

BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

DOCKET NO. HP07-001

IN THE MATTER OF THE APPLICATION OF TRANSCANADA KEYSTONE PIPELINE,
LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND
TRANSMISSION FACILITY ACT TO CONSTRUCT THE KEYSTONE PIPELINE
PROJECT

Surrebuttal Testimony of John Muehlhausen on Behalf of the
Staff of the South Dakota Public Utilities Commission

November 28, 2007

1 BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

2 SURREBUTTAL TESTIMONY OF JOHN MUEHLHAUSEN

3 **Q: Please state your name and business address.**

4 A: John Muehlhausen of Merjent, Inc. of 615 First Avenue Northeast, Suite 425,
5 Minneapolis, Minnesota 55413.

6 **Q: Did you provide direct testimony in this proceeding?**

7 A: Yes.

8 **Q: In surrebuttal, to whose rebuttal testimony are you responding?**

9 A: I am responding to the rebuttal testimony of L.A. Buster Gray.

10 **Q: Do you agree with L.A. Buster Gray's rebuttal testimony, which states, "the best**
11 **party to monitor and assess crop's productivity after a two year period is the**
12 **landowner, and should there be a productivity loss issue, the landowner will advise**
13 **Keystone."**

14 A: No, I do not necessarily agree that the best party to monitor and assess crop productivity
15 is the landowner, although in some instances it may be. Although diminished
16 productivity will, in many instances, be visually obvious from the crops' physical
17 condition, that may not always be the case. Furthermore, proper monitoring requires
18 time, money, expertise, and other resources. A landowner may or may not have time,
19 money, expertise, or other resources at their disposal to effectively assess crop
20 productivity. Regardless, TransCanada indicated that it would monitor the yield of land
21 impacted by construction with the help of agricultural specialists when requested by the
22 landowner.

1 The real issue associated with crop monitoring centers around the passive nature
2 of TransCanada's proposal, which requires monitoring only when requested by the
3 landowner. This passive condition assumes fields have returned to preconstruction yields
4 unless a landowner has taken the time to identify areas of diminished productivity and
5 made an effort to complain to TransCanada. It shifts a portion of the responsibility for
6 returning fields to preconstruction conditions from TransCanada onto the landowner. It
7 effectively amounts to "acceptance by omission" and is further complicated by the fact
8 that landowners may not be aware that they can or should request yield monitoring in
9 suspected areas of diminished productivity, especially when two or more years have
10 passed after construction.

11 The recommendation I provided in my direct testimony would require
12 TransCanada to monitor the yield of agricultural lands and hay fields until successful
13 restoration could be demonstrated, unless waived in writing by the landowner. This
14 would keep the burden of restoration largely on TransCanada. Understandably,
15 TransCanada may be concerned with the cost associated with monitoring of all affected
16 agricultural lands and hay fields in South Dakota after construction. As an alternative to
17 my original recommendation, the Commission could consider a less comprehensive, but
18 cost-saving measure that would require TransCanada to:

- 19 • **Send a letter to all owners of agricultural land and hay fields within the**
20 **project work area reminding them of their right to request yield monitoring if**
21 **they believe productivity has been diminished as a result of construction. The**
22 **letter should be sent in the second quarter of each year for three years**
23 **following construction. Upon landowner request, TransCanada should**

1 monitor the yield of agricultural lands and hay fields impacted by
2 construction. Monitoring should be conducted until the area is successfully
3 restored to yields which are similar to adjacent portions of the same field that
4 were not disturbed by construction. TransCanada should compensate the
5 landowner for reduced yields at market rate until the area is successfully
6 restored.

7 Q: Can you comment on L.A. Buster Gray's rebuttal testimony regarding mitigation
8 for pipeline construction near residences?

9 A: Yes, in his rebuttal to my direct testimony Mr. Gray did not dispute or refute any of the
10 mitigation measures for pipeline construction near residences, he merely outlined some of
11 the mitigation measures already contained in TransCanada's Construction Mitigation and
12 Reclamation Plan. The Construction Mitigation and Reclamation Plan is a very good
13 document and TransCanada should be commended on the plan. However, there is room
14 for improvement. One area that could be improved is mitigation for pipeline construction
15 near residences. The additional measures in my direct testimony improve, clarify, and/or
16 emphasize residential mitigation in the plan. Following is a point-by-point discussion of
17 the measures provided in my direct testimony.

- 18 • **TransCanada should coordinate construction work schedules with affected
19 residential landowners prior to the start of construction.**

20 The Construction Mitigation and Reclamation Plan proposed by TransCanada
21 requires only that residents be notified prior to construction; it does not require the
22 coordination of the construction work schedules with affected residents. TransCanada
23 should consider input from the affected residential landowner regarding the most

1 satisfactory time for construction through the area. Although TransCanada may not be
2 able to satisfy all schedule requests, many requests may be easy to accommodate.

- 3 • **TransCanada should maintain access to all residences, except for brief**
4 **periods essential to pipe-laying as coordinated with affected residential**
5 **landowners.**

6 The Construction Mitigation and Reclamation Plan proposed by TransCanada
7 requires that access and traffic flow in residential areas be maintained during construction
8 activities, particularly for emergency vehicles. However, it is not clear if access would
9 be maintained to each home, or if access would just be maintained on the streets in the
10 vicinity of the homes. The idea that access to individual homes could be blocked during
11 construction was derived, in part, from Mr. Gray's comments during the Commission's
12 public meetings where he suggested that special arrangements could be made when
13 access needs to be kept open to a particular home (see page 83 of the transcript to the
14 June 27, 2007, public meeting in Britton, South Dakota). The purpose of the proposed
15 mitigation is to clarify that, if TransCanada would block access to a residence, they
16 should do so only for the brief period essential to laying the pipe and should coordinate
17 the timing of the closure with the affected residential landowners.

- 18 • **TransCanada should install temporary safety fencing to control access and**
19 **minimize hazards associated with an open trench in residential areas.**

20 The Construction Mitigation and Reclamation Plan proposed by TransCanada
21 requires fencing the edge of the construction work area adjacent to residences for a
22 distance of 100 feet on either side of the residence and fencing or plating open ditches
23 during non-construction activities. These are important safety precautions, but may not

1 be sufficient in all locations. Some residential areas may have swing sets, sand boxes,
2 barbeque pits, outdoor patio sets, trampolines, or other areas that should be fenced but are
3 more than 100 feet from the residences. The mitigation in my direct testimony is general
4 in nature and is intended to account for fencing these areas as well, although being more
5 specific could also be beneficial.

- 6 • **TransCanada should notify affected residents in advance of any scheduled**
7 **disruption of utilities and limit the duration of any interruption to the**
8 **smallest time possible.**

9 The Construction Mitigation and Reclamation Plan proposed by TransCanada
10 does not address disruption of utilities. If TransCanada would disrupt utilities,
11 TransCanada should notify affected residents in advance and limit the duration to the
12 smallest time possible.

- 13 • **TransCanada should repair any damages to property that result from**
14 **construction activities.**

15 The Construction Mitigation and Reclamation Plan requires TransCanada to
16 restore all lawn areas, shrubs, specialized landscaping, fences, other structures, *etc.*
17 consistent with its preconstruction appearance or the requirements of the landowner
18 (presumably as specified in TransCanada's construction agreement with the landowner).
19 This is consistent with the recommendation in my direct testimony.

- 20 • **TransCanada should restore all areas disturbed by construction to**
21 **preconstruction conditions or better.**

22 The Construction Mitigation and Reclamation Plan requires TransCanada to
23 restore all lawn areas, shrubs, specialized landscaping, fences, other structures, *etc.*

1 consistent with its preconstruction appearance or the requirements of the landowner.

2 This is consistent with the recommendation in my direct testimony.

3 **Q: Can you comment on L.A. Buster Gray's rebuttal testimony regarding restoration**
4 **of roads?**

5 A. Mr. Gray's rebuttal testimony was in response to my direct testimony in which I
6 recommended that TransCanada be responsible for "restoring [road] deterioration caused by
7 construction traffic such that the road is returned to its preconstruction condition or better."
8 Based on his rebuttal, Mr. Gray is concerned that the mitigation, as written, would require road
9 improvements on every road where a project-related vehicle has traveled, and all roads would be
10 required to be restored to their exact preconstruction state. This is not the intent of the
11 mitigation. The mitigation is intended to require TransCanada to restore evident, discernible
12 damage and deterioration caused by construction traffic such that the restored road would be of a
13 makeup, quality, and integrity consistent with its preconstruction condition or a better condition.
14 The mitigation could be clarified as follows:

- 15 • **TransCanada should implement a regular program of road maintenance and**
16 **repair throughout active construction to keep paved and gravel roads in an**
17 **acceptable condition for travel by the public. Following construction,**
18 **TransCanada would be responsible for restoring evident, discernible damage**
19 **and deterioration caused by construction traffic such that the restored road**
20 **would be of a makeup, quality, and integrity consistent with its**
21 **preconstruction condition or a better condition. Repairs during and after**
22 **construction would be consistent with federal, state, and local requirements.**