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**From:** Semmler, Kara

**Sent:** Friday, April 17, 2009 9:37 AM

**To:** Debra Niemi

**Cc:** Gregg, Deb; Van Gerpen, Patty

**Subject:** PUC Reply - Transcanada's financial condition

Ms. Niemi,

Attached please find the PUC reply to your e-mail below.

Please contact me if you have any additional questions.

thank you.

Kara Semmler

SD Public Utilities Commission, Staff Attorney

500 E. Capitol

Pierre, SD 57501



Dustin Johnson, Chair  
Steve Kolbeck, Vice Chair  
Gary Hanson, Commissioner

## **SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

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April 17, 2009

Debra Niemi

Via e-mail only: [niemi@knology.net](mailto:niemi@knology.net)

Re: Keystone XL – financial condition

Ms. Niemi: Thank you for your interest in the proposed Keystone XL pipeline. The commission welcomes comments, especially constructive ones, regarding all of its cases, and we understand that a major transmission project like Keystone XL raises a number of legitimate concerns for those affected, particularly landowners.

Before I respond specifically to your question, I wanted to make you aware of the commission's procedures for submitting comments. I noticed you copied commissioners directly on your e-mail. Direct communication with the commission can, due to the filing status of the case, create problems. We encourage people to follow the proper submission procedures, both because they are required by South Dakota statute and the commission's rules, and because our docket filing and management systems are set up to ensure proper filing of all communications.

There are two problems with direct communications with commissioners outside the process. The first is legal. SDCL 1-26-26 provides:

*Unless required for the disposition of ex parte matters authorized by law, members of the governing board or officers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.*

Once TransCanada filed its application for a permit with the commission, this matter became a contested case. The commission's rules deal with this statutory directive by specifying how communications to the commission are to be made in contested cases. The first is ARSD 20:10:01:02.01:

*All correspondence with the commission shall be addressed to the commission's executive director at the commission's principal office. Correspondence with the commissioners shall not be addressed to an individual commissioner unless otherwise specifically authorized or directed by the commission.*

Besides the legal reasons for following the commission's communication and filing procedures, there is a practical reason as well. These procedures are designed to identify submittals as either formal docket filings or public comments. The process is important to ensure submittals are properly filed, made a part of the record where appropriate and made available to all parties, the public and the commission.

The commission will hold informal public input hearings on the Keystone XL application on April 27, 2009, 12 noon CDT in Winner, and at 7 p.m. MDT in Phillip, and on April 28, 2009 6 p.m. MDT in Buffalo. The purpose of these hearings are for the applicant to present information about the project to the public, and taking comments and questions concerning the project from members of the public. The commission will not, however, take formal evidence at these public meetings. Also, commission staff will be present at the meetings and can help with procedural questions.

In your e-mail dated Monday, April 13, 2009, you question whether the PUC will guarantee funding for the Keystone XL pipeline. I am unaware of any situation involving state government permitting where the agency guarantees performance of an applicant. The PUC is not a building partner in this project. Rather, it may, if the burden of proof is met, issue a building permit. Without the PUC permit, the applicant cannot build the pipeline in South Dakota. The applicant has a burden of proof to establish according to SDCL 49-41B-22 that:

- (1) The proposed facility will comply with all applicable laws and rules;*
- (2) The 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;*
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and*
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.*

The PUC acts as the judicial decision-making body to rule whether the applicant met its burden of proof, and thus receives a building permit. The PUC cannot base its orders on public opinion. Rather, the PUC must base its decision on rule, law and formal evidence. Formal evidence must be entered into the record in a formal judicial process. The final hearing has not been scheduled. We anticipate it will be held late fall 2009. At the conclusion of the hearing, the PUC will issue an order wherein the permit to build may be granted, denied or granted with particular conditions or limitations.

Although the PUC does not provide financing nor does it assist in the physical building process, the PUC has a strict statutory process it must follow in this case. The PUC's facility siting process is found in its entirety in SDCL Title 49 Chapter 41B. The PUC has an obligation to follow the rules of civil procedure and provide due process to both the pipeline company and the landowners. Finally, the PUC will hold a fair final hearing wherein all parties are provided an opportunity to submit evidence to further his or her cause.

Please contact me if I can be of assistance with our procedural rules or help you find information on our Web site.

Sincerely,

A handwritten signature in cursive script that reads "Kara Semmler". The signature is written in black ink and is positioned above the printed name and title.

Kara Semmler  
Staff Attorney