

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE	*	HP 07-001
APPLICATION BY TRANSCANADA		
KEYSTONE PIPELINE, LP FOR A	*	
PERMIT UNDER THE SOUTH		INTERVENER WEB WATER
DAKOTA ENERGY CONVERSION	*	DEVELOPMENT ASSOCIATION'S
AND TRANSMISSION FACILITIES		REPLY BRIEF
ACT TO CONSTRUCT THE KEYSTONE	*	
PIPELINE PROJECT		
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INTRODUCTION

This Brief is submitted by Intervener WEB Water Development Association in response to the Post Hearing Briefs filed by Applicant and the Commission Staff. The Brief is supplemented by WEB's Objections to Keystone's Proposed Findings of Fact and Conclusions of Law, which are being submitted in conjunction with the Brief.

PROMISES

One of the most concerning aspects of TransCanada's application is that it is so heavily based upon actions TransCanada promises to take. Numerous paragraphs in Keystone's Proposed Findings of Fact state what the Applicant "will" do. TransCanada has not submitted an emergency response plan. They have not completed an integrity management plan. WEB recognizes that, under federal regulations, such plans are not yet due. TransCanada could not, however, provide information as to where personnel will be stationed, other than in Yankton. (TR 501-02). Although TransCanada states it is likely first responders will be located elsewhere in South Dakota, the location of such individuals was not identified. (TR 515-16). TransCanada could not even state where its regional office would be located. (TR 516). Inability of TransCanada to supply such information is troubling.

Page 10 of TransCanada's Brief cites the final EIS. What is important to note is that the EIS states the pipeline project will cause limited adverse impacts "if designed, constructed and operated in accordance with the Project Description . . . ." (EIS § ES.6.16, p. ES-35). Without more information providing assurances that TransCanada will develop appropriate plans to protect South Dakota's environment and its inhabitants, TransCanada's application should be denied. If, however, the permit is granted, the Commission should continue to monitor the project, as recommended by staff witness Tom Janssen (TR 1679-80), and should require TransCanada to post a substantial bond to provide funds for the cleanup of a major spill.

### LEAKS

Although attempting to downplay the possibility as much as possible, TransCanada cannot deny that pipeline leaks will almost undoubtedly occur. Page 11 of TransCanada's Post Hearing Brief acknowledges "that abnormal operation of the proposed Keystone Pipeline could pose some threat of an event that would cause serious injury to the environment, such as a substantial pipeline leak or spill . . . ." The DNV report and testimony from TransCanada's own witnesses at the hearing acknowledged this possibility. (TR 283, 387, 410-11, 500-01, 505-07; EX TC 6 D, ¶ 25; EX TC 8 D, ¶ 8). The final EIS also recognizes the potential for leaks to occur. "System emergencies could result from natural or human-induced events that lead to damage to critical components of the pipeline system." (EIS § 2.3.2.1, p. 2-38). TransCanada extols the virtues of fusion bond epoxy. The method for welding pipe and applying the FBE is described in §§ 2.2.2.4 and 2.2.2.5 of the final EIS (p. 2-23). Despite the measures taken to ensure the product is correctly applied, it cannot be seriously argued there is no chance for human error and misapplication of the epoxy in this process.

There is no question the quality of pipelines has improved. The chances a pipe manufactured 50 years ago will leak certainly is much greater than the chances a similar pipe

manufactured today will leak. Similar statements can be made regarding numerous products. The chances an airplane manufactured 50 years ago will crash are probably much greater than the chances of one manufactured today crashing. Nonetheless, airplanes still crash. Pipeline leaks still occur. If TransCanada's permit is granted, additional conditions should be imposed by the Commission to protect the environment and the inhabitants in South Dakota.

### ROUTE

Although SDCL 49-41B-36 provides the Commission does not have the authority to designate a route, there is nothing in that statute which states the Commission cannot consider the route in determining whether the pipeline poses a threat under SDCL 49-41B-22. TransCanada contends the route was chosen only after careful consideration of various factors. The evidence presented at the hearing indicates otherwise. The route change to send the pipeline through the Hecla Sands area was not made until after the filing of the initial application on April 27, 2007. (TR 121-22; TC EX 3 D, ¶ 10; TC EX 9; WEB EX 1). This rerouting caused the pipeline to run through an area of shallow and surficial aquifers. On page 23 of its Brief, TransCanada cites the testimony of Heidi Tillquist to the effect that the chance of a spill from the pipeline affecting an aquifer is low. This is the same Ms. Tillquist who did not even bother to visit the Marshall County area even though staff witness Brenda Winkler testified this was a hydrogeologic sensitive area. (TR 425, 785, 1084; STAFF EX 11, p. 1).

Page 23 of TransCanada's Brief also cites testimony from Ms. Tillquist concerning how far BTEX compounds might travel in the event of a spill. According to the cited testimony, a study of over 500 sites with BTEX contamination in the ground water found that in, 75 percent of the cases, the contaminant plume was within 250 feet and, in 80 percent of the cases, the contaminant plume was stable or decreasing. Looking at these statistics from the other side, this means that, in at least 125 cases, the contaminant plume moved more than 250 feet and, in at

least 100 cases, the contaminant plume was not stable or decreasing. Frankly, the statistics cited by Ms. Tillquist are not particularly reassuring.

WEB presented respected geologists Drs. Perry Rahn and Arden Davis as witnesses. Both of them testified that, geologically speaking, a much better route could have been chosen for the pipeline. From the testimony presented, it appears TransCanada considered and rejected a route running near I-29. TransCanada then settled upon the route contained in the original application, which route was then modified so as to run through the ecologically sensitive Hecla Sands area. It is clear TransCanada did not spend nearly enough time locating an appropriate route for its pipeline.

This failure to adequately study the proposed route is also evidenced by TransCanada's treatment of cultural resources. Page 13 of TransCanada's Brief contains a heading referencing "extensive environmental and cultural resource studies" conducted by TransCanada. The text of the Brief following this heading makes virtually no reference to cultural resources. The reason for this is clear; TransCanada did very little with regard to cultural resources. Although Paige Hoskinson Olson from the State Historic Preservation Office testified she would normally expect to see a 100 percent cultural survey for a project of this type, TransCanada conducted only a 17 percent survey. (TR 151-52, 1010-12). According to the final EIS, the South Dakota State Historic Preservation Office has recommended that TransCanada conduct additional cultural resource surveys. (EIS § 5.11.2(3), p. 5-16).

Before a permit is granted, TransCanada should be required to demonstrate to the Commission that it has appropriately analyzed its proposed route so as to consider geologic factors, cultural resources and other appropriate factors.

## SPECIAL PERMIT

Much evidence was presented at the hearing regarding TransCanada obtaining a special permit allowing for the use of thinner pipe along most of the pipeline route. Page 20 of TransCanada's Brief states that the thinner wall pipe does not reduce the safety of the pipeline. This was consistent with the testimony of TransCanada witness Meera Kothari who answered "no" when asked, "Everything else being equal, a thicker pipe would be less likely to leak than a thinner one." (TR 291). TransCanada's position makes no sense in light of paragraph 15 of the special permit which provides: "Pipe installed in pipe stations, road crossings, railroad crossings, launchers/receiver fabrications, population HCAs and navigable waters must comply with the design factor in 49 CFR 195.106."<sup>1</sup> (TC EX 11). TransCanada claims the areas mentioned in paragraph 15 of the permit are excluded "primarily because of stress concerns during installation." (TRANSCANADA BRIEF, p. 21). The permit itself says nothing of the kind. TransCanada does not explain what the added stresses might be in population areas. TransCanada's position is contradicted by the testimony of its own vice president, Robert Jones.

COMMISSIONER HANSON: It causes me to wonder why the wall thickness would be greater in some areas than in others. Obviously, I am going to assume it is for safety purposes.

THE WITNESS: Yes.

(TR 106). Mr. Jones went on to explain that the reason for thicker pipe in certain areas was to protect against possible damage from excavation. He said nothing about stress concerns during installation. (TR 106).

TransCanada's arguments regarding the special permit serve to highlight its apparent unwillingness to acknowledge the dangers created by the pipeline. Thinner pipe is more likely to

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<sup>1</sup> Title 49 CFR § 195.106 requires use of the .72 design factor.

leak. Leaks can occur and go undetected for considerable periods of time. These factors must be considered by the Commission when making its final decision with regard to this matter.

### WEB'S INVOLVEMENT

Both TransCanada and the Commission Staff make several references to WEB and the testimony of its general manager, Curt Hohn, in their Post Hearing Briefs. (*See* TRANSCANADA BRIEF, pp. 8-10, 31-32; STAFF BRIEF pp. 2, 6, 11). Some of these statements are critical of WEB or Mr. Hohn. For instance, in discussing the granting of WEB's request for an extension of time in which to pre-file direct testimony, page 2 of the Staff's Brief states the extension was granted even though WEB "did not demonstrate good faith attempts to meet the original deadline." This is a strange statement in light of the fact there is nothing in the Commission's November 13, 2007 Second Scheduling and Procedural Order indicating WEB did not demonstrate good faith. Furthermore, the Commission's original September 14, 2007 Scheduling and Procedural Order states that relief from that Order will be granted "only if the Commission finds good cause has been demonstrated for the extension." Presumably, since the Commission granted the request for an extension, the two commissioners voting in favor of WEB's motion found there to be good cause.

TransCanada's Brief makes a point of arguing that WEB's testimony regarding its possible use of water from the Middle James Aquifer is belied by the fact WEB is expanding its capacity to pump and treat water from the Missouri River. (TRANSCANADA BRIEF, p. 31). As Mr. Hohn explained, the potential for economic development exists in the Webster area and it would be much more economical for WEB to obtain additional water for that area from the Middle James Aquifer then to pump it all the way from the Missouri River. (TR 1317-19, 1404-05).

TransCanada's Brief attempts to impeach Mr. Hohn with regard to statements about the AWWA study supposedly made by him at informal summer hearings held by the Commission. (TRANSCANADA BRIEF, p. 32). TransCanada does not provide a citation to any such statements nor was any attempt made to impeach Mr. Hohn at the hearing with those statements. Such an argument is inappropriate. Despite TransCanada's reliance upon the AWWA study regarding exposure of PVC pipe to BTEX, Mr. Hohn testified he has seen water contaminated when PVC pipe was exposed to gasoline. (TR 1356-57). Furthermore, the study relied upon by TransCanada did not test crude oil. The Commission is referred to WEB's proposed paragraphs 91 through 94 of WEB's Proposed Findings of Fact regarding this issue.

WEB is concerned about the Keystone Pipeline both for its potential effect on rural water pipelines and the State of South Dakota in general. WEB participated in the hearing process in good faith. It is interesting to note that both TransCanada, and particularly the Staff, cite testimony from state witnesses. (See TRANSCANADA BRIEF, pp. 27, 31-32; STAFF BRIEF, pp. 8-10, 12, 14). With the exception of one DENR witness, none of these witnesses would have been heard had it not been for WEB subpoenaing them. The concerns raised by WEB are legitimate and should be considered by the Commission.

#### PREEMPTION

TransCanada's Brief spends several pages discussing preemption. TransCanada raised no issues regarding preemption leading up to or during the hearing. TransCanada submitted substantial evidence at the hearing regarding safety considerations. Is it now TransCanada's position that all such evidence was irrelevant because the PUC has no authority over safety matters? It is unclear as to the purpose for TransCanada's arguments concerning preemption. The Commission is urged to carry out its responsibilities and require TransCanada to meet its burden of proof as described in SDCL 49-41B-22.

## RECOMMENDATIONS

Should the Commission determine TransCanada's application should be granted, the Commission should, as permitted by SDCL 49-41B-24, impose certain terms and conditions on the permit. The Commission is urged to impose those conditions described on pages 4 and 5 of WEB's Post Hearing Brief. The Commission is also encouraged to impose the conditions recommended on pages 15 through 23 of the Staff's Brief.

## CONCLUSION

No one expected the Titanic to sink. No one expected the World Trade Center towers to collapse as they did. Man made objects are subject to failure. The TransCanada pipeline is no different. Based on the evidence presented, the Commission should deny TransCanada's application at this point. Should the Commission decide to grant the application, the various recommendations suggested by the PUC staff, WEB and other interveners should be adopted.

Dated this 31st day of January, 2008.

SIEGEL, BARNETT & SCHUTZ, L.L.P.



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