

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

DOCKET NO. HP07-001

IN THE MATTER OF THE APPLICATION OF TRANSCANADA KEYSTONE PIPELINE,  
LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND  
TRANSMISSION FACILITY ACT TO CONSTRUCT THE KEYSTONE PIPELINE  
PROJECT

Surrebuttal Testimony of John Muehlhausen on Behalf of the  
Staff of the South Dakota Public Utilities Commission

November 28, 2007

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2                   SURREBUTTAL TESTIMONY OF JOHN MUEHLHAUSEN

3   **Q:   Please state your name and business address.**

4   A:   John Muehlhausen of Merjent, Inc. of 615 First Avenue Northeast, Suite 425,  
5        Minneapolis, Minnesota 55413.

6   **Q:   Did you provide direct testimony in this proceeding?**

7   A:   Yes.

8   **Q:   In surrebuttal, to whose rebuttal testimony are you responding?**

9   A:   I am responding to the rebuttal testimony of L.A. Buster Gray.

10  **Q:   Do you agree with L.A. Buster Gray's rebuttal testimony, which states, "the best**  
11        **party to monitor and assess crop's productivity after a two year period is the**  
12        **landowner, and should there be a productivity loss issue, the landowner will advise**  
13        **Keystone."**

14  A:   No, I do not necessarily agree that the best party to monitor and assess crop productivity  
15        is the landowner, although in some instances it may be.  Although diminished  
16        productivity will, in many instances, be visually obvious from the crops' physical  
17        condition, that may not always be the case.  Furthermore, proper monitoring requires  
18        time, money, expertise, and other resources.  A landowner may or may not have time,  
19        money, expertise, or other resources at their disposal to effectively assess crop  
20        productivity.  Regardless, TransCanada indicated that it would monitor the yield of land  
21        impacted by construction with the help of agricultural specialists when requested by the  
22        landowner.

1           The real issue associated with crop monitoring centers around the passive nature  
2 of TransCanada's proposal, which requires monitoring only when requested by the  
3 landowner. This passive condition assumes fields have returned to preconstruction yields  
4 unless a landowner has taken the time to identify areas of diminished productivity and  
5 made an effort to complain to TransCanada. It shifts a portion of the responsibility for  
6 returning fields to preconstruction conditions from TransCanada onto the landowner. It  
7 effectively amounts to "acceptance by omission" and is further complicated by the fact  
8 that landowners may not be aware that they can or should request yield monitoring in  
9 suspected areas of diminished productivity, especially when two or more years have  
10 passed after construction.

11           The recommendation I provided in my direct testimony would require  
12 TransCanada to monitor the yield of agricultural lands and hay fields until successful  
13 restoration could be demonstrated, unless waived in writing by the landowner. This  
14 would keep the burden of restoration largely on TransCanada. Understandably,  
15 TransCanada may be concerned with the cost associated with monitoring of all affected  
16 agricultural lands and hay fields in South Dakota after construction. As an alternative to  
17 my original recommendation, the Commission could consider a less comprehensive, but  
18 cost-saving measure that would require TransCanada to:

- 19       • **Send a letter to all owners of agricultural land and hay fields within the**  
20       **project work area reminding them of their right to request yield monitoring if**  
21       **they believe productivity has been diminished as a result of construction. The**  
22       **letter should be sent in the second quarter of each year for three years**  
23       **following construction. Upon landowner request, TransCanada should**

1           **monitor the yield of agricultural lands and hay fields impacted by**  
2           **construction. Monitoring should be conducted until the area is successfully**  
3           **restored to yields which are similar to adjacent portions of the same field that**  
4           **were not disturbed by construction. TransCanada should compensate the**  
5           **landowner for reduced yields at market rate until the area is successfully**  
6           **restored.**

7   **Q: Can you comment on L.A. Buster Gray's rebuttal testimony regarding mitigation**  
8           **for pipeline construction near residences?**

9   **A:** Yes, in his rebuttal to my direct testimony Mr. Gray did not dispute or refute any of the  
10 mitigation measures for pipeline construction near residences, he merely outlined some of  
11 the mitigation measures already contained in TransCanada's Construction Mitigation and  
12 Reclamation Plan. The Construction Mitigation and Reclamation Plan is a very good  
13 document and TransCanada should be commended on the plan. However, there is room  
14 for improvement. One area that could be improved is mitigation for pipeline construction  
15 near residences. The additional measures in my direct testimony improve, clarify, and/or  
16 emphasize residential mitigation in the plan. Following is a point-by-point discussion of  
17 the measures provided in my direct testimony.

- 18       •       **TransCanada should coordinate construction work schedules with affected**  
19               **residential landowners prior to the start of construction.**

20           The Construction Mitigation and Reclamation Plan proposed by TransCanada  
21 requires only that residents be notified prior to construction; it does not require the  
22 coordination of the construction work schedules with affected residents. TransCanada  
23 should consider input from the affected residential landowner regarding the most

1 satisfactory time for construction through the area. Although TransCanada may not be  
2 able to satisfy all schedule requests, many requests may be easy to accommodate.

- 3 • **TransCanada should maintain access to all residences, except for brief**  
4 **periods essential to pipe-laying as coordinated with affected residential**  
5 **landowners.**

6 The Construction Mitigation and Reclamation Plan proposed by TransCanada  
7 requires that access and traffic flow in residential areas be maintained during construction  
8 activities, particularly for emergency vehicles. However, it is not clear if access would  
9 be maintained to each home, or if access would just be maintained on the streets in the  
10 vicinity of the homes. The idea that access to individual homes could be blocked during  
11 construction was derived, in part, from Mr. Gray's comments during the Commission's  
12 public meetings where he suggested that special arrangements could be made when  
13 access needs to be kept open to a particular home (see page 83 of the transcript to the  
14 June 27, 2007, public meeting in Britton, South Dakota). The purpose of the proposed  
15 mitigation is to clarify that, if TransCanada would block access to a residence, they  
16 should do so only for the brief period essential to laying the pipe and should coordinate  
17 the timing of the closure with the affected residential landowners.

- 18 • **TransCanada should install temporary safety fencing to control access and**  
19 **minimize hazards associated with an open trench in residential areas.**

20 The Construction Mitigation and Reclamation Plan proposed by TransCanada  
21 requires fencing the edge of the construction work area adjacent to residences for a  
22 distance of 100 feet on either side of the residence and fencing or plating open ditches  
23 during non-construction activities. These are important safety precautions, but may not

1 be sufficient in all locations. Some residential areas may have swing sets, sand boxes,  
2 barbeque pits, outdoor patio sets, trampolines, or other areas that should be fenced but are  
3 more than 100 feet from the residences. The mitigation in my direct testimony is general  
4 in nature and is intended to account for fencing these areas as well, although being more  
5 specific could also be beneficial.

- 6 • **TransCanada should notify affected residents in advance of any scheduled**  
7 **disruption of utilities and limit the duration of any interruption to the**  
8 **smallest time possible.**

9 The Construction Mitigation and Reclamation Plan proposed by TransCanada  
10 does not address disruption of utilities. If TransCanada would disrupt utilities,  
11 TransCanada should notify affected residents in advance and limit the duration to the  
12 smallest time possible.

- 13 • **TransCanada should repair any damages to property that result from**  
14 **construction activities.**

15 The Construction Mitigation and Reclamation Plan requires TransCanada to  
16 restore all lawn areas, shrubs, specialized landscaping, fences, other structures, *etc.*  
17 consistent with its preconstruction appearance or the requirements of the landowner  
18 (presumably as specified in TransCanada's construction agreement with the landowner).  
19 This is consistent with the recommendation in my direct testimony.

- 20 • **TransCanada should restore all areas disturbed by construction to**  
21 **preconstruction conditions or better.**

22 The Construction Mitigation and Reclamation Plan requires TransCanada to  
23 restore all lawn areas, shrubs, specialized landscaping, fences, other structures, *etc.*

1 consistent with its preconstruction appearance or the requirements of the landowner.

2 This is consistent with the recommendation in my direct testimony.

3 **Q: Can you comment on L.A. Buster Gray's rebuttal testimony regarding restoration**  
4 **of roads?**

5 A. Mr. Gray's rebuttal testimony was in response to my direct testimony in which I  
6 recommended that TransCanada be responsible for "restoring [road] deterioration caused by  
7 construction traffic such that the road is returned to its preconstruction condition or better."

8 Based on his rebuttal, Mr. Gray is concerned that the mitigation, as written, would require road  
9 improvements on every road where a project-related vehicle has traveled, and all roads would be  
10 required to be restored to their exact preconstruction state. This is not the intent of the  
11 mitigation. The mitigation is intended to require TransCanada to restore evident, discernible  
12 damage and deterioration caused by construction traffic such that the restored road would be of a  
13 makeup, quality, and integrity consistent with its preconstruction condition or a better condition.

14 The mitigation could be clarified as follows:

- 15 • **TransCanada should implement a regular program of road maintenance and**  
16 **repair throughout active construction to keep paved and gravel roads in an**  
17 **acceptable condition for travel by the public. Following construction,**  
18 **TransCanada would be responsible for restoring evident, discernible damage**  
19 **and deterioration caused by construction traffic such that the restored road**  
20 **would be of a makeup, quality, and integrity consistent with its**  
21 **preconstruction condition or a better condition. Repairs during and after**  
22 **construction would be consistent with federal, state, and local requirements.**