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Writer's E-mail: koenecke@magt.com

Patricia Van Gerpen
SD Public Utilities Commission
500 E. Capitol
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Dear Ms. Van Gerpen:

Based on the limited conversations we have had with Paul Blackburn on behalf of Dakota Rural Action, especially about discovery issues, we were surprised to read his letter to you dated October 20, 2009. Rather than discuss DRA's discovery concerns with us, Mr. Blackburn chose to write to you. His letter begs a response.

1. DRA's general approach to discovery has been confusing at best and abusive at worst.

On July 31, 2009, the last day for discovery under the Commission's scheduling order, DRA served a set of 24 interrogatories and document requests. The document requests were the backbone of the discovery and were enormously broad, far-reaching, in many cases vague, and many appeared to us to seek information either outside the jurisdiction of the Public Utilities Commission or simply not relevant to the issues to be heard beginning on November 2, 2009. The document requests were addressed to TransCanada Keystone Pipeline, LP (Keystone), as well as to its partners, corporate parents, subsidiaries, affiliates, and successors, and required an extensive document search to answer. Answers were due in less than thirty days. Many of the requests were so broad that they required Keystone to guess what information DRA was seeking. To allow DRA an adequate opportunity to address Keystone's concerns about the scope of the requests, we separately filed objections to the requests dated August 12, 2009, which was less than two weeks after the requests were served, and more than one week before a response was due. Rather than requesting a hearing on those issues, DRA delayed doing anything. On August 24, 2009, we then timely served responses to the requests and provided written answers or documents in response to 15 of them. Of the requests to which only an objection was made, eight of them addressed the issue of demand for crude oil in the United States. Thus, Keystone produced thousands of documents in a short amount of time.

Apparently, DRA was satisfied with none of this, and complained that Keystone had both produced too many documents and yet failed to guess what documents DRA actually wanted. For instance, in his October 20 letter, Mr. Blackburn faults Keystone for not providing

documents related to the Pipelines and Informed Planning Alliance (PIPA) process in response to a broad request for documents related to "the potential damage caused by a crude oil pipeline rupture." In his letter, Mr. Blackburn says that DRA "sought information related to setbacks," which was one of the subjects addressed in the PIPA process, even though the request clearly seeks documents related to crude oil ruptures and the damage likely to be caused, including, for instance, "the speed and force of the oil upon leaving a rupture," and the "potential for explosion or fire caused by a rupture." (DRA Request No. 1.) Keystone produced documents responsive to these issues, but DRA was apparently not interested in them. Rather than call Keystone's counsel to request documents specifically related to TransCanada's participation in any planning processes related to setbacks, Mr. Blackburn chose instead to write to you, very late in the proceedings, to complain that the very substantial volume of documents that he received pursuant to his request was not really what he wanted, and that we were obviously trying to hide the ball.

Mr. Blackburn's general approach to discovery can be fairly characterized as highly adversarial, mostly confrontational, and not at all collaborative. Under the applicable rule of procedure, SDCL § 15-6-37(a), a motion to compel discovery requires a certification "that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Although Mr. Blackburn sent a letter dated August 25, 2009 addressing the legal basis for Keystone's objections, and a letter dated September 16, 2009, objecting that some of Keystone's responses were insufficient even though Keystone had not objected to the requests, Mr. Blackburn at no time called us to confer collaboratively about any of the requests or the documents mentioned in his letter dated October 20.

In short, DRA's approach to discovery has been to make extraordinarily broad and vague requests, complain publicly about Keystone's responses, and work with opposing counsel in ways poorly designed to reach accommodation. As discussed below, Mr. Blackburn's specific complaints do not at all support DRA's accusation that Keystone has acted in bad faith.

2. Request No. 1 and the PIPA process documents.

Mr. Blackburn writes that DRA's first request sought "information related to setbacks," but the July request sought "*all documents* concerning the potential damage caused by a crude oil pipeline rupture." As Mr. Blackburn writes in his letter, Keystone produced thousands of documents, all of which were responsive, even if they were not specifically related to setbacks, which he now says is all he really wanted. By not producing documents related to the PIPA process, DRA suggests that Keystone "may have made false or misleading statements to the Commission."

James Moore, Jim White, and I addressed the PUC at the hearing on September 23, 2009. Based on responses we received from company personnel who were asked about the existence of documents related to potential damage caused by a crude oil pipeline rupture, understandably

none of us had been made aware of TransCanada's participation in the PIPA process, and Paul Blackburn had never mentioned it to us or discussed it with us. We have since learned that TransCanada participated in group discussions as part of that process, which resulted in the report to which Mr. Blackburn refers. TransCanada did not prepare any documents for the PIPA process. Much of the discussion that occurred was not specific to the product to be shipped in any particular pipeline. As would be expected given TransCanada's extensive natural gas pipeline operations, the participants in the process on behalf of TransCanada do not recall offering an opinion on anything other than natural gas pipelines.

Thus, not only is the PIPA report only marginally related to the request for documents concerning potential damage caused by a crude oil pipeline rupture, but we were unaware of it until Mr. Blackburn specifically mentioned it in his October 20 letter.

3. Request No. 2 and soil depth of cover.

DRA's second request asked for "all documents concerning the potential for pipelines to lose their earth cover due to soil erosion, movement of earth, or movement of the pipe." Keystone did not object to this request and produced responsive documents, but DRA nevertheless included the request in its motion to compel. After discussion at the hearing on September 23, the PUC ordered that Keystone provide documents related to "equipment, methods and procedures for monitoring and maintaining depth of cover."

In his letter, Mr. Blackburn claims that Keystone should have produced public comments that TransCanada PipeLines Limited made on May 11, 2008, regarding a proposed rule issued by PHMSA on March 12, 2008, published in the Federal Register, Vol. 73, No. 49, 13167. On page 16 of TransCanada's response, TransCanada commented on the provisions of the proposed rule relating to depth of cover. TransCanada responded that the language used in the proposed rule was confusing because the first sentence provided that depth of cover must be maintained, while the second indicated that if observed conditions indicated the possible loss of cover, a survey should be conducted and cover replaced as necessary. TransCanada commented: "The first sentence statement requiring that cover be maintained is a requirement that can not be obtained in any practical sense. The second sentence is more in line with a performance requirement that can be obtained and is event driven." TransCanada also commented that based on incidents where depth of cover was recorded, "no correlation was found between depth of cover and third party damage." In situations where the removal of cover could pose a threat of damage to the pipeline due to third party activities, as in agricultural situations, TransCanada agreed that restoration of cover may be appropriate. TransCanada's "formal written position on depth of cover," as characterized and referred to by Mr. Blackburn, is summarized at the bottom of page 16 of its response: "TransCanada recommends changing the language to eliminate the first sentence so that it reads 'If observed conditions indicate the possible loss of cover in an area where damage to the pipeline may result due to the loss of cover, replace the cover or provide appropriate prevention and mitigation measures as necessary.'" By referring to factual statements "related to a general lack of need to maintain depth of cover," Mr. Blackburn appears to have

mischaracterized TransCanada's response. A copy of page 16 from TransCanada's response is attached.

TransCanada's response does not address equipment, methods and procedures for monitoring and maintaining depth of cover, and the TransCanada employees to whom the document request was made did not identify it to us as a responsive document. Moreover, in responding to Mr. Blackburn's October 20 letter, we have learned that TransCanada does not have any internal documents related to the response.

4. Request No. 3 and pipeline abandonment.

In its third July request, DRA sought "all documents concerning the abandonment of pipelines." Keystone did not object to the request, but produced responsive documents in its possession. At the hearing on September 23, the PUC ordered that Keystone provide documents in its possession related to the Canadian National Energy Board Land Matters Consultative Initiative. Keystone then provided documents that it authored and submitted to the NEB as part of the LMCI process. DRA objects that Keystone "may have cherry picked" the documents and did not provide copies of documents authored by other entities.

In pursuing this issue after receiving Mr. Blackburn's letter, we have learned that TransCanada maintains no separate file of documents related to the LMCI process. When TransCanada needs a document in the docket, it obtains the document from the NEB website. Thus, by producing the documents submitted to the NEB that it authored, TransCanada certainly did not "cherry pick" documents, and did not withhold any documents in its possession. TransCanada got the documents it produced to DRA from the same source available to Mr. Blackburn.

5. Request No. 4 and demand forecasts.

TransCanada objected to DRA's several requests related to demand as beyond the PUC's jurisdiction and not relevant to the issues for hearing. The PUC ordered that Keystone respond to request nos. 12, 14, and 16-18, which Keystone did on October 5, 2009. Numbers 16-18 required a narrative response, not documents, which Keystone provided, and which DRA does not mention. Request No. 12 seeks "all documents concerning western Canadian crude oil production forecasts used to support your statements in Section 3 of your Application to the Commission that Western Canadian Sedimentary Basin ("WCSB") production is increasing." Request No. 14 seeks "all documents and data concerning US crude oil demand forecasts used by you to support your statements in Section 3 of your Application to the Commission that US demand for crude oil is increasing." Keystone's application references a 2008 report by the Canadian Association of Petroleum Producers to support Keystone's statement that WCSB production is increasing. Keystone's application references a 2007 US Energy Information Agency report to support its statement that US crude oil demand is increasing. In response to DRA's requests, Keystone supplied the most current versions of these reports, because those are the authoritative documents that Keystone is now using to support its statements regarding

supply and demand. The documents provided to DRA are exactly what it asked for. DRA's complaints that the documents Keystone produced in response to requests 12 and 14 were publicly available, and that TransCanada should not be relying entirely on two publicly available reports are simply another example of DRA reinterpreting its request after the fact.

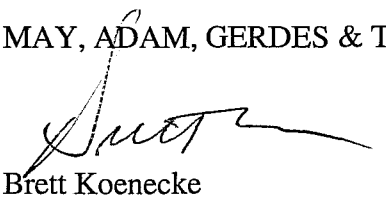
Conclusion

Mr. Blackburn concludes that TransCanada has "systematically withheld relevant documents and unreasonably withheld documents it ultimately was required to disclose." His hyperbole is not supported by the content of his letter, which likely would have been unnecessary had he called us to discuss these issues.

We look forward to working with all of the participants at next week's hearing.

Very truly yours.

MAY, ADAM, GERDES & THOMPSON, LLP



Brett Koenecke
BK/sfh

cc: Paul Blackburn
James Moore
Bill Taylor

and $0.467*10^{-4}$ per year per mile (14/300000) for gas transmission lines. In other words, the lines patrolled 26 times a year have on average about 3.5 times higher incident rate compared to the lines patrolled 2 times a year (twice per year is an average required number of patrols based on one per year for Class 1, two per year for Class 2 and four per year for Class 3).

A report by CFER Technologies for PRCI shows that unless patrolling is done daily, there is not much chance of prevention of outside force damage. In addition, B31.8 only requires once per year in Class 1 and 2 even when Class 1 pipe can operate at 80%.

TransCanada recommends changing the patrolling requirements to two times per year Class 1, four times per year in Class 2 and six times per year in Class 3.

This increase in frequency is akin to the frequency for the next higher class location, as are others of the additional requirements in the NPRM. For example, the requirement in the NPRM for NDE to 100% of all girth welds in Class 1 areas operating at 80% of SMYS is the same as required in Class 3 areas in the existing regulations.

Depth of Cover

The language used in the NPRM for maintaining depth of cover is confusing. The first sentence says to maintain depth of cover to the requirements stated in 192.327 or 192.328. The second sentence says that if observed conditions indicate the possible loss of cover, perform a depth of cover survey and replace cover as necessary. The first sentence statement requiring that cover be maintained is a requirement that can not be obtained in any practical sense. The second sentence statement is more in line with a performance requirement that can be obtained and is event driven.

Based on the incidents where depth of cover was recorded, no correlation was found between depth of cover and third party damage. There are situations where the removal of cover may pose a threat of damage to the pipeline due to third party activities such as in agricultural situations. In these cases the restoration of cover may be appropriate.

There may be situations where cover can not be permanently restored. In these situations there may be more appropriate measures that can be employed, such as the addition of a barrier or some other prevention or mitigation measure.

For existing pipelines that were installed in accordance with 192.327, the depth of cover requirements in a Class 1 area was 30 inches. Some removal of cover may have occurred during the life of the pipeline due to agriculture, normal soil erosion or other factors. This paragraph, as written would require the operator to maintain cover to 30 inches for existing pipelines which may result in significant environmental disturbance to replace cover over long segments of pipeline.

TransCanada recommends changing the language to eliminate the first sentence so that it reads "If observed conditions indicate the possible loss of cover in an area where damage to the pipeline may result due to the loss of cover, replace the cover or provide appropriate prevention and mitigation measures as necessary".