

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

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**IN THE MATTER OF THE PETITION  
OF TRANSCANADA KEYSTONE  
PIPELINE, LP FOR ORDER  
ACCEPTING CERTIFICATION OF  
PERMIT ISSUED IN DOCKET HP09-  
001 TO CONSTRUCT THE KEYSTONE  
XL PIPELINE**

\* STAFF'S BRIEF IN RESPONSE  
\* TO JOINT MOTION TO  
\* VACATE OR, IN THE  
\* ALTERNATIVE, TO CLARIFY  
\* OR AMEND PROTECTIVE  
\* ORDER  
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\* **HP14-001**

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COMES NOW, Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this brief in response to the Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order (“Motion”) filed by TransCanada Keystone XL Pipeline, LP (“Keystone”).

**I. Procedural Background**

On April 14, 2015, hearings were held on motions to compel filed by several parties. The Commission granted the motions to compel filed by Dakota Rural Action, Yankton Sioux Tribe, and Standing Rock Sioux Tribe. The Commission directed Keystone to provide the compelled documents by April 17, 2015. As was discussed at the April 14 hearings, several documents would be filed as confidential. With that knowledge, on April 17, 2015, the Commission filed a Protective Order, which is the subject of the current Motion.

**II. The Commission did not err by issuing the Protective Order.**

Contrary to the assertion of the Motion, the Commission acted within its authority when it issued the Protective Order on April 17, 2015. The moving parties suggest that the

Commission violated the Rules of Civil Procedure by issuing a protective order without first receiving a motion to do so. This assertion fails to take into account the fact that the Commission's own administrative rules, rather than merely the Rules of Civil Procedure, are to be adhered to during any proceeding before the Commission. Specifically, the moving parties mention, but do not account for the provisions of ARSD 20:10:01:41, which provides

A request for confidential treatment of information shall be made by submitting the material to the commission along with the following information: (1) An identification of the document and the general subject matter of the materials or the portions of the document for which confidentiality is being requested; (2) The length of time for which confidentiality is being requested and a request for handling at the end of that time. This does not preclude a later request to extend the period of confidential treatment; (3) The name, address, and phone number of a person to be contacted regarding the confidentiality request; (4) The statutory or common law grounds and any administrative rules under which confidentiality is requested. Failure to include all possible grounds for confidential treatment does not preclude the party from raising additional grounds in the future; and (5) The factual basis that qualifies the information for confidentiality under the authority cited. Information shall be sent to the commission's executive director, unless another person is designated. Each page must clearly be marked "confidential" in large, bold letters. Information submitted by mail or hand delivery must be in a separate, sealed envelope and clearly state in large, bold letters on the envelope that confidential treatment is requested. If filed electronically, the information must be filed as a separate document.

Keystone clearly stated at the April 14 hearings that there would be information which was confidential. Some of that information would even be confidential by law or at the direction of another regulatory body, rather than at the discretion of Keystone. Thus, the assertion that Keystone never made the request, and the Commission acted without cause to do so is incorrect. When the Commission moved to grant the motions to compel, the method of dealing with the confidential information was addressed. The Commission was clearly aware of and had

contemplated the way in which it wished to deal with confidential information. Issuing its standard protection order, with an addition to comply with the April 14 Orders, was neither surprising nor unwarranted.

The Commission has ample experience in dealing with confidential filings and in this proceeding has acted consistently with prior proceedings. The implication that the Commission acted arbitrarily by issuing the Protective Order is completely without merit.

### **III. The terms of the Protective Order are appropriate.**

As evidenced by the discussion prior to the granting of the motions to compel, the Commission was well aware of the sensitivity of some of the information Keystone would be compelled to produce. The Commission, therefore, felt it necessary to make this information available to a limited number of people, specifically people who are bound by an ethical obligation by virtue of their career not to violate any party's confidentiality.

The moving parties now suggest that the confidential information should be made available to their clients, as well. When one considers the vast number of persons who could be deemed "clients" of a lawyer representing a group or entity, the protective order becomes meaningless. Therefore, if the Commission agrees that all information viewable by an attorney should also be viewable by the client, it may be necessary to reconsider the orders granting the motions to compel to determine, following an *in camera* inspection by the Commission, to determine whether those documents are, in fact, confidential and, if so, whether they should be viewable by any party.

#### **IV. No party is prejudiced by the issuance of the Protective Order.**

Staff, like any other party, is tasked with diligently researching and inquiring as to whether or not Keystone can continue to meet the conditions upon which the permit was granted. Staff, has also reviewed the Final Supplemental Environmental Impact Statement (FSEIS) and found that relevant information was adequately addressed therein. Because adequate information is available in the FSEIS, Staff fails to see the need to release confidential information to a seemingly innumerable amount of people.

Furthermore, the Protective Order need not be amended because the confidential information is accessible by the necessary persons. Keystone agreed in a telephone conversation that included all attorneys who were privy to the confidential information, as well as Staff, that expert witnesses and co-counsel could view the confidential information, provided they executed the protective agreement. This compromise has now been memorialized for the record in the Affidavit of William Taylor in Opposition to Motion to Vacate Protective Order. Therefore, a new or amended protective order is not warranted. Regardless of the existing Protective Order, it is initially within Keystone's discretion to release its confidential information to whomever it deems necessary, and it has agreed in writing to do so.

#### **V. Access to confidential information should not be expanded to pro se intervenors absent a showing the confidentiality will be protected.**

While Staff strongly believes in adequate disclosure for all intervenors in order to develop a strong case, this need must be balanced against the need for security based on the public interest. As noted earlier, Staff has prepared its case with within the confines of the

controlling recertification standards without any need for confidential information of the type TransCanada is required to protect.

Attorneys who have either intervened or who have been fully active during the matter representing clients' interests are aware of the seriousness of keeping confidential material confidential. These attorneys must bear the consequences of failing to do so. It is both unclear and questionable if the similar responsibilities could be assessed to pro se intervenors. Unless and until there is a clearly enforceable method to assure confidentiality with pro se intervenors, and that confidential information is critical to development of a position necessary for the standards of recertification, the public interest demands caution before releasing confidential material.

## **VI. Conclusion**

Because the Commission acted consistently with pertinent administrative rules when it issued the Protective Order, the Protective Order should not be vacated. Staff further recommends the Commission not amend the Protective Order for the reasons stated above.

Staff does not, in this brief, take a position as to whether or not individual documents were properly deemed confidential by Keystone, but is prepared to do so at the hearing should the Commission wish to address documents individually.

Dated this 28th day of April, 2015.

  
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