

October 20, 2009



**VIA EMAIL**

Patricia Van Gerpen  
SD Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

Dear Ms. Van Gerpen:

Dakota Rural Action (“DRA”) wishes to inform the Commission that DRA and its members intend to participate in the upcoming Keystone XL hearing through the Tuesday night public comment opportunity rather than by presenting witnesses during the evidentiary hearing. DRA’s members have determined that their comments to the Commission are appropriate for the public comment process such that they have decided to not participate as witnesses. Unlike the Commission, DRA does not have the resources needed to hire the expert witnesses required to respond to TransCanada’s experts, therefore DRA will not be providing expert testimony. Instead, DRA encourages Commission staff in their efforts to protect the public and urges the Commission to fully consider the concerns and requests provided by citizens during the public comment period.

DRA also intends to provide the Commission with documents related to specific concerns, some of which DRA acquired from TransCanada in the discovery process, some of which it found on its own. Unfortunately, TransCanada’s responses to DRA’s information requests have proven to be of little worth. Worse, TransCanada’s actions have severely hindered DRA’s efforts in this proceeding and consumed time and resources that DRA had intended to commit to preparation for the upcoming hearing. Specifically, TransCanada:

- unreasonably opposed some of DRA’s information requests, thereby delaying the Commission’s proceeding and consuming DRA’s limited resources with unnecessary argument;
- buried the small amount of relevant information it provided in thousands upon thousands of pages of irrelevant, illegible, unusable, or marginally relevant material; and
- appears to have withheld substantial amounts of relevant material even after direct order by the Commission (detailed below).

The following identifies documents requested by DRA that TransCanada appears to have failed to disclose.

**FAILURE TO PROVIDE INFORMATION RELATED TO SETBACKS AND PROTECTION OF LANDOWNERS FROM MAJOR PIPELINE RUPTURES**

DRA sought information related to setbacks, the risks mitigated by setbacks including the risk of injury and damage caused by major pipeline ruptures, and other measures to mitigate these risks. In its response, TransCanada sent a very large volume of material, much of which is irrelevant or of very limited relevance and none of which is directly related to setbacks. Of the thousands and thousands of sheets of paper provided, it appears that only a few pages, related to the spray and pool zones from the 1979 Bemidji, MN Enbridge pipeline spill, are directly related to the immediate damage caused by a major pipeline rupture.

In response to DRA's assertions that TransCanada had not provided any documents related to setbacks, James Moore, Attorney for TransCanada stated in Commission's September 23 hearing that "we don't have additional documents in the Keystone files that are responsive to this request. We've produced everything we have." Transcript p. 14. James White, also an attorney for TransCanada, supplemented Mr. Moore's statements by noting that, "There is one document that's arguably responsible that was not produced, and that was a document that's subject to the objection to the extent that materials involve high consequence areas. There's a document called Evaluation of Risk to High Consequence Areas, which defined portions of the project, which if a spill occurred, would have the potential to reach a high consequence area. . . . So that single document was not produced." TransCanada has produced a redacted version of this document, which contains little information directly related to the risks mitigated by setbacks or measures intended to mitigate these types of risks.

However, during a search for information related to setbacks and the immediate damage caused by release of oil from very high pressure pipelines necessitated by the lack of useful information provided by TransCanada, it came to DRA's attention that TransCanada, or its corporate affiliates, participated in the Pipelines and Informed Planning Alliance ("PIPA") process. This US federal stakeholder process began in August 2007 and related to investigation of land use planning measures, such as setbacks, that mitigate the risks posed by pipelines. The process involved most if not all of the major pipeline companies and at least 24 organizations, such as the National Association of Counties, the National Association of Home Builders, the National Association of State Fire Marshalls, various industry trade groups, and a number of federal agencies.

PIPA documentation states that TransCanada assigned Alex Osborne to represent it on Task Team 1 and Steve McNulty to represent it on Task Team 3. Belinda Friis and Brad Watson are also identified as representing TransCanada in this process. DRA understands that Belinda Friis has served for 14 years as Senior Counsel with TransCanada primarily supporting ANR Pipeline Company, and that Brad Watson is a Senior Technologist for TransCanada.

In April 2009, after exchange of written comments, the PIPA process produced a 104 page Draft Report entitled "Partnering to Further Enhance Pipeline Safety in Communities through Informed Land Use Planning." The Draft Report contains 49 possible recommended practices related to local land use controls, including among other things, a discussion of setbacks, "consultation zones," and modification of local land use plans to address pipeline safety concerns.

TransCanada's voluminous response to Request 1 does not contain the PIPA Draft Report and it also does not appear to contain any reference to the PIPA process.

It is beyond belief that TransCanada was and is unaware of the PIPA process, that it has no documents about this process, and that none of its four employees who participated in this process retained any files whatsoever. Further, TransCanada's failure to provide documents related to the PIPA process casts substantial doubt on its claims that it has no documents related to setbacks or other similar mitigation measures. Rather, it appears that the PIPA process was of substantial concern to TransCanada and that TransCanada chose to withhold information about this process. Therefore, it appears that, at a minimum, TransCanada did not diligently search its files, and at worst may have made false or misleading statements to the Commission.

#### **FAILURE TO PROVIDE INFORMATION RELATED TO MAINTAINING SOIL DEPTH OF COVER**

DRA sought information related to monitoring and maintaining depth of cover, which is a key method used to reduce the risk of damage to pipelines that could result in leaks and major ruptures. In

response, TransCanada initially sent thousands of pages of material much of which was irrelevant or illegible, the remainder of which was marginally relevant, and none of which related to monitoring and maintaining depth of cover over pipelines. Due to TransCanada's failure to provide relevant material, on September 23, the Commission ordered TransCanada to disclose all documents related to methods and procedures for monitoring and maintaining depth of cover. In response, TransCanada provided Exhibit V containing four documents, including a Portable Electronic Pipe and Cable Locator Specification and three relatively short and summary TransCanada Operating Procedures entitled "Line Locator Inspection," "Pipeline Ground Based Patrols," and "Aerial Pipeline Patrol."

Due to the limited worth of the material provided, DRA conducted research to identify other documents that might help landowners understand the monitoring and maintenance of depth of cover. DRA learned that on May 11, 2008, TransCanada submitted comments to the Pipeline and Hazardous Materials Safety Administration ("PHMSA") on the federal natural gas maximum allowable operating pressure draft regulations, including comments on depth of cover. On page 16 of its comments, TransCanada asserted that depth of cover cannot be maintained and made factual statements related to a general lack of need to maintain depth of cover. Although TransCanada did not cite its source for these assertions, it appears that TransCanada relied on a May 19, 2008, White Paper prepared by the Interstate Natural Gas Association of America ("INGAA"), which contains similar language on pages 25 and 26, and states that the industry had conducted studies on depth of cover. Importantly, these studies apparently include an assessment of the potential for loss of depth of cover in agricultural areas.

Since DRA did not limit its depth of cover request to only oil pipelines, and since loss of depth of cover over a pipeline is not dependent on the nature of a product transported by a pipeline, documents in TransCanada's possession related to this federal rulemaking are relevant to this proceeding. It is difficult to believe that TransCanada is unaware of its public formal written position on depth of cover and does not have access to the studies referenced by the INGAA documents. It is also difficult to believe that TransCanada's entire library on monitoring and maintaining depth of cover over pipelines comprises only four documents.

### **FAILURE TO PROVIDE INFORMATION ABOUT PIPELINE ABANDONMENT**

DRA sought information related to abandonment of pipelines, because its landowner members are concerned that they not bear the costs of removal or stabilization of this 3 foot diameter steel pipeline or be subjected to the safety risks this pipeline will create once it is abandoned. In response to this request, TransCanada initially provided only one document, specifically an internal operating procedure related to abandonment. In its motion to compel, DRA noted that TransCanada had participated in the Canadian National Energy Board Land Matters Consultative Initiative ("LMCI") process, including two information gathering and policy development processes related to pipeline abandonment, and yet had not produced a single document from this process. On September 23, the Commission ordered TransCanada to produce documents related to the LMCI process.

TransCanada responded to this order by producing Exhibit S, which contains a number of documents related to the LMCI process. Due to TransCanada's failure to separate these documents from each other, it is difficult to determine which of these documents are included as attachments to other documents. Nonetheless, it appears that TransCanada has provided only documents authored by it, its affiliates, its attorneys, or the Canadian government, and has omitted documents authored by other participants in this process, except for limited documents that appear to be attachments to TransCanada filings. Since the documents provided by TransCanada contain its responses to documents filed by other participants, and after further web research related to the filings of other entities, it is clear that TransCanada had or has many more LMCI documents than it provided, and that TransCanada may have cherry picked only those documents it authored and a few Canadian government documents. Unless

TransCanada has purged all of its files of LCMI documents authored by other entities, it has failed to comply with the Commission's order on this matter.

### **FAILURE TO PROVIDE INFORMATION RELATED TO DEMAND FORECASTS**

DRA sought information related to western Canadian crude oil production forecasts and US crude oil demand forecasts to confirm demand for the Proposed Pipeline and to determine whether lowered demand would result in a delay in the start date for construction of the Proposed Pipeline. TransCanada refused to provide documents related to this request. On September 23, 2009, the Commission ordered TransCanada to respond to these requests. In response, TransCanada provided two publically available documents, the Canadian Association of Petroleum Producers 2009 forecast, and the US Energy Information Administration's 2009 Annual Energy Outlook, both of which DRA has previously referenced in this proceeding.

It is difficult to believe that a company of the size and capacity of TransCanada relies for its demand forecasts for a multi-billion dollar project entirely on two publically available reports. Further, if we assume for the sake of argument that these publically available documents contain the only data on which TransCanada relies for its planning, TransCanada should have disclosed this fact and produced these documents in its first response rather than withhold them. Instead, TransCanada's actions required that DRA spend weeks of effort to acquire two documents that it knew from other filings that DRA already possessed.

In sum, it appears that TransCanada has systematically withheld relevant documents and unreasonably withheld documents it ultimately was required to disclose. Further, a large proportion of the documents that TransCanada provided were irrelevant, illegible, and poorly organized, with the result that DRA's review of these documents was substantially more time consuming than necessary. As such, DRA believes that TransCanada has acted in bad faith during this discovery process, with the result that the discovery process required effort that far outweighs the value of the material provided by TransCanada. Given the relative sizes and capacities of TransCanada and DRA, such behavior by TransCanada is unacceptable.

Due to resource and schedule constraints and in belief that additional efforts to compel TransCanada to produce documents would further waste the Commission's and DRA's time, DRA does not intend to file a subsequent motion to compel. This being said, DRA reserves any legal rights it may have with regard to the Commission's discovery process, including those related to the Commission's scope of jurisdiction. For now, DRA intends to focus its limited resources on assisting landowners in other efforts to protect their families, homes, lands, and businesses from this massive and dangerous project.

Very truly yours,



Paul C. Blackburn  
Attorney for Dakota Rural Action