

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

<b>IN THE MATTER OF THE APPLICATION BY )</b>	<b>ORDER GRANTING IN PART</b>
<b>TRANSCANADA KEYSTONE PIPELINE, LP )</b>	<b>AND DENYING IN PART</b>
<b>FOR A PERMIT UNDER THE SOUTH DAKOTA )</b>	<b>MOTION TO COMPEL</b>
<b>ENERGY CONVERSION AND TRANSMISSION )</b>	<b>DISCOVERY</b>
<b>FACILITIES ACT TO CONSTRUCT THE )</b>	
<b>KEYSTONE XL PROJECT )</b>	<b>HP09-001</b>

On March 12, 2009, TransCanada Keystone Pipeline, LP, (Keystone) filed a siting permit application for the South Dakota portion of the proposed Keystone XL Project (Project). The Project will transport crude oil starting in Hardisty, Alberta, Canada and ending in Port Arthur and East Houston areas of Texas. On April 6, 2009, the Commission issued its Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status in this docket. The notice provided that pursuant to SDCL 49-41B-17 and ARSD 20:10:22:40 interested persons may be granted party status in this proceeding by making written application to the Commission on or before May 11, 2009.

On May 11, 2009, the Commission received a Motion for Extension of Time to File Application for Party Status from Dakota Rural Action requesting that the intervention deadline be extended to June 10, 2009. On May 15, 2009, the Commission received a Response to Motion to Extend Time from Keystone and a Motion to Establish a Procedural Schedule from Commission Staff. At its regularly scheduled meeting of May 19, 2009, the Commission voted unanimously to grant party status to Jasper, Seamans, D. Iversen, Colome, G. Iversen, Limpert, Harter, Vig, TCWUD, DRA, David Niemi, Debra Niemi and Lyman. The Commission also voted to deny the Motion for Extension of Time to File Application for Party Status, and in the alternative, the Commission voted to extend the intervention deadline to May 31, 2009. At its regularly scheduled meeting of June 9, 2009, the Commission voted unanimously to grant the Motion to Establish a Procedural Schedule and granted intervention to Iversen and Lueck.

On August 26, 2009, the Commission received a revised Application from TransCanada. On September 3, 2009, the Commission received a Motion for Extension of Time to Submit Testimony from DRA. At its regularly scheduled meeting of September 8, 2009, the Commission voted unanimously to grant the Motion for Extension of Time to Submit Testimony to extend DRA's time to submit testimony until September 22, 2009.

On September 18, 2009, Keystone filed Applicant's Response to Dakota Rural Action's Request for Further Discovery. On September 21, 2009, DRA filed a Motion to Compel Responses and Production of Documents Addressed to TransCanada Keystone Pipeline, LP Propounded by Dakota Rural Action (Motion).

The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapter 49-41B, specifically 49-41B-1, 49-41B-2, 49-41B-2.1, 49-41B-4, 49-41B-11, 49-41B-12, 49-41B-13, 49-41B-15, 49-41B-16, 49-41B-17, 49-41B-17.1, 49-41B-21, 49-41B-22, 49-41B-26, 49-41B-33, 49-41B-38, SDCL Chapter 1-26, specifically, 1-26-19.2, ARSD Chapter 20:10:22 and ARSD Chapter 20:10:01, specifically, 20:10:01:01.02 and 20:10:01:22.01.

At an ad hoc meeting on September 23, 2009, the Commission considered DRA's Motion to Compel. DRA and Keystone appeared through counsel. No other intervenors appeared. The

Commission considered each of the issues presented by DRA's Motion separately, primarily with respect to each separate discovery request at issue. The separate actions of the Commission on these issues follow. The term "protective order" as used herein means such protective order as is mutually agreed to by the parties or, if they cannot agree, is approved by order of the Commission.

DRA Request 1 – Following discussion, Keystone and DRA each agreed that it would be acceptable to them for Keystone to provide the risk assessment for high consequence areas (HCA) with the HCA locations redacted. The Commission voted unanimously to grant the Motion in part with respect to DRA Request 1 to the extent of requiring Keystone to provide to DRA its risk assessment(s) for HCAs in South Dakota with the HCA location information redacted.

DRA Request 2 – Following discussion, Keystone stated that it could provide documents in possession of both Keystone and affiliates related to equipment, methods and procedures for monitoring and maintaining depth of cover and would not object to production on DRA Request 2 if limited to that. DRA agreed that would be acceptable. The Commission voted unanimously to grant the Motion in part with respect to DRA Request 2 to require Keystone to produce information of both Keystone and its affiliates related to equipment, methods and procedures for monitoring and maintaining depth of cover and to deny the Motion with respect to DRA Request 2 except with respect to such documents.

DRA Request 3 – Keystone stated that it had produced all documents related to its abandonment policy including those of affiliates. The Commission voted unanimously to require Keystone to provide documents in possession of Keystone and affiliates related to the Canadian National Energy Board (NEB) Land Matters Consultative Initiative.

DRA Request 5 - The Commission voted unanimously to grant the Motion with respect to DRA Request 5 to the extent of requiring Keystone to produce non-privileged documents in its possession containing statements about oil spill liability provided by Keystone or its affiliates to non-privileged parties and to deny the Motion with respect to Request 5 with respect to other documents, on the grounds that liability for releases or other incidents are legal questions, not factual questions.

DRA Request 6 – The Commission voted unanimously to deny the Motion with respect to DRA Request 6 pertaining to preparation of the emergency response plan (ERP) to be filed with PHMSA on the grounds that approval of the ERP is a PHMSA decision and the request is unduly burdensome. The Commission later reconsidered this action and expressed the view that when a draft ERP has been completed, at least the draft and subsequent drafts should be produced to DRA. Keystone requested an opportunity to inquire into the status of development of the ERP and to report back to the Commission on the status and timeline of ERP development. The Commission took no further action pending such inquiry.

DRA Request 7 – Finding that the issue is within the jurisdiction of PHMSA and preempted by federal law and therefore not within the Commission's jurisdiction, the Commission voted unanimously to deny the Motion with respect to DRA Request 7 regarding additional documents responsive to PHMSA's ABD-09-01.

DRA Request 8 – Finding that the issue is within the jurisdiction of PHMSA and preempted by federal law and therefore not within the Commission's jurisdiction, the Commission voted unanimously to deny the Motion with respect to Request 8.

DRA Request 9 – The Commission voted unanimously to grant the Motion with respect to DRA Request 9 to the extent of requiring Keystone to provide to DRA analyses of the chemical and

physical composition of two crude oils likely to be transported by the Project that are representative of the two basic types of crude oil to be shipped and representative of the extremities of the spectrum of the oil types to be shipped.

DRA Request 10 – The Commission voted unanimously to grant the Motion with respect to DRA Request 10 to the extent of requiring Keystone to produce documents in its and its affiliates possession related to the worst case spill analysis, including analyses and other input documents supporting, or used in the analysis of, the numerical values and conclusions contained in the analysis, subject to a protective order with respect to confidential materials and any special protective provisions required with respect to any HCA locations or other confidential HCA information.

DRA Requests 12-19 – The Commission voted unanimously to grant the Motion with respect to DRA Requests 12, 14 and 16 through 18, to deny the Motion with respect to DRA Requests 13 and 19, to grant the Motion with respect to DRA Request 15 to require Keystone to produce the uniform package supplied to prospective shippers, subject to a protective order, and to deny with respect to DRA Request 15 except for such documents.

DRA Request 23 – The Commission voted unanimously to deny the Motion with respect to DRA Request 23.

It is therefore

ORDERED, that the Motion is hereby granted in part and denied in part as follows:

The Motion is granted in part with respect to DRA Request 1 to the extent of requiring Keystone to provide to DRA its risk assessment(s) for HCAs in South Dakota with the HCA location information redacted.

The Motion is granted in part with respect to DRA Request 2 to require Keystone to produce information of both Keystone and its affiliates related to equipment, methods and procedures for monitoring and maintaining depth of cover and is denied and is denied in part as to DRA Request 2 except with respect to such documents.

The Motion is granted in part with respect to DRA Request 3 to require Keystone to provide documents in possession of Keystone and affiliates related to the Canadian National Energy Board (NEB) Land Matters Consultative Initiative.

The Motion is granted in part with respect to DRA Request 5 to the extent of requiring Keystone to produce non-privileged documents in its possession containing statements about oil spill liability provided by Keystone or its affiliates to non-privileged parties and is denied in part as to Request 5 with respect to other documents.

The Motion is denied with respect to DRA Request 6. Keystone shall inquire into the status of development of the ERP and report back to the Commission on the status and timeline of ERP development and the availability of a draft for production to DRA.

The Motion is denied with respect to DRA Request 7 regarding additional documents responsive to PHMSA's ABD-09-01.

The Motion is denied with respect to Request 8.

The Motion is granted in part with respect to DRA Request 9 to the extent of requiring Keystone to provide to DRA analyses of the chemical and physical composition of two crude oils likely to be transported by the Project that are representative of the two basic types of crude oil to be shipped and representative of the extremities of the spectrum of the oil types to be shipped.

The Motion is granted in part with respect to DRA Request 10 to the extent of requiring Keystone to produce documents in its and its affiliates possession related to the worst case spill analysis, including analyses and other input documents supporting, or used in the analysis of, the numerical values and conclusions contained in the analysis, subject to a protective order with respect to confidential materials, including any special protective provisions required with respect to any HCA locations or other confidential HCA information.

The Motion is granted with respect to DRA Requests 12, 14 and 16 through 18, denied with respect to DRA Requests 13 and 19, granted in part with respect to DRA Request 15 to require Keystone to produce the uniform package supplied to prospective shippers, subject to a protective order, and denied in part with respect to DRA Request 15 except for such documents.

The Motion is denied with respect to DRA Request 23.

Dated at Pierre, South Dakota, this 2nd day of October, 2009.

<p align="center"><b>CERTIFICATE OF SERVICE</b></p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.</p> <p>By: <u>Arlene Kolbo</u></p> <p>Date: <u>10/2/09</u></p> <p align="center">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:

Dustin M. Johnson  
DUSTIN M. JOHNSON, Chairman *dk*

Steve Kolbeck  
STEVE KOLBECK, Commissioner

Gary Hanson  
GARY HANSON, Commissioner