

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION : HP 09-001
BY TRANSCANADA KEYSTONE
PIPELINE, LP FOR A PERMIT UNDER :
THE SOUTH DAKOTA ENERGY
CONVERSION AND TRANSMISSION : APPLICANT'S RESPONSE TO
FACILITIES ACT TO CONSTRUCT THE DAVID NIEMI'S LETTER FILED
KEYSTONE XL PROJECT : ON JANUARY 13, 2010

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Applicant TransCanada Keystone Pipeline, LP (Keystone) responds to David Niemi's January 13 filing as follows:

Preliminary Statement

Mr. Niemi was granted party status in this case on May 20, 2009. He was served with all pre-filed testimony, notices, and orders. He elected not to appear, offer meaningful pre-filed direct or rebuttal testimony, or participate in the hearing. Now, belatedly, he has filed a letter in which he purports to represent¹ a group of unidentified landowners, makes a series of unsupported "factual" allegations, and argues for certain permit conditions.

¹ Under South Dakota law only a licensed attorney is permitted to represent others in a contested matter before the Public Utilities Commission. A non-lawyer may appear before the Commission only on his own behalf. See Attorney General's Opinion No. 76-56, May 19, 1976. Mr. Niemi and the landowner groups he purports to speak for have been represented for at least seven months by Cheyenne, WY, attorney Frank Falen. Keystone has had conversations with attorney Falen periodically since late June.

Mr. Niemi's letter is not evidence. None of his purported factual statements were offered in evidence, and none have been tested by cross-examination. All are unsworn and made out-of-court, hearsay, and untimely in presentation. Commission orders, rules, SDCL 1-26 *et seq.*, and the rules of civil procedure govern introduction of evidence in this proceeding. Mr. Niemi's presentation does not constitute evidence under any of the foregoing. It would be patently unfair to consider Mr. Niemi's letter as evidentiary foundation for the conclusions he reaches and the outcome he advocates. It would be equally unfair to require Keystone, at this late hour, to attempt to rebut the "facts" he purports to present, as they are not in evidence.

Argument and Authority

Mr. Niemi's presentation covers a host of subjects, sometimes intermingles one subject with another, and then returns to subjects previously discussed. For continuity of presentation, Keystone has organized Mr. Niemi's subjects and addressed each separately.²

² Many of Mr. Niemi's subjects were addressed in detail in the briefs submitted by Keystone and the Public Utilities Commission Staff on January 20, 2010. In the interests of brevity, Keystone will reference those briefs where appropriate rather than replicate portions of the briefs here.

1. Keystone's Negotiation with Landowners

Contrary to Mr. Niemi's assertion, Keystone has **not** rejected negotiation with Mr. Niemi and the three landowner groups he represents. Keystone negotiated survey access with Mr. Niemi's lawyers and Mr. Niemi himself last summer. At the request of the landowner groups, Keystone's executives met with the leaders of the Nebraska, South Dakota, and Montana groups and their lawyers in Rapid City on December 4.³ Mr. Niemi attended as one of six representatives of the three-state group. Virtually all of the issues Mr. Niemi raises in his letter were raised in the all day meeting. Keystone did not reject anything as inappropriate for discussion. All issues raised by the landowner groups were taken away for review and consideration. The parties agreed to meet again for further discussion, now set February 11. Keystone welcomes the meetings, and has every intention of negotiating in good faith towards resolution of the issues raised by the landowners.

2. Role of the Commission Staff

Mr. Niemi argues that it is difficult for individual landowners to address issues presented by the proposed pipeline because of the technical complexity of the application. In large measure, the Public Utilities Commission Staff de-mystified the application for him. Charged with protecting the public interest, the Commission's staff hired well-

³ Keystone was represented by John Hunt, the TransCanada executive in charge of land and right of way acquisition for the project. He was accompanied by Doug Reichley, the chief land agent for the project. The landowner groups were accompanied by attorney Falen and his associate Abby Jones.

qualified experts to read and study the application and assist in understanding and addressing issues presented by the proposed project. The experts reviewed the application and provided comments, Keystone answered data requests in response to the expert's inquiries. Permit conditions were recommended by the experts. The experts appeared at the hearing one by one, and were questioned and cross examined. All of the information developed by the experts, including transcripts of their testimony was available to Mr. Niemi. Mr. Niemi, the landowner groups and their lawyers had every opportunity to access the resources the Commission and Staff provided, but chose not to. The Commission provided Mr. Niemi with the opportunity to fully understand the application and its nuances.

3. Condemnation

Mr. Niemi asserts that condemnation fails to offer landowners meaningful protections. Condemnation is a product of the South Dakota Constitution and statutes, designed to protect landowner's rights, supported by more than a century and a quarter of jurisprudence. SDCL 21-35-10.1 affords Mr. Niemi the opportunity to challenge Keystone's right to take his property by condemnation. If his property is taken, Mr. Niemi is entitled to *just compensation*⁴ for the pipeline crossing his property, not fair market value as he contends. Just compensation includes consequential damages to the

⁴ See Article VI, Section 13 and Article XVII, Section 18 of the South Dakota Constitution.

remainder of Mr. Niemi's property. Just compensation is measured by comparing the value of his property before the pipeline is constructed with the value afterwards.⁵ If Mr. Niemi is concerned the pipeline will adversely affect the safety, usefulness and value of his property, his remedy is to seek compensation for the loss in the condemnation process, not complain to this Commission that he is without a remedy.

Mr. Niemi argues that compensation for the easement will be eaten up in lawyer's and expert's fees, making it impracticable for a landowner to defend himself. South Dakota law puts Keystone at risk for failing to compensate landowners fairly. SDCL 21-35-23 allows a landowner to recover attorney fees and the costs incurred for hiring two expert witnesses if Keystone's compensation offer is less than 80% of the jury's condemnation award.

4. Paleontological Resources

In a footnote to page 3 of his letter, Mr. Niemi raises the issue of protection of paleontological resources, particularly in Harding County. Keystone is very aware of the paleontological resources and the issues they present. Keystone has adopted a plan for dealing with paleontological resources. Keystone's management of those issues was

⁵ *Basin Elec. Power Co-op V. Cutler*, 254 N.W.2d 143 (S.D. 1977).

discussed in the hearing and is fully addressed in its initial brief, in the Staff's brief, and in Keystone's response to the Staff's brief.

5. Special Permit

Mr. Niemi contends that the special permit solicited by Keystone dramatically increases the risk of leaks and environmental damage. There is no evidence that operating the pipeline under special permit conditions increases the risk of leaks. To the contrary, the record testimony demonstrates the special permit conditions assure that there is no risk increase. The special permit is discussed in section 3.B.5 on pages 19 and 20 of Keystone's January 20, 2010, brief.

6. Landowner Liability.

Mr. Niemi argues, on pages four and five of his letter, that he can be held liable for the cost of cleanup if the pipeline leaks. Mr. Niemi's expression of the law governing responsibility for cleanup expense is inaccurate.

SDCL Chapter 34A-12 governs clean up liability for crude oil pipeline leaks. SDCL § 34A-12-1(10) defines "responsible person" as the owner or operator of the pipeline or the person who caused the leak. SDCL § 34A-12-10 directs the Department of Environment and Natural Resources ("DENR") to compel the responsible person to perform the cleanup. Landowners are not included in the definition of responsible persons, unless they caused the leak.

SDCL Chapter 34A-2 governs discharge of crude oil into the waters of the state. SDCL § 34A-2-48 requires persons who spill pollutants in proximity to state waters to clean up the spill. SDCL § 34A-2-96 prohibits petroleum discharges into the waters of the state and requires the owner or operator of the leaking facility to contain and recover the spill, subject to reimbursement by the person causing the spill.

SDCL Chapter 34A-18, adopted in 2008 in response to the construction of the first Keystone pipeline, compels Keystone to develop, in consultation with the DENR, a comprehensive oil spill response plan that addresses spill detection and spill cleanup procedures. SDCL § 34A-18-8 compels Keystone to execute the response plan “. . . in the event of an oil spill regardless of the cause of the spill or the party responsible for the spill.” The application and its supporting documents contain numerous references to the plan and witness Hayes testified about it at length. The emergency response plan is discussed in section 3.B.7 on pages 23 and 24 of Keystone's January 20, 2010, brief.

In 1988 the Legislature enacted SDCL 34A-2-3 *et seq.*, creating the Regulated Response Fund and providing for its funding. As directed by SDCL 34A-12-4 (3), under the management of the Secretary of the DENR, the fund pays for clean up when the responsible person cannot be identified or does not clean up a spill. The federal Oil Spill Liability Trust Fund, 33 USCA 1321, is a similar fund for crude oil spills that impact the

waters of the United States. See the testimony of Kimberly McIntosh, commencing page 483 of the hearing transcript.

Finally, Keystone's proposed Easement addresses landowner liability. The proposed easement provides

“Grantee will pay all commercially reasonable costs and expenses that result from the Grantee's, or anyone acting on the Grantee's behalf, use of the Easement Area or Temporary Work Space, including but not limited to damages caused by petroleum leaks and spills. . .”.

On pages six and seven of his letter, Mr. Niemi proposes a permit condition that purportedly deals with landowner liability. In some aspects the proposed condition follows and in others conflicts with South Dakota law. State law clearly places responsibility on the pipeline company for leaks and provides a fund to execute a clean up when the pipeline company does not act. The landowner is not included in the clean up liability chain. Mr. Niemi's proposed condition is either already spelled out in South Dakota law or amends South Dakota law. The Commission does not have the authority to adopt a permit condition that changes state law. Accordingly the proposed condition should be rejected.

7. Decommissioning

Mr. Niemi suggests a condition requiring Keystone to remove the pipeline when operations end and to post a bond dealing with removal of the pipeline. Nothing in South Dakota law authorizes the Commission to impose a condition requiring removal of the

pipeline or posting a bond to cover removal costs, nor is there any evidence in the record to support such a condition. See the Staff brief of January 20, 2010, pages 10 and 11 for an explanation of the Staff's view of federal pre-emption of decommissioning.

While the Commission may exercise a degree of discretion in determining appropriate permit conditions, as noted earlier, the Commission's discretion is not unbridled. There must be some evidentiary or legal basis to support a condition. Nothing in the evidence or the statutes supports the argument that the pipe must be removed on decommissioning or that a bond to insure removal is necessary.

No evidence was offered demonstrating that Keystone will not be financially able to take all steps lawfully required to decommission the pipeline, when and if that should that occur. Mr. Niemi infers that Keystone will disappear and not act responsibly if and when the pipeline is decommissioned. There is nothing in the record to support that conclusion. The only evidence in the record is that Keystone is a well managed company, a subsidiary of a financially sound well run parent with nearly a half century of experience in the North American pipeline business.

Mr. Niemi's proposal is far beyond the scope of this Commission's statutory power to impose conditions. Mr. Niemi's argument for a decommissioning bond is unsupported by statute or evidence, was not timely proposed to the Commission and the

parties for consideration, and should not now be considered by the Commission in its decision process.

8. Indemnity

Mr. Niemi argues that landowner liability risks require the Commission to impose indemnity obligations on Keystone, and then suggests the indemnity obligation be secured with a bond. Mr. Niemi proposes indemnity be required should a landowner be sued *for any reason*, which presumably includes the landowner's own acts.

The easement offered by Keystone to every landowner contains an indemnity provision. The proposed easement provides

If claims or legal actions for damages arise from Grantee's [Keystone], or anyone acting on the Grantee's behalf, use of this Easement, Grantee will be responsible for those claims or legal actions, and will defend, indemnify and hold the Grantor [Landowner] harmless in this regard, except to the extent that those claims or legal actions result from the negligence, recklessness, or willful misconduct of the Grantor or anyone acting on the Grantor's behalf.

The easement indemnity provision excludes the actions of the landowner, as is both appropriate and required by law.

Mr. Niemi argues that the Commission should require Keystone to indemnify landowners against *anything* that happens as a result of the presence of the pipeline, no matter who causes a problem. The indemnity burden he proposes is unlawful. Under SDCL § 53-9-3, contracts that exempt persons from responsibility for their own willful conduct or violation of the law are contrary to public policy and thus unlawful. The

indemnity provision in the easement meets the standards of South Dakota law and is legally sufficient to accomplish what Mr. Niemi solicits.

Mr. Niemi argues that a bond should be imposed to insure Keystone meets its indemnity obligation. There is no evidence supporting the proposition that Keystone is financially irresponsible, nor is there any statutory basis to support imposition of such a bond.

9. Reclamation

Mr. Niemi devotes pages ten through fourteen of his letter to proposing reclamation conditions. On close inspection, the Commission will see that virtually all of Mr. Niemi's proposed reclamation requirements are already met or addressed in the Keystone's comprehensive Construction, Mitigation, and Reclamation Plan ("CMR Plan"), TC-1, Ex. B. In many instances Keystone's CMR Plan is more thorough and rigorous than the conditions suggested by Mr. Niemi. The CMR Plan is discussed at length in section 3.B.4 on pages 16 through 18 of Keystone's January 20, 2010, brief and Staff's brief on pages 13-28.

Mr. Niemi was free to submit data requests or provide comments on the CMR Plan, to examine both Keystone's and the Staff's reclamation experts, and to then offer

testimony supporting modifications to the CMR Plan. He chose not to do so, and should not now be allowed to offer essentially duplicating language as a condition.

Having said that, certain proposals in this section of his letter merit individual comment. Proposal 4 on page 10 suggests a baseline survey be performed on each property crossed by the pipeline. Proposal 14 (b) on page 14 would impose a similar survey and report requirement for post construction compaction within the right of way. There is no legal or evidentiary basis to support such a requirement and nothing in the evidence or in practice demonstrates such a process will enhance reclamation. Nothing prohibits a landowner from hiring his own expert if he feels it is worthwhile.

Finally, in 14 (d) on page 14 Mr. Niemi proposes compensation for damages caused by pipeline construction and operation. Damage compensation is beyond the jurisdiction of the Commission and is properly a subject for condemnation.

11. Landowners Committee

Mr. Niemi proposes a landowners committee be formed and funded by Keystone, arguing that the landowners have no other recourse to address issues or problems. Mr. Niemi is apparently unaware of the reporting arrangement directed by the Commission in the first Keystone permit, which resulted in appointment of Sarah Metcalf as a direct liaison between landowners, Keystone and the Commission. The process proved very successful and Keystone would support the Commission to direct such an arrangement for

the proposed project. Staff recommends such a process in its brief of January 20, 2010, on page 31.

No evidence was offered demonstrating that the liaison approach was unsuccessful or in any way deficient. Again not to belabor the point, Mr. Niemi had every opportunity to present evidence why the liaison method did not work or to suggest alternatives. Instead he proposes a salaried landowner position with no power to or requirement that the committee answer to the Commission, a far less effective method than the liaison approach.

Finally, as an alternative, Mr. Niemi suggests a construction monitor. The evidence demonstrated that Keystone will do exactly that. Keystone offered testimony to the end that it will hire both construction and environmental monitors who will assure that all requirements of applicable statutes, regulations and permits are consistently implemented and followed.

Conclusion

Mr. Niemi failed to offer evidence to support his arguments. His belated effort to inject supposition, hearsay and unsupported statements into the record is inappropriate. Adopting his conditions at this late hour would be a violation of state statute and Commission rule. Even so, his proposed conditions are inappropriate, sometimes

surplusage, and often simply unauthorized by law. Keystone respectfully requests the Commission reject the Niemi letter and proposed conditions for the reasons stated herein.

Dated this 2nd day of February, 2010.

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