

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION	:	HP 09-001
BY TRANSCANADA KEYSTONE		
PIPELINE, LP FOR A PERMIT UNDER	:	
THE SOUTH DAKOTA ENERGY		
CONVERSION AND TRANSMISSION	:	APPLICANT'S REPLY BRIEF IN
FACILITIES ACT TO CONSTRUCT THE		SUPPORT OF MOTION FOR
KEYSTONE XL PROJECT	:	LIMITED RECONSIDERATION
	:	

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On April 9, 2010, Applicant TransCanada Keystone Pipeline, LP (“Keystone”) filed a motion for limited reconsideration of certain permit conditions. In response, Intervenor Paul Seamans and David Niemi, and non-party Peter Larson have written to the Public Utilities Commission to object to Keystone’s motion, or, in Larson’s case, to propose different modifications of the conditions attached to the Final Decision and Order dated March 12, 2010. Keystone offers this response to their proposals and comments.

**1. Paul Seamans’ comments.**

Paul Seamans responded by e-mail dated April 19, 2010, to Keystone’s request to reconsider §§ 43 and 44, addressing cultural and paleontological resources. Seamans objects to Keystone’s proposal that the Department of State determine what constitutes a protectable resource and to approve a plan to deal with it. Seamans argues that the State Historic Preservation Office as the local agency has superior knowledge. This position

conflicts with section 106 of the National Historic Preservation Act. As testified to by Paige Hoskinson Olson of the SHPO, it is the responsibility of the DOS to determine whether a significant resource is present. (Tr. at 452.) The SHPO provides input into this determination. Keystone's proposal is consistent with Section 106 of the National Historic Preservation Act.

Seamans objects to Keystone's motion to modify the paleontological conditions in ¶ 44 as an attempt "to avoid the requirement that a trained paleontological monitor be on-site during construction." Keystone's proposal does not support such an interpretation. Keystone in fact objected to the condition adopted in the Final Order because it allowed for an environmental monitor trained to address paleontological issues, instead of a trained paleontologist recognized by the Bureau of Land Management. (Keystone Br. at 8.) The objection apparently misunderstood Keystone's proposal.

## **2. David Niemi's comments.**

David Niemi objects to a number of Keystone's proposals. First, he urges that "any" spill of hazardous material be reported as required in ¶ 16(j). Niemi does not, however, cite any standard, statute, or regulation supporting such a requirement, and he does not explain why the federal standard requiring reporting of spills of five gallons or more would be insufficient.

Niemi objects to Keystone's request for clarification on the use of floating

sediment curtains addressed in ¶ 20. He does not, however, explain how floating sediment curtains could be used in the construction right of way, which is the issue Keystone raised in its motion. (Keystone Br. at 2-3.) Keystone does not object to using floating sediment curtains, which are addressed in its proposed language, but does believe they could be usefully employed as required in the condition as presently drafted. (*Id.* at 3.)

In response to paragraph 22(a) on construction across or near wetlands or waterbodies, Keystone proposed in its motion that the condition recognize that the United States Army Corps of Engineers has regulatory oversight of all waters of the United States. (Keystone Br. at 3.) Niemi's response discusses wetlands surveys required by the Farm Service Agency or the National Resource Conservation Service, but it does not address Keystone's point that the Corps can trump the permit condition based on federal supremacy.

In response to Keystone's proposed modification of paragraph 41, Niemi says that sage and sharp-tail grouse deserve the same protection on private property as on federal or state land. Keystone does not seek to avoid their protection, but rather asked that the governing references in the condition be to the Federal Environmental Impact Statement and the Biological Assessment, which will be more current than Keystone's applications. (Keystone Br. at 5.) Niemi does not address these.

Finally, Niemi comments on cultural and paleontological resources. Keystone does not disagree that cultural resources are an important part of South Dakota history and need to be preserved. Niemi also objects that Keystone is asking South Dakota citizens to provide compensation for the preservation of a fossil found in the right of way during pipeline construction. As further addressed in response to Peter Larson's comments, Keystone proposes that if a landowner chooses to recover a fossil discovered during construction, the landowner would bear the cost of excavating the fossil, which would belong to the landowner. If Keystone re-routes to avoid a discovered fossil, then Keystone would bear the cost of avoidance, but costs incurred as a result of a landowner's decision to excavate would be borne by the landowner. In neither case does Niemi explain why Keystone should bear the cost of excavating a fossil belonging to the landowner, and from which the landowner would profit.

**3. Peter Larson's comments.**

In his e-mail dated April 18, Peter Larson, a non-party, urges that salvage or avoidance of fossils be at Keystone's expense. He continues that "[n]either the citizens of this state and nation nor the private landowners should be asked to bear the expense of salvage, construction shutdown, or rerouting when TransCanada encounters fossils along the route of the proposed pipeline. These costs have been traditionally and universally born by the proponents of all other pipelines."

First, Keystone has not proposed that the landowner bear the cost of construction shutdown or avoidance if the pipeline is rerouted to avoid a fossil discovered during construction. Nothing in Keystone's proposed language would suggest that. Second, the record contains no evidence supporting Larson's assertion that the cost of salvage, by which Keystone understands he means excavating a fossil discovered during construction, is a cost traditionally born by the pipeline. The language that Larson cites from Exhibit D states only that the project proponent is responsible for costs associated with survey, monitoring, and mitigation, all of which Keystone accepts and agrees with. Thus, Keystone proposes that a landowner pays to recover a fossil discovered during construction that the landowner owns and from which the landowner may profit, while Keystone bears all the expense of surveying, monitoring, mitigation, and avoidance if the route is changed because of a fossil discovered during construction.

Larson also proposes in a second e-mail dated April 19 that landowners be able to hire their own paleontologist to determine whether a scientifically significant paleontological resource is present. His proposal does not require, as does Keystone's, that the paleontologist's credentials be approved and recognized by the BLM. If the landowners or the State want to hire separate paleontologists to monitor construction, they should be required to have the same credentials as Keystone's paleontologist.

### Conclusion

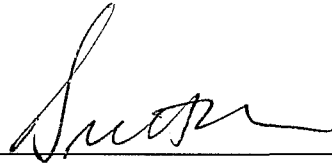
Nothing in the comments from Seamans, Niemi, or Larson merits a departure from the changes Keystone proposed in its motion for limited reconsideration or clarification.

Keystone respectfully requests that its motion be granted.

Dated this 27 day of April, 2010.

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IN THE MATTER OF THE APPLICATION ) HP 09-001  
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DAKOTA ENERGY CONVERSION AND ) **CERTIFICATE OF SERVICE**  
TRANSMISSION FACILITIES ACT TO )  
CONSTRUCT THE KEYSTONE XL )  
PROJECT )

I hereby certify that the Applicant's Reply Brief in Support of Motion for Limited Reconsideration was served upon all of the parties listed below on the 27<sup>th</sup> day of April, 2010, electronically to their last known email address:

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