

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION BY )	DOCKET NUMBER HP09-001
TRANSCANADA KEYSTONE PIPELINE, LP )	
FOR A PERMIT UNDER THE SOUTH )	<b>MOTION FOR EXTENSION</b>
DAKOTA ENERGY CONVERSION AND )	<b>OF TIME TO SUBMIT</b>
TRANSMISSION FACILITIES ACT TO )	<b>TESTIMONY</b>
CONSTRUCT THE KEYSTONE XL PROJECT )	

COMES NOW Dakota Rural Action (“DRA”), by and through its counsel of record pursuant to ARSD 20:10:01:14, and hereby moves the South Dakota Public Utilities Commission (“Commission”) for an order to extend the time in which DRA as intervenor is required to submit prefiled testimony. By its order dated June 30, 2009, the Commission set a procedural schedule in which Intervenor prefiled testimony is due September 8, 2009. For the reasons described herein, DRA requests that the Commission extend this deadline for two weeks, or until completion of discovery, whichever comes later.

1. DRA’s counsel has recently received two large boxes of requested discovery materials from applicant TransCanada Keystone Pipeline, LP (“Keystone”), and is in the process of reviewing all the materials and matching them with the interrogatory questions. DRA believes that the discovery material contains information which is necessary to be included in DRA’s prefiled testimony. Further, that DRA needs more than two weeks to be able to process the material received and include it in its planned written testimony.

2. Keystone also has objected to fifteen of DRA’s discovery requests, has provided no documents in response to nine of DRA’s discovery requests, and has provided very limited responses to a number of the discovery requests to which Keystone did respond, therefore, at this time, discovery is not complete. Also, DRA and Keystone are currently conferring as required by S.D.R.Civ.P. 37(a) in an attempt to informally resolve our disagreements (see attached correspondence). DRA asserts that its ability to meaningfully provide written testimony is dependent upon Keystone fully and completely responding to the legitimate discovery requests filed upon them.

3. An extension of time is appropriate and necessary to ensure that the intervenors’ due process rights are upheld. Further, it would be fundamentally unfair to not allow DRA’s counsel to thoroughly review the discovery material provided by Keystone pursuant to discovery requests.

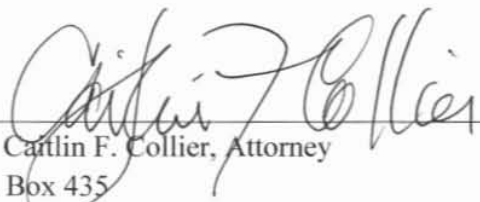
4. The deadline for the PUC staff to submit prefiled testimony is September 25, and applicant's rebuttal testimony is not due until October 19, 2009, therefore, DRA believes that an extension of time would not prejudice the current schedules.

5. The applicable administrative rule puts the question of whether or not to grant an extension of time to the discretion of the Commission, and DRA urges the Commission to grant this very reasonable request.


4. For the reasons stated above, DRA respectfully requests that the Commission:
- a. extend the period for intervenor DRA's submission and filing of prefiled testimony in this matter for a period of two weeks (until September 22<sup>nd</sup>, 2009, or until all discovery has been completed; and
  - b. for such other relief as the Commission may find appropriate.

Respectfully submitted this 2nd day of September 2009.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2009, I sent either by first class mail, postage prepaid, or by electronic transmission, a true and correct copy of the foregoing Motion for Extension of Time to Submit Testimony to the following:

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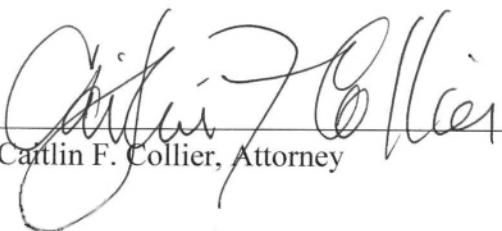
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Caitlin F. Collier, Attorney



C O P Y

August 12, 2009

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Mr. Paul C. Blackburn  
Plains Justice  
PO Box 251  
Vermillion, SD 57069

Re: In the Matter of the Application by TransCanada Keystone Pipeline, LP  
PUC Docket No. HP09-001

Dear Counsel:

I enclose TransCanada Keystone Pipeline, LP's Objections to Dakota Rural Action's First Set of Interrogatories and Request for Documents, this being intended as service by mail. Please note that we have served objections early, and will further respond to the discovery requests on or before August 24, 2009, as indicated in the objections and as required by the PUC's order dated June 30, 2009.

We would like the objections to be resolved as early as possible, and without any delay in the proceedings. Accordingly, we will contact PUC staff to schedule an ad hoc meeting of the PUC to resolve any differences resulting from our objections.

Yours very truly,

WOODS, FULLER, SHULTZ & SMITH P.C.

James E. Moore

Enclosure

Ms. Caitlin F. Collier  
Mr. Paul C. Blackburn  
August 12, 2009  
Page 2

cc:

Patricia Van Gerpen	Bob Knadle	Stacy Splittstoesser
Kara Semmler	Nathan Solem	Tim Binder
Lisa Schieffer	Paul Seamans	Julie Pearson
City of Colome	Patricia Freeman	John Harter
Jacqueline Limpert	Kathy Gilines	John Brunskill
Zona Vig	Elaine Jensen	Pam Michalek
Craig Covey	Sylvia Chapman	Mary Jasper
Kathleen Flakus	David Niemi	Ruth Iversen
Martin Lueck	Darrell Iverson	Glen Iversen
Lon Lyman	Brett Koenecke	Jim White



August 18, 2009

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Extension 613

**Via e-mail**

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Re: In the Matter of the Application by TransCanada Keystone Pipeline, LP  
PUC Docket No. HP09-001

Dear Counsel:

This letter follows my telephone conversation with Paul last Friday morning. We discussed the objections that TransCanada Keystone Pipeline, LP filed in response to Dakota Rural Action's First Set of Interrogatories and Requests for Documents. I indicated that Keystone wanted the objections resolved in a timely manner so that no delay would occur in the proceedings before the Public Utilities Commission. Paul indicated that he had only seen the answers the night before and that both of you had not yet had a chance to discuss the objections.

I have heard nothing since. We checked with the Public Utilities Commission today, and we can still get on the PUC's agenda for next week, if necessary. If you intend to challenge any of the objections, I would be grateful if you would reply today so that we can get on the PUC's agenda.

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LAWYERS • EST. 1887

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**WOODS, FULLER, SHULTZ & SMITH P.C.**

Ms. Caitlin F. Collier  
Mr. Paul C. Blackburn  
August 18, 2009  
Page 2

As we discussed, we will provide further responses to the discovery requests to which no objection was made on or before August 24.

Yours very truly,

WOODS, FULLER, SHULTZ & SMITH P.C.

A handwritten signature in cursive script, appearing to read "James E. Moore", is written in black ink on a light blue rectangular background.

James E. Moore

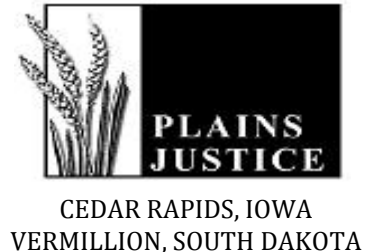
cc: Brett Koenecke



August 18, 2009

**VIA EMAIL**

James E. Moore  
Woods Fuller Shultz & Smith P.C.  
P.O. Box 5027  
Sioux Falls, SD 57117-5027



Dear Mr. Moore:

We have considered your request for an ad hoc informal meeting to discuss your discovery objections, including the August 25 date proposed for such meeting. Although we agree that an informal meeting might be helpful, in the interests of efficient resolution of these matters we would like to pursue an alternative process for the following reasons.

First, your August 12 objections have inadequate foundation in law such that you must produce the requested documents. We believe that the efficient resolution of our discovery disagreements would be better served by our filing a motion to compel so that you, the Commission, and its counsel have the benefit of our briefing on these matters. Should the Commission desire that our clients attempt resolution of any disputes through informal process after your receipt of our motion but before a Commission hearing on it, we would be happy to do so.

Second, we note that that Counsel for the Commission in her email of August 13 described the proposed event on August 25 as a "hearing." We are concerned that there might be some confusion as to the nature of the August 25 event. We would object to a "hearing" before the Commission absent a motion or opportunity for briefing on these important matters.

Third, we note that the date proposed for the informal meeting, Tuesday, August 25, is the day after the date that your responses to our discovery requests are due. In the interests of efficient resolution, it would seem to us to be more efficient for us to review your responses to our discovery requests and then have any objections we might have to your production on August 24 be considered together with your objections of August 12 as this will avoid piecemeal resolution by the Commission of discovery disputes. As it is not reasonable to expect us to receive your forthcoming production and be prepared to discuss its adequacy with the Commission the following day, we believe that a later date for an informal meeting would be more appropriate.

As for the timing of our response to your request for an informal meeting, Ms. Collier was scheduled to be in trial on August 25, but the matter was dismissed yesterday afternoon.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Paul C. Blackburn", is written over the typed name.

Paul C. Blackburn



August 19, 2009

James E. Moore  
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**Via e-mail**

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Re: In the Matter of the Application by TransCanada Keystone Pipeline, LP  
PUC Docket No. HP09-001

Dear Counsel:

Thank you for your letter dated August 18, 2009, indicating that you intend to challenge at least some of the objections we stated in response to Dakota Rural Action's initial discovery requests. We agree that we should discuss your challenges in an effort to informally resolve the objections. If we cannot resolve them, we want the Public Utilities Commission to rule on the validity of our objections sooner rather than later. For that reason, we separately stated and served the objections well before the deadline for responding. We do not want an extended process that would compromise the PUC's procedural scheduling order.

The next hearing date after August 25 is September 8, 2009. It makes no difference to us whether the discovery dispute would come before the PUC based on your motion to compel or our request that the PUC rule on the validity of our objections. If we cannot resolve any discovery disputes based on our objections before then, we would like the issues decided by the PUC on September 8.

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**WOODS, FULLER, SHULTZ & SMITH P.C.**

Ms. Caitlin F. Collier  
Mr. Paul C. Blackburn  
August 19, 2009  
Page 2

Please let us know what objections you challenge and on what basis. We will respond forthwith.

Yours very truly,

**WOODS, FULLER, SHULTZ & SMITH P.C.**

A handwritten signature in black ink, appearing to read "James E. Moore", is centered below the firm name. The signature is written in a cursive style.

**James E. Moore**

cc: Brett Koenecke (via e-mail)

August 25, 2009

**VIA EMAIL**

James E. Moore  
Woods Fuller Shultz & Smith P.C.  
P.O. Box 5027  
Sioux Falls, SD 57117-5027



CEDAR RAPIDS, IOWA  
VERMILLION, SOUTH DAKOTA

Dear Mr. Moore:

Thank you for your August 24 response to our discovery requests. We are in the process of reviewing them and will let you know if and the extent to which we believe that your responses are not sufficient.

In an effort to advance this process, please find attached DRA's comments on your discovery objections of August 24. For each DRA discovery request, except those related to demand for the pipeline, I have included the text of the request, your objections to it, and then DRA's comments on your objections. Due to the similarity of the issues related to demand, these requests and objections are addressed together.

While I believe that we could have fruitful discussions about many of these matters, it appears that some of our disagreements are based on differing interpretations of law related to the scope of discovery that is appropriate in this proceeding. Therefore, I have included some initial legal arguments in an effort to help refine the precise legal questions at issue and perhaps help us resolve some of our disagreements informally.

My hope is that for each of your objections we can either come to agreement on the scope of discovery or at least clearly define issues so that we might present them to the Commission for resolution as efficiently as possible. Before we discuss these objections, I would appreciate a written response from you providing your understanding of the law related to the objections.

I have taken the liberty of providing a copy of this correspondence to the Commission's counsel so that she has the benefit of having DRA's initial position on these matters.

I look forward to your response and to conferring with you on your objections.

Very truly yours,

Paul C. Blackburn

## **DAKOTA RURAL ACTION'S COMMENTS ON KEYSTONE DISCOVERY OBJECTIONS**

The purpose of this document is to provide an initial response by Dakota Rural Action ("DRA") to TransCanada Keystone Pipeline LP's ("Keystone") objections to DRA's discovery requests. It is intended to assist DRA and Keystone in their efforts to resolve discovery disagreements without recourse to action by the South Dakota Public Utilities Commission ("Commission"), and failing complete resolution of these disputes to initiate an effort to clearly identify matters for efficient resolution by the Commission.

Since this document was provided to Keystone on the day it provided its responses to DRA's discovery requests, this document does not include any comments on whether the information that Keystone did provide adequately responds to DRA's requests.

This document first provides general comments on issues common to many of Keystone's objections and then discusses particular requests and objections in the context of these general comments.

### **SCOPE OF DISCOVERY**

"The scope of discovery in administrative hearings is governed by statute and the agency's discretion as well as by due process." 2 AmJur2d Administrative Law § 328 (footnote omitted). Since SDCL 1-26-19.2 and ARSD 20:10:01:01:02 (promulgated pursuant to SDCL § 49-41B-35) require that discovery before the Commission be conducted in accordance with the South Dakota Rules of Civil Procedure ("Rules"), SDCL Chapter 15-6, the scope of discovery within this proceeding is defined by the Rules, specifically Rules 26 through 37. In particular, Rule 26 states in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Thus, discovery may be had regarding any matter that is not privileged, at a minimum reasonably calculated to lead to discovery of admissible evidence, and relevant to the subject matter of this proceeding.

The subject matter of this proceeding is circumscribed by SDCL Chapter 49-41B and ARSD Chapter 20:10:22, therefore matters relevant to these provisions, not otherwise privileged, and reasonably calculated to lead to admissible evidence are subject to discovery.

Many of Keystone's objections are based on arguments that various matters are outside the Commission's jurisdiction. These objection's may be summarized as:

- Keystone need produce only those documents related to its burden of proof contained in SDCL § 49-41B-22;
- the Commission's authority under state law does not extend to the subject matter of a request; and

August 25, 2009

- the Commission lacks jurisdiction due to preemption by federal law.

Keystone misstates the Commission's jurisdiction under state and federal law, as well as the scope of discovery allowed pursuant to this jurisdiction.

### **The Scope of Discovery Is Not Defined Primarily by SDCL § 49-41B-22**

Keystone objects to Requests 6 to 8, 12 to 18, and 19 on the basis that the Commission's jurisdiction is defined only by SDCL § 49-41B-22. Keystone objects to Requests 5 to 8, 12 to 19, and 23 because it asserts that these matters "beyond the scope of the Commission's jurisdiction."

Keystone's argument that the Commission's scope of discovery is limited to the burden of proof found in SDCL § 49-41B-22 appears to ignore other provisions in SDCL Chapter 49-41B and ARSD Chapter 20:10:22, particularly those related to the contents of its application for a permit, including but not limited to SDCL § 49-41B-11; ARSD §20:10:22:05 to §20:10:22:25, inclusive; and §20:10:22:36 to §20:10:22:39, inclusive. Although SDCL § 49-41B-22 defines Keystone's burden of proof and generally describes the policy balancing required of the Commission, the scope of information relevant to the Commission's decision in this matter is primarily defined by:

- The application contents required by SDCL § 49-41B-11 and ARSD Chapter 20:10:22;
- Keystone's burden of proof under SDCL § 49-41B-22, including evidence of whether or not the proposed facility will comply with all applicable laws and rules; and
- other provisions in SDCL Chapter 49-41B, *e.g.* SDCL § 49-41B-19 (information provided by state and local governments), SDCL § 49-41B-21 (environmental impact statement), SDCL § 49-41B-28 (impact of county ordinances), SDCL § 49-41B-38 (road damage).

The foregoing provisions provide the Commission with the authority to consider a broad array of information related to the proposed pipeline.

Further, there is a distinction between the scope of the Commission's power to condition a permit application as opposed to its power to investigate and consider information related to the proposed pipeline. Although agency action must relate to its authority to act, the courts have found that agencies have broad investigative powers necessary to implement this authority.

If the Commission adopts Keystone's argument that Commission *jurisdiction* is limited to the language of SDCL § 49-41B-22 or that the Commission is otherwise without *jurisdiction* to consider matters required by law to be included in the Application or to be addressed by the Commission, this would mean that the Commission could not consider in its decision making process information that is required by law to be included in the application or information related to other SDCL Chapter 49-41B provisions. Such interpretation would render meaningless most of SDCL § 49-41B-11 and its related regulations and would limit the Commission's authority and ability to perform the duties required of it by law.

The practical effect of prohibiting discovery on matters discussed in the Application would be to permit Keystone to provide only that information to the Commission that Keystone desires to disclose. Such limitation would be unfair because it would allow Keystone to pick and choose which information held only by it to disclose to the Commission and prevent intervenors from discovering other relevant information that Keystone might choose to withhold.

### **The Scope of Discovery May Include Matters Regulated by Federal Law**

Keystone argues that Requests 6, 7, 8, and 9 are preempted by federal law. Federal law does not preempt discovery of the matters contained in these Requests.

First, Keystone fails to make a distinction between, on the one hand, the Commission's broad jurisdiction to investigate Keystone's compliance with federal law as well as the potential impacts of the pipeline on South Dakotans and their environment with on the other hand, federal preemption of state action to regulate the design and construction of the proposed pipeline.

Under SDCL 49-41B-22(1) Keystone must prove and the Commission must investigate Keystone's compliance with "all" laws, including federal laws.

Under SDCL 49-41B-22(2) and (3), Keystone must prove and the Commission must investigate whether "[t]he facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area" and whether "[t]he facility will not substantially impair the health, safety or welfare of the inhabitants."

It is not possible for the Commission to find that Keystone has met these burdens of proof without *investigating* the scope and requirements of federal pipeline safety law to determine whether Keystone will comply with them and whether additional *non-preempted* state health, safety, and environmental requirements may and should be imposed.

The Commission's mere investigation of facts relevant to the welfare of South Dakotans is nowhere preempted by federal pipeline safety law. The Commission has the authority and obligation to investigate the impacts of the proposed pipeline on the safety, welfare, and environment of South Dakotans as well as Keystone's compliance with federal law. Therefore, matters regulated by federal law are relevant to this proceeding and as such are subject to discovery.

Second, that federal law preempts certain types of pipeline safety regulations does not mean that the Commission has no ability to protect the health and safety of South Dakotans through non-preempted permit conditions. SDCL § 49-41B-24 specifically authorizes the Commission to grant a permit "upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission may deem appropriate." While these conditions may not frustrate the intent of federal law, they may provide additional protections where the type of state protection provided is not related to the design or operation of the pipeline itself.

The Commission in the past has ordered Keystone to comply with state conditions intended to protect the health, welfare, and environment of South Dakotans. For example, in its Keystone Pipeline Final Order (“K1 Final Order”) dated April 25, 2008, the Commission imposed a number of health and safety conditions that enhanced the safety and welfare of South Dakotans without interfering with federal law. *See, e.g.*, K1 Final Order Exhibit A, Paragraphs 7, 10, 15, 16, 17, 18, 21, 22, 30, 32, 41, and 48.

Inclusion of appropriate state health and safety conditions cannot be accomplished without investigation of the protections offered by federal law as well as the limits of federal law. Such investigation ensures that the Commission can avoid conflict with federal law and ensures that non-preempted state requirements complement federal law. Since appropriate and permissible state permit conditions cannot be imposed absent an investigation of the federal regulatory requirements and protections, matters regulated by federal law are relevant to this proceeding and therefore discoverable.

Third, after an investigation of federal law, the Commission may *request* that Keystone or responsible federal agencies apply federal law in particular ways based on local needs. For example, in the K1 Final Order, Exhibit A, Paragraph 43, the Commission investigated federal spill prevention and clean up planning requirements and required that Keystone treat the Middle James Aquifer area in Marshall County as a hydrologically sensitive area in its federally mandated Integrity Management and Emergency Response Plans. This action ensured that federal law was implemented fully to protect specific resources and communities in South Dakota.

Even though the Commission cannot impose conditions that conflict with or are preempted by federal law, after investigation of Keystone’s compliance with federal requirements it may ensure that the application of federal law in South Dakota is thorough and appropriate. Since the Commission has authority to investigate Keystone’s compliance with federal pipeline safety requirements and seek full enforcement of federal requirements, matters regulated by federal law are relevant to this proceeding and therefore discoverable.

## **DRA’S PRELIMINARY RESPONSES TO GENERAL AND PARTICULAR OBJECTIONS**

**GENERAL OBJECTION:** Keystone provides the following general objection to DRA’s entire discovery request:

Keystone objects to the instructions and definitions contained in Dakota Rural Action's First Set of Interrogatories and Request for Documents to the extent that they are inconsistent with the provisions of SDCLCh. 15-6. See ARSD 20:10:01:01.02. In particular, Keystone objects to the definition of "you" and "yours" to the extent that it encompasses TransCanada Keystone Pipeline, LP's partners, corporate parents, subsidiaries, affiliates, or successors. Keystone will



respond to the discovery only on its behalf as the Applicant and party before the Public Utilities Commission.

**ARGUMENT:** This general objection is overbroad for the following reasons.

Limiting Discovery to Only Keystone Would Be a Violation of Law

Keystone has provided no meaningful legal foundation for its General Objection. Keystone argues that extension of discovery to Keystone's "partners, corporate parents, subsidiaries, affiliates, or successors" is inconsistent with SDCL Chapter 15-6, the South Dakota Rules of Civil Procedure, and also cites ARSD 20:10:01:01:02 for support. Keystone fails to point to any particular provision within Chapter 15-6 that supports its objection, such that DRA and the Commission can only speculate about how the Rules of Procedure limit discovery to Keystone's "partners, corporate parents, subsidiaries, affiliates, or successors." ARSD 20:10:01:01:02 provides no legal basis for the objection because it merely states that the Rules of Civil Procedure apply to Commission proceedings and does not speak to the appropriate scope of discovery. Therefore, Keystone has provided no meaningful legal basis for its objection.

The South Dakota Rules of Civil Procedure recognize no general right to exempt corporate affiliates from discovery. Further, neither SDCL Chapter 1-26 nor the Commission's rules of procedure, ARSD 20:10:01, provide an exemption from discovery for corporate affiliates. It does not appear that the Commission has so limited the discovery rights of parties that have practiced before it, nor would such a blanket exemption serve the public interest. Thus, not only has Keystone failed to provide a legal foundation for its General Objection, the law indicates that the rules of civil procedure do not allow such broad exemption.

Instead, the standard for whether or not a related corporate entity is subject to discovery is based on the relationship between the entities and the relevance of the information sought to the proceeding. Although there appears to be no direct South Dakota precedent on this matter, the Federal Courts have described the reach of discovery into corporate affiliate files. In *Murphy v. Kmart Corp.*, 255 F.R.D. 497; 2009 U.S. Dist. LEXIS 6081, in which the court described the test applicable there:

In *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101, 1999 WL 14007 (S.D.N.Y. Jan. 11, 1999), involving a dispute over the production of documents in response to certain discovery requests, the court held that "[i]f the nature of the relationship between the parent and its affiliate is such that the affiliate can obtain documents from its foreign parent to assist itself in litigation, it must produce them for discovery purposes." See *Hunter Douglas, Inc.*, 1999 U.S. Dist. LEXIS 101, 1999 WL 14007 at \*3. "[T]he test focuses on whether the corporation has 'access to the documents' and 'ability to obtain the documents.'" *Id.* (citation omitted); see also *Japan Halon Co., Ltd. v. Great Lakes Chemical Corp.*, 155 F.R.D. 626, 628 (N.D. Ind. 1993) (holding that the relationship between the plaintiff and its two Japanese parent corporations was sufficiently close to justify enforcing the defendant's discovery request for documents in the physical possession of the parent corporations).

Thus, the federal courts do not provide a blanket exemption of related corporate actors from the reach of discovery. Instead, the federal courts examine the ability of a party to acquire information from its corporate affiliates, the relevance of the information, and other applicable objections, such as that a request is unusually, unduly, or extraordinarily burdensome on the corporate affiliate. *Kmart Corp.*, 255 F.R.D. 497; 2009 U.S. Dist. LEXIS 6081.

This refusal by the federal courts to allow a blanket exemption for corporate affiliates makes sense given the complexity, diversity, and multinational nature of corporate relationships. If the Commission were to adopt such exemption and allow discovery only of the specific entity that submits an application for a Commission permit or license, it would be entirely possible for applicants to shield important information from Commission process by ensuring that applicant entities are not provided with information held by their corporate affiliates that might be adverse to the application sought.

Where an applicant is formed to develop a new project and itself has no experience or history operating similar projects there is a particular risk that its parent corporation might not have given the applicant important information. Further, such applicant would be expected to turn to and rely on the operating history and experience of corporate parent or other affiliates when providing required information. Here, Keystone was purpose-formed to develop the Keystone Pipeline System such that it has never operated a pipeline and must rely on its corporate Parent, TransCanada, for some of the information required by the application process.

It appears that Keystone has included information from its corporate affiliates in its application such that the Commission should presume that it has access to such information and permit discovery where TransCanada has relevant information that is not otherwise in Keystone's files. Shielding TransCanada from the reach of discovery would allow Keystone and TransCanada to select which information could be acquired by the Commission and intervenors by simply keeping it out of Keystone's files.

Also, Keystone's use of a blanket general objection here is procedurally improper. Although the South Dakota and federal courts recognize a limited role for general objections, *DM&E Railroad v. Acuity*, 2009 S.D. 69 (general objection "may suffice for a time as the parties deal with issues of privilege . . ."); *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 1998 U.S. Dist. LEXIS 6726 (D KS) (general objections "may occasionally serve as an efficient response . . ."), the general rule is that "blanket" objections are patently improper. *Ritacca v. Abbott Labs.*, 203 F.R.D. 332; 2001 U.S. Dist. LEXIS 4366 (ND IL). A general objection may be used for a time to identify general discovery issues, but ultimately the withholding party must object with specificity otherwise the general objection is deemed to be waived.

Here, it is entirely possible for Keystone to specify why inclusion of its corporate affiliates as respondents to a specific discovery request would be unduly burdensome or otherwise state specific objections to specific discovery requests. Therefore, Keystone must do so.

That there need to be reasonable limits on the scope of discovery into corporate affiliates does not justify a blanket exemption of all affiliate files. Keystone should re-state its objection with

specificity as to each of DRA's Requests and state why discovery of information from its corporate affiliates is objectionable or provide relevant information not included within Keystone's files.

## **OBJECTIONS RELATED TO SPECIFIC REQUESTS**

**REQUEST 1:** Produce all documents concerning the potential damage caused by a crude oil pipeline rupture, including but not limited to the maximum distance that crude oil may be projected through the air from a rupture of a crude oil pipeline; the speed and force of the oil upon leaving a rupture of a crude oil pipeline; the potential for explosion or fire caused by a rupture of a crude oil pipeline; the potential damage that may be caused to residential or business structures by crude oil that is released by a rupture of a crude oil pipeline; the potential damage that might be caused to livestock or growing crops by a rupture of a crude oil pipeline; the potential harm that might be caused to natural persons by a rupture of a crude oil pipeline; any case studies or media accounts demonstrating the impacts of a rupture of a crude oil pipeline; and any modeling that predicts the potential damage caused by the rupture of a crude oil pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their determination of the adequacy, given the size and operating pressure and temperature of the proposed Keystone XL pipeline, of existing setbacks from structures, businesses, thoroughfares, and other occupied land, as well as the identification of other mitigation measures that may limit damage caused by ruptures.

**OBJECTION AND RESPONSE:** This request seeks information that is confidential to the extent that any responsive document contains information related to High Consequence Areas that PHMSA requires operators to keep confidential. Without waiving the objection, responsive documents, including an index, are attached as Exhibit A. In addition, counsel has several voluminous final or draft environmental impact statements for other pipeline projects that may be responsive to this request, namely: (1) a draft Environmental Impact Statement for Shell's New Mexico Products Pipeline dated April 2003; (2) an Environmental Assessment for the Longhorn Partners Pipeline; (3) the Final Environmental Impact Statement for Questar, Williams, & Kern River Pipeline Project dated June 2001; and (4) a draft Environmental Impact Statement for the Entrega Pipeline Project dated February 2005. Counsel will either make these documents available for review or produce copies on request.

**ARGUMENT:** Pending review of documents.

**REQUEST 5:** Produce all documents concerning the scope of your liability for damages resulting from operation of the proposed Keystone XL pipeline in South Dakota, including but not limited to liability for cleanup costs; liability for permanent damage to land; liability for damage to business interests; liability for damages related to personal injury; liability for damages related to lost wages; or liability for other types of damages, where such documents have been disclosed to the public, governmental entities, or other persons the disclosure of which is not protected by the attorney-client privilege or other privilege. The purpose of this request is

to assist the Commission, impacted landowners, local governments, and the public determine your scope of liability as it relates to particular types of damages.

**OBJECTION AND RESPONSE:** This request seeks legal conclusions beyond the scope of discovery and addressed to issues that are beyond the scope of the PUC's jurisdiction in this proceeding. The determination of liability for damages resulting from operation of the Keystone XL Pipeline is a matter for the courts. Without waiving the objection, a copy of the easement, which addresses liability in paragraph 1, and a relevant portion of a document that Keystone used in connection with the open houses that it hosted addressing the Keystone XL pipeline are attached as Exhibit E.

**ARGUMENT:** Keystone states two objections: (1) that Request 5 calls for a legal conclusion; and (2) that determination of liability is beyond the scope of the Commission's jurisdiction and instead is a matter for the courts. Since Keystone's second objection is broader, it is discussed first.

Keystone objects that the issue of liability for oil spill damages is "beyond the scope of the PUC's jurisdiction in this proceeding" and that "[t]he determination of liability for damages resulting from operation of the Keystone XL Pipeline is a matter for the courts." The first statement is incorrect as a matter of law and the second is inapposite to the current situation. If the Commission sustains this objection on these grounds, it would hold that it has no power to investigate the potential liability of regulated entities under its jurisdiction, and this is not the case.

Chapter 49-41B gives the Commission's jurisdiction to investigate the extent and nature of the legal remedies available to landowners under which they may recover damages for oil spills. The scope of Keystone's liability to South Dakota landowners is directly related to whether the proposed pipeline poses as threat to the "social and economic condition of inhabitants or expected inhabitants in the siting area" and also relates to whether the facility will "unduly interfere with the orderly development of the region." SDCL § 49-41B-22. If Keystone's liability and legal remedies for the propose pipeline adequately protect the private property interests of South Dakotans, then its economic threat is substantially reduced. Therefore, Keystone's scope of liability is relevant to this proceeding and unprivileged documents that describe this scope of liability are discoverable.

Further, in its K1 Final Order, Exhibit A, Paragraphs 53 to 57, the Commission imposed conditions related to liability after investigation of the scope of liability in that proceeding. Therefore, Commission precedent demonstrates the Commission has jurisdiction to investigate liability issues and that such issues are relevant to this proceeding.

That the courts might be called on some day to determine liability in the event of a future spill of oil from the proposed pipeline does not mean that the Commission is without jurisdiction to investigate the state of existing law on this matter. Since the proposed pipeline has not yet been built, there is presently no case or controversy and any attempt to seek a court determination of the scope of liability for an oil spill from the proposed pipeline would seek an unpermitted

advisory ruling. Therefore, an investigation of the legal remedies available to landowners to recover damages caused by future oil spills is not within the jurisdiction of the courts.

Rather, the Commission has authority to investigate the legal remedies available under South Dakota law to landowners to recover damages for oil spills.

A discovery request may be said to call for a legal conclusion when it purports to require a party to admit, for example, that a statute or regulation imposes a particular obligation. *Miller v. Holzmann*, 240 F.R.D. 1 (DDC 2006) citing *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 1, 3 (D.D.C. 2006).

Here, DRA has not requested that Keystone admit that the law imposes any obligation, but rather requests non-privileged documents containing statements about oil spill liability provided by Keystone to non-privileged parties. Where information would amount to an admission of liability, then Keystone need not produce such documents. However if Keystone has collected documents related to this issue that are not admissions (perhaps because Keystone did not write them) and not otherwise protected by Keystone's attorney-client privilege or other privilege, then it should disclose such documents so that the Commission has a full understanding of the efficacy of the legal remedies for oil spills available to landowners in South Dakota.

**REQUEST 6:** Produce all documents concerning your preparation of an Emergency Response Plan for the Keystone XL pipeline, including but not limited to the amount and placement of emergency response equipment and other emergency response materials; the number and placement of emergency response personnel; estimated deployment-to incident- site times for emergency response personnel and equipment; emergency response planning; and coordination with local and state emergency personnel. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand of the measures that you plan to take to protect interests in South Dakota from a spill or leak of crude oil from the proposed Keystone XL pipeline.

**OBJECTION:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. This request also seeks information addressing an issue that is governed by federal law and is within the province of the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA). The PUC's jurisdiction over the emergency response plan is preempted by federal law. See 49 C.F.R. Part 194; 49 U.S.C. § 60104(c). This request further seeks information that is confidential and proprietary. Public disclosure of the emergency response plan could commercially disadvantage Keystone. This request is also unduly burdensome. Keystone has employees who have worked essentially full time for the better part of the last year preparing the emergency response plan for the Keystone XL Pipeline. Moreover, the emergency response plan will be completed as the pipeline is built, making the request premature.

**ARGUMENT:** For the reasons discussed above, federal law does not in wholesale fashion preempt discovery of information related to compliance with federal law. Even if the Commission may not change the requirements of federal law, it may investigate whether

Keystone is in compliance with federal law and the scope of on-the-ground protection provided to South Dakotans by federal law. Further, the Commission may request that PHMSA improve Keystone's federal Emergency Response Plan ("ERP") before it is implemented and/or request that Keystone voluntarily augment its obligations under federal law. See K1 Final Order paragraph 107. To the extent that Keystone believes that disclosure of information related to development of an ERP for the proposed pipeline would violate federal law, it should clearly describe the legal foundation for this objection rather than through vague statements.

Keystone is required by SDCL § 49-41B-22(1) to comply with all federal laws. Therefore, matters related to whether or not Keystone is in compliance with federal ERP requirements are relevant to this proceeding. Moreover, the federal ERP is the primary legal mechanism to protect the lives and property of South Dakotans in the event of an oil spill. Therefore, Keystone's compliance with federal ERP requirements and the appropriate development of the ERP are relevant to SDCL Chapter § 49-41B, and particularly Keystone's burden of proof under SDCL § 49-41B-22. That this is a federal requirement does not prevent the Commission from investigating Keystone's compliance with federal law to ensure the safety and welfare of South Dakotans or to determine the extent to which the State may enhance the safety of South Dakotans through non-preempted actions related to emergency response, for example by providing additional first responder training or additional spill containment equipment to local governments.

Keystone alleges that information related to the ERP is confidential and proprietary and that public disclosure of ERP information could commercially disadvantage Keystone. Although some of the information in the ERP might be subject to a protective order requiring the nondisclosure of sensitive information, most of the information in an ERP does not appear to be confidential, proprietary, or commercially sensitive. For example, an ERP must contain information related to:

- A description of each spill response zone;
- The person, position, or facility responsible for starting immediate notification of a spill;
- The maximum time required to detect spills and shut down flow in bad weather;
- Spill containment strategies;
- Description of spill response equipment and procedures to maintain it;
- The location of spill response equipment;
- The time to deploy response equipment;
- A description of the amount of trained personal and deployment of personnel for spill containment operations;
- The contents of the training program to be provided to first responders; and
- Drill procedures.

It is difficult to see that this sort of information is confidential, proprietary, or commercially sensitive, especially because it is related to public health and safety. Rather, the information contained in the federal ERP is required to comply with federal regulation. Compliance with these standards is of vital importance to the landowners whose lands are crossed by the pipeline as it represents the only government plan to protect their interests in the event of a spill. The

Commission has investigated Keystone's compliance with other federal standards and should do so with regard to the ERP, as well.

Therefore, a blanket exemption for discovery of all information related to the ERP is not appropriate such that Keystone should identify which information in the ERP is confidential, proprietary, or commercially sensitive and disclose the rest.

Keystone also objects that disclosure of information in the ERP would be unduly burdensome. Keystone must describe how disclosure of information would be unduly burdensome and disclose information to the extent that doing so is not unduly burdensome.

Finally, Keystone states that because the ERP will not be complete until the pipeline is built, that therefore the request is premature. Since the point of discovery about development of the ERP is to ensure that it complies with federal law and adequately protects the interests of South Dakotans before a permit is issued so that the Commission could seek to improve the ERP before operations begin, waiting to allow discovery would result in a failure to protect the interests of South Dakotans. Further, the Request does not seek only the *final* ERP itself, but rather documents related to its preparation. Since these documents are in existence and relevant to this proceeding, they are subject to discovery.

**REQUEST 7:** Produce all documents concerning Advisory Bulletin ABD-09-01, prepared pursuant to Docket No. PHMSA-2009-0148, entitled "Potential Low and Variable Yield and Tensile Strength and Chemical Composition Properties in High Strength Line Pipe" as noticed and described at 74 Fed. Reg. 23930 ("Advisory Bulletin"), including but not limited to: your investigation of whether you have used or intend to use pipe from the steel or rolling mills that provided the defective pipe described in the Advisory Bulletin; your correspondence with the federal Pipeline and Hazardous Materials Administration ("PHMSA") concerning the Advisory Bulletin or the issues described therein; your participation in the April 23, 2009, New Pipeline Construction Workshop in Fort Worth, Texas, hosted by PHMSA; other investigations by you to confirm whether or not you have acquired substandard pipe; and measures you have taken to ensure that you do not use substandard pipe. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand the efforts you took related to your possible use of pipe from a steel or pipe mill that provided the substandard pipe identified in the Advisory Bulletin.

**OBJECTION AND RESPONSE:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. In addition, this request seeks information concerning issues that are governed by federal law, and over which the PUC's jurisdiction is therefore preempted. See 49 U.S.C. § 60104(c). Without waiving the objection, Keystone previously filed with the PUC a response dated June 1, 2009, to an inquiry concerning the advisory bulletin. A copy of the response is attached as Exhibit F.

**ARGUMENT:** The information sought by this request is relevant to Keystone's burden of proof under SDCL § 49-41B-22, and also relevant to ARSD §§ 20:10:22:37 and 20:10:22:38. Further, Keystone makes the following statement in Section 2.2 of its application:

The proposed facilities will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the US Department of Transportation (USDOT) regulations at 49 Code of Federal Regulations (CFR), Part 195, Transportation of Hazardous Liquids by Pipeline; American Society of Mechanical Engineers Standard B31.4; and other applicable federal and state regulations. These regulations and standards specify pipeline material and qualification; minimum design requirements; and protection from internal, external, and atmospheric corrosion, thereby ensuring adequate protection for the public and environment by preventing pipeline incidents. Keystone has filed an application with Pipeline and Hazardous Materials Safety Administration (PHMSA) for a Special Permit authorizing Keystone to design, construct, and operate the project at up to 80 percent of the steel pipe specified minimum yield strength for most locations.

To ensure compliance with the regulations, standards, and Keystone's internal quality standards, Keystone will implement a quality control and quality assurance plan (QC/QA Plan). The QC/QA Plan will establish technical inspection policies and procedures during manufacturing and construction, and will delineate the duties and responsibilities of each QC/QA inspector assigned to the Project. Keystone's QC/QA Plan includes periodic audits by manufacturing and construction management to confirm that inspections are being properly performed and documented.

Matters that bring Keystone's compliance with these standards into doubt are relevant to this proceeding.

As previously noted, federal law does not preempt the Commission from investigating whether Keystone may be out of compliance with federal law, even if the Commission cannot change federal standards. Therefore, discovery of information about whether Keystone has used defective steel pipe and its efforts to avoid a possible future use of defective steel pipe are relevant to this proceeding and discoverable.

**REQUEST 8:** Produce all documents concerning whether a design factor of 0.80 is appropriate for use in crude oil pipelines instead of the 0.72 design factor contained in 49 C.F.R. § 195.106, including but not limited to: management of pressure fluctuations; modeling of rupture characteristics of crude oil pipelines in pressure surge events; the operational differences between crude oil pipelines and natural gas pipelines as these differences relate to the appropriate design factor for crude oil pipelines; the differences between crude oil and natural gas pipelines with regard to the different environmental impacts of leaks and ruptures of natural gas pipelines in comparison to crude oil pipelines; and documents related to the risks of operating a crude oil pipeline with a design factor of 0.80. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand the risks of operating a crude oil pipeline built with a 0.80 design factor, as well as the means of mitigating these risks.



**OBJECTION AND RESPONSE:** This request seeks information that is beyond the scope of the PUC's jurisdiction and Keystone's burden under SDCL § 49-41B-22. In addition, this request seeks information concerning issues that are governed by federal law, and over which the PUC's jurisdiction is therefore preempted. See 49 U.S.C. § 60104(c). This request is also unduly burdensome because it requests all documents associated with the Special Permit application that Keystone filed with PHMSA. Moreover, many documents related to the Special Permit application have proprietary value to Keystone. Without waiving the objection, a copy of the Special Permit application and amendment thereto, with the appendices are attached as Exhibit G.

**ARGUMENT:** The information sought by this request is relevant to Keystone's burden of proof under SDCL § 49-41B-22, and also relevant to ARSD §§ 20:10:22:37 and 20:10:22:38. Further, Keystone makes the following statement in Section 2.2 of its application:

Keystone has filed an application with Pipeline and Hazardous Materials Safety Administration (PHMSA) for a Special Permit authorizing Keystone to design, construct, and operate the project at up to 80 percent of the steel pipe specified minimum yield strength for most locations.

In addition, the Commission has discussed Keystone's application for a Special Permit in a number of public hearings and evaluated this matter in its K1 Final Order. *E.g.*, K1 Final Order paragraph 137. Therefore, the issue of the potential impact of a Special Permit on the safety and welfare of South Dakotans is relevant to this proceeding, and therefore discoverable.

As previously noted, federal law does not preempt the Commission from investigating the appropriate application of federal law to matters before the Commission, even if the Commission cannot change federal standards or make the determination of compliance with these standards. Further, the Commission has authority to implement state requirements that do not frustrate the intent of federal law but nonetheless provide additional protection to South Dakotans. Therefore, discovery of information about the Special Permit and its potential impacts on South Dakotans is relevant and discoverable.

**REQUEST 9:** Produce all documents concerning the composition of the materials to be transported by the proposed Keystone XL pipeline, including but not limited to: the chemical and physical composition or characteristics of such materials; the capacity of such materials to corrode, abrade, or wear components such as the pipe walls, valves, or pumps of the proposed Keystone XL pipeline; comparisons of corrosion or abrasion characteristics of such material to the corrosion or abrasion characteristics of crude oil not derived from the tar or oil sands of Canada; the rate of internal corrosion or mechanical erosion of internal components of the pipeline by such material; and other documents concerning the effect of transportation of such material on the operational life of the proposed Keystone XL pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand how the material to be transported may or will affect the internal components of the proposed Keystone XL pipeline.

**OBJECTION AND RESPONSE:** Keystone objects to this request on the grounds that it pertains to matters that are preempted by federal law and not relevant to the PUC's determination. Notwithstanding this objection, Keystone states that it cannot definitively identify the components of the crude oil to be transported through the pipeline, as the specific crude oil to be shipped through the Keystone XL Pipeline will be controlled by Keystone's shippers. A range of crude oil may be transported by the pipeline from time to time. The crude oil must meet the quality specifications contained in Keystone XL's Federal Energy Regulatory Commission tariff, which is still under development. Without waiving the objection, attached as Exhibit H is Article 4 of the current version of the US Tariff for the Keystone Pipeline. The tariff is still under development and has not yet been filed with FERC. The Keystone tariff, including the quality specs, will also apply to Keystone XL.

**ARGUMENT:** For the reasons previously discussed, the Commission is not without jurisdiction to investigate that Keystone will be in compliance with federal law, nor does the Commission lack jurisdiction to investigate the potential risks and impacts of pipelines, even if the safety standards for such pipelines are determined by federal law. The chemical nature of the range of crude oil to be shipped is directly related to the operation and wear of the proposed pipeline and to the nature of impacts to South Dakotans and their environment should the oil leak. Therefore, such information is relevant to this proceeding.

Although the Federal Energy Regulatory Commission ("FERC") will approve a tariff containing quality specifications, this tariff is not designed, nor is it within FERC's jurisdiction to determine the impacts of the shipped crude oil on pipeline operations or the potential impacts of spilled oil on the environment. Therefore, federal law related to FERC tariffs does not preempt Commission action.

**REQUEST 10:** Produce all documents concerning a worst case spill assessment for the proposed Keystone XL pipeline. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public understand where a worst case spill might occur and the volume of oil that might be spilled so that an assessment may be made of the adequacy of your Emergency Response Plan.

**OBJECTION AND RESPONSE:** This request is unduly burdensome because it requests all documents reviewed in connection with the risk assessment prepared by AECOM for the United States Department of State in connection with Keystone's application for a Presidential Permit. This request also seeks information that is confidential because the risk assessment contains information related to High Consequence Areas that PHMSA requires operators to keep confidential. Without waiving the objection, that part of the risk assessment addressing estimated spill volumes, which was previously filed with the Department of State, is attached as Exhibit I.

**ARGUMENT:** Pending review of disclosed documents.

**REQUESTS 12 TO 19:** Rather than include the full text of Requests 12 to 19 and Keystone’s respective objections to them, a description of each is provided below. These Requests all relate to the projected demand for the proposed pipeline and seek information about:

- Request 12 – Western Canadian Production Forecasts
- Request 13 – Canadian Crude Oil Export Capacity to US
- Request 14 – US Crude Oil Demand
- Request 15 – Binding Shipper Agreements
- Request 16 – Use of Pipeline by Shippers
- Request 17 – Impact of CAPP 2009 Report (Canadian tar sands production forecast)
- Request 18 – Impact of AEO 2009 (US domestic oil consumption forecast)
- Request 19 – Impact on Domestic Production

Keystone presents the following objections to these Requests:

- Beyond the scope of the PUC’s jurisdiction (Requests 12 to 19);
- Beyond the scope of Keystone’s burden of proof under SDCL § 49-41B-22 (Requests 12 to 19);
- Confidential business information (Request 15); and
- Matter preempted by Executive Order (Requests 16-19).

Since these Requests share many of the same objections, they are addressed here together.

#### Scope of PUC’s Jurisdiction Over Demand for Proposed Pipeline

South Dakota law specifically makes matters related to demand for the pipeline relevant to this proceeding. Specifically, SDCL § 49-41B-11(9) requires that applications include information related to:

Estimated consumer demand and estimated future energy needs of those consumers to be directly served by the facility . . . .

Also, ARSD § 20:10:22:10, entitled “Demand for facility” states:

The applicant shall provide a description of present and estimated consumer demand and estimated future energy needs of those customers to be directly served by the proposed facility. The applicant shall also provide data, data sources, assumptions, forecast methods or models, or other reasoning upon which the description is based. This statement shall also include information on the relative contribution to any power or energy distribution network or pool that the proposed facility is projected to supply and a statement on the consequences of delay or termination of the construction of the facility.

As discussed above, relevancy here is not limited to Keystone’s burden of proof in SDCL § 49-41B-22, but rather is defined by a number of provisions in SDCL Chapter 49-41B, which in any

case is broad enough to encompass consideration of whether demand for a facility is great enough to justify burdening landowners with it.

Presumably in response to the foregoing legal requirements, Keystone included information about demand for the proposed pipeline in Section 3.0 in its application. Section 3.0 includes five subsections entitled:

3.1 - WCSB [Western Canadian Sedimentary Base] Crude Oil Supply (related to Requests 12, 13, and 17)

3.2 - Increasing Crude Oil Demand in the US (related to Requests 14 and 18)

3.3 - Decreasing Domestic Crude Oil Supply (related to Request 19)

3.4 - Further Supply Diversification to Canadian Crude Oil (not related to any Requests)

3.5 - Binding Shipper Interest (related to Requests 15 and 16)

These sections of the Application contain conclusory statements about demand for the proposed pipeline, some of which appear to be based on out-of-date government and industry forecasts.

Keystone argues that material required by law to be included within its application is beyond the scope of the Commission's jurisdiction, such that the Commission is without jurisdiction to require that Keystone provide evidence supporting Section 3.0's conclusory statements.

As discussed above, if statute and regulation require that information about demand for a facility be included in an application for a permit, then the Commission must consider such information such that it is relevant to the permit decision and within the scope of the Commission's jurisdiction. Further, an order that allows Keystone to include information in its Application about demand for the proposed pipeline but prevents discovery into the facts that underlie Keystone's claims would be unjust.

#### Confidential Business Information

Keystone objects to Request 15 on the grounds that a disclosure of certain information in binding shipper agreements would disclose confidential business information. This is undoubtedly true. However, the question faced by the Commission is whether this information is relevant and whether some information about binding shipper agreements can be protected from harmful disclosure through protective orders, especially since some of the contract terms and tolls in the Keystone XL Open Season binder may have been disclosed within the industry pursuant to confidentiality agreements with prospective shippers.

### Preemption by DOS Presidential Permit Authority

Keystone objects to Requests 16 to 19 because: “It is within the purview of the United States Department of State to make a determination whether the proposed project is in the national interest, under the applicable Presidential Executive Order.” This objection appears to be an argument that state authority to consider demand for the pipeline is preempted by federal law.

This statement is overbroad. The Department of State (“DOS”) purports to approve only the border crossing portion of the proposed pipeline, not the project as a whole. Executive Order 13337 (“EO 13337”), under empowers the DOS to issue Presidential Permits for energy-related facilities, is entitled “Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation *Crossings* on the International Boundaries of the United States” (emphasis added). The purpose of EO 13337 contained in its first paragraph is “to provide a systematic method for evaluating and permitting the construction and maintenance *of certain border crossings* for land transportation . . .” (emphasis added). Likewise, Section 1 of EO 13337 states that the DOS is:

empowered to receive all applications for Presidential permits . . . for the construction, connection, operation, or maintenance, *at the borders of the United States*, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.

(Emphasis added.) Thus, the DOS does not have authority to approve the entire pipeline project or to find that all of it is in the national interest. Rather, it is empowered only to determine whether the border crossing for the pipeline is in the national interest. Absent an Act of Congress, the President does not have authority to approve the construction of the proposed pipeline between the proposed crossing of the border with Canada and its terminals at the Gulf Coast.

With regard to the “national interest,” the only guidance on what this means found in DOS documentation is in a DOS Fact Sheet, dated March 11, 2008, entitled “Applying for Presidential Permits for Border Crossing Facilities (Canada),” which states that an application for a Presidential Permit “should” contain a statement on national interest that includes:

An explanation of how the proposed facility would serve the national interest. This explanation may be supported by any reports, Applying for Presidential Permits for Border Crossing Facilities (Canada) correspondence, and other material indicating the desirability and feasibility of the proposed facility.

The Fact Sheet does not contain language that could be read to preempt state law, and even if it did contain such language the Fact Sheet is not a promulgated regulation and as such is not federal law.

Since there is no federal law that examines the need or demand for the facility other than at the border, federal law does not preempt the Commission from determining whether there is adequate demand for the facility in South Dakota. Even if federal law did empower the federal

government to determine the demand for the facility, this would not preclude the Commission from investigating this matter if required to do so by South Dakota law.

Therefore, Keystone's objection that because the DOS will determine if the proposed "project" is in the national interest that therefore the Commission cannot consider the demand for the proposed pipeline is not correct, such that federal law does not limit the Commission's authority to investigate and determine the demand for the proposed pipeline.

**REQUEST 23:** Produce all documents related to and provide a description of your efforts to identify alternative routes for the Keystone XL Pipeline that do not require a new right of way in South Dakota, including but not limited to: routes that parallel the Keystone Pipeline currently under construction or other routes that pass north of South Dakota; and routes that pass west and south of South Dakota, including routes that parallel existing pipelines in Montana and Wyoming including but not limited to the Express, Platte, West Corridor, Bridger, Butte, and Belle Fourche pipelines, as well as natural gas pipelines west and south of South Dakota; provide an explanation of why these alternative routes were either not considered or considered and rejected. The purpose of this request is to assist the Commission, impacted landowners, local governments, and the public in their understanding of why you need a new right of way through South Dakota when multiple existing pipeline rights of way exist between Alberta and the Gulf Coast.

**OBJECTION AND RESPONSE:** This request seeks information beyond the scope of the PUC's jurisdiction. Without waiving the objection, alternative routes and Keystone's iterative process in determining the preferred route for the Keystone XL Pipeline are discussed in Keystone's application for a Presidential Permit and in the prepared direct testimony of its witness Richard Gale. A copy of the relevant portion of the Presidential Permit application is attached as Exhibit K. The testimony of Richard Gale is available on the PUC's website.

**ARGUMENT:** Although the Commission does not have authority to route the proposed pipeline, SDCL § 49-41B-36, both Commission regulation ARSD § 20:10:22:12 and the environmental review being performed for the proposed pipeline pursuant to SDCL Chapter 34A-9 and the National Environmental Policy Act, 42 U.S.C. 4321-4327 ("NEPA"), require the Commission to receive and consider information related to alternative routes for the proposed pipeline. In particular, § 20:10:22:12 states:

The applicant shall present information related to its selection of the proposed site for the facility, including the following:

- (1) The general criteria used to select alternative sites, how these criteria were measured and weighed, and reasons for selecting these criteria;
- (2) An evaluation of alternative sites considered by the applicant for the facility;
- (3) An evaluation of the proposed plant, wind energy, or transmission site and its advantages over the other alternative sites considered by the applicant, including a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site, alternative generation method, or alternative waste handling method.

Further, it would not be possible for the Commission to consider whether county or municipal land use rules, regulations, or ordinances are unreasonable as applied to Keystone's proposed route absent an ability to investigate the routing alternatives. SDCL § 49-41B-28. Also, Keystone included substantial information about route alternatives in its Application. Therefore, alternative routings for the proposed pipeline are relevant to the Commission's permit process and the Commission has the authority to investigate alternative routes. Since route alternatives are relevant to this proceeding, information about Keystone's efforts to evaluate different routes are discoverable.