM. It is also requested that the PUC require TransCanada to supply a sample of the oil it intends to transport for testing by an independent lab.

A number of witnesses testified on behalf of the PUC staff. Several of these witnesses made recommendations regarding the construction, operation and maintenance of the pipeline.


Those recommendations are summarized in paragraphs 82, 83, 116, 118 through 120, 123 through 126 and 131 through 136 of WEB's Proposed Findings of Fact. The PUC is urged to make TransCanada comply with these various recommendations should a permit be granted. The PUC is also requested to impose the conditions requested by WEB in Exhibit 39 attached to the direct testimony of Curt Hohn.

TransCanada wants to construct a high pressure oil pipeline with minimum safety standards. TransCanada is asking the PUC to issue a permit to TransCanada to allow for the construction of their pipeline before TransCanada has to comply with certain federal regulations. There is nothing preventing the PUC from requiring TransCanada to comply with higher standards and safety measures to protect the people, resources and prosperity of South Dakota.

In summary, the PUC is urged to deny TransCanada's permit until such time as TransCanada is able to satisfy the PUC as to the safety of its pipeline and to meet its burden of proof under SDCL 49-41B-22. Alternatively, the PUC is urged to require TransCanada to comply with the conditions recommended by WEB, BDM, the South Dakota Rural Water Association and the staff witnesses.

Dated this 11th day of January, 2008.

SIEGEL, BARNETT & SCHUTZ, L.L.P.



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