BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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| IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT | ) ) ) ) ) ) | HP 09-001<br><br>APPLICANT'S BRIEF ADDRESSING DRA'S OFFER AND WITHDRAWAL OF EXHIBITS |

On November 3, 2009, the second day of the hearing in this matter, Dakota Rural Action (DRA) offered into evidence 21 exhibits, a list of which was shown to opposing counsel for the first time, none of which are supported by the testimony of any witness, and none of which counsel had copies of at the time of the motion. (Daily Tr., Nov. 3, at 8.) Hearing Examiner Smith deferred ruling on the offer, to which Applicant TransCanada Keystone Pipeline ("Keystone"), LP, objected,[1] until DRA could provide copies of the documents in electronic form to the Public Utilities Commission, Staff, and Keystone. Rather than provide the documents, and before any ruling from the hearing Examiner, DRA withdrew its offer on November 4. DRA advised that it would instead offer the documents as public comment. (Daily Tr. Nov. 4 at 125-128.) Thus, despite DRA's withdrawal, it is clear that DRA still wants the PUC to consider the documents. Because the documents are not admissible and should not be considered as evidence by the Commission, Keystone offers this brief responding to DRA's action.

[1]The single exception is the testimony of Heidi Tillquist from a previous docket, HP 07-001. Applicant stipulated to its admission.

**1. The documents are irrelevant to this proceeding.**

By DRA's own admission, the documents are irrelevant. Counsel for DRA stated at the hearing that "none of these documents are offered for the proof of, you know--about anything about TransCanada's Keystone XL pipelines." (Daily Tr., Nov. 3, at 17.) Instead, DRA wants the documents admitted so that the PUC can consider policy issues related to abandonment, setbacks, depth of cover, and crude oil demand. (*See, e.g., Id.* at 10-11, 14, 31.) On the issue of abandonment, for instance, DRA stated that "all we're providing evidence for is that abandonment is a problem and the Commission should consider it as an issue." (*Id.* at 11.) DRA continued that the solution it proposes "is that the Commission conduct a study." (*Id.*) On the issue of setbacks, Mr. Blackburn stated that the documents "are just simply to show that there is a problem with the zone of danger," that the Pipeline and Informed Planning Alliance Draft Final Report of Recommended Practices is an exemplary document, and that "again, this is a policy solution." (*Id.* at 14.) DRA admitted that "depth of cover is a federal requirement, frankly, not a state requirement," but still wants the PUC to consider the issue. (*Id.* at 15.) Later, Mr. Blackburn agreed that the policy issues were too big for the hearing, and that the Commission has "the authority to conduct investigations on different issues." (*Id.* at 22.) Clearly, the documents are relevant by DRA's own admissions, only to generic policy issues, not to the facts at issue in this Keystone XL permit proceeding.

Generic policy issues are not properly the subject of this hearing. Keystone's burden of proof is outlined in SDCL § 49-41B-22, and is well-known to the Commission and the parties to this proceeding. Because the documents are by DRA's own admission irrelevant to these issues, they are inadmissible under SDCL § 1-26-19, which provides that in contested cases "[i]rrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded." If

DRA wants the Commission to address policy issues, it can do so with the legislature, by seeking the creation of a task force established by the executive branch, or by invoking the Commission's rule-making authority in a separate docket.

**2. The documents are hearsay.**

"The rules of evidence generally apply in administrative proceedings." *DuBray v. Dep't of Social Services*, 690 N.W.2d 657, 661 (S.D. 2004). The rules of evidence preclude hearsay. "[U]nless it falls within an exception, hearsay is not admissible in administrative proceedings." *Id.* Because all of the documents are out-of-court statements and are being offered for the truth of the matters asserted in them, they are hearsay. SDCL § 19-16-1(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

No exception applies. Under SDCL § 1-26-19, evidence not otherwise admissible may be admitted "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules." The South Dakota Supreme Court applied this rule in *DuBray*, in which it held that documents were erroneously admitted into evidence at an administrative hearing in which appellant DuBray challenged a decision of the Department of Social Services to place her name on a child abuse registry. At a hearing on DuBray's request to remove her name from the registry, the hearing examiner admitted over objection three documents that was the sole proof of abuse and neglect: a DSS intake worksheet, a law enforcement incident report, and a DSS narrative of its involvement in the case. 690 N.W.2d at 660. A DSS supervisor "provided the only foundational testimony for the documents." *Id.* at 662. She testified that the intake worksheet and narrative outline were prepared by another social worker, and that the Rosebud Police Department prepared the other document. *Id.* On appeal, the supreme court held that

admission of the documents was not necessary to ascertain facts not reasonably susceptible of proof under the rules of civil procedure. *Id.* at 661-62. "While there was testimony that [the authoring social worker] was no longer employed by the Department, there was no evidence that either [the authoring social worker] or the investigating police officer were unavailable to testify." *Id.* Thus, there was no foundational showing "that the hearsay was probative of facts not reasonably susceptible of proof under normal rules." *Id.*

Here, DRA's only argument is that it lacks resources to call witnesses to the stand to address the policy issues it wants the Commission to consider. That is clearly not a recognized exception to the hearsay rule, and not sufficient to meet the standard set in SDCL § 1-26-19.

**3. The documents are not supported by any foundation.**

Even business records under SDCL § 19-16-10 (and clearly not all of the documents are business records) require foundation before being admitted. "Prior to the use of the business records exception, a proper foundation must be made through the 'testimony of the custodian or other qualified witness.'" *DuBray*, 690 N.W.2d at 662. *Accord Sawyer v. Farm Bureau Mut. Ins. Co.*, 619 N.W.2d 644, 651 (S.D. 2000) (error to admit documents under SDCL 19-16-10 "without any foundation testimony from their custodian or any other qualified witness"); *State v. Brown*, 480 N.W.2d 761, 763 (S.D. 1992) (business records admissible as hearsay exception only when supported by testimony of a custodian or qualified witness).

In *DuBray*, the testifying supervisor attempted to lay foundation for the reports of the social worker and the Rosebud police officer, but the effort fell short because "a proper foundation must be made through the 'testimony of the custodian or other qualified witness.'" *Id.* at 662. In *Brown*, the defendant's academic records were admitted into evidence as business records in a criminal proceeding for perjury, stemming from his testimony that he had a degree

that the records showed he did not. The trial court admitted the academic records under SDCL 19-16-10, but without any foundation. The South Dakota Supreme Court held that the admission was error. "In this instance, not only was there no foundation testimony or cross examination of a witness knowledgeable as to the manner Brown's scholastic records were made and kept, there was *no foundation testimony from any witness whatsoever.* " 480 N.W.2d at 764 (emphasis added).

As in *Brown*, DRA has not even attempted to lay foundation for any of the documents, but rather has moved their admission *without any foundation whatsoever*. Moreover, with respect to those documents received by DRA from TransCanada in discovery, DRA had ample opportunity to seek to lay a foundation through the multiple TransCanada witnesses that appeared in the hearing. DRA deliberately elected not to do so, but rather sought to introduce the documents after all TransCanada witnesses had been excused. This strategic decision by counsel for DRA does not constitute a justification for the failure to provide the requisite foundation. One cannot imagine a clearer case of error than if they were admitted.

**4. The documents are not the proper subject of judicial notice.**

SDCL Ch. 19-10 governs judicial notice. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the territorial jurisdiction of the trial court; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." SDCL § 19-10-2. In general, courts take judicial notice of facts about which there is no dispute and which it would therefore be unnecessary, time-consuming, and expensive to prove, like geographic facts (*State v. Graycek*, 335 N.W.2d 572 (S.D. 1983) (court may take judicial notice of in which county towns and cities are located)), historical facts (*Poppen v. Walker*, 520 N.W.2d 238 (S.D. 1994) (court may take

judicial notice of historical facts that are matters of general knowledge and specially those peculiarly connected with or affecting state)), or natural phenomena that are the subject of common knowledge (*Rikansrud v. City of Canton*, 116 N.W.2d 234 (S.D. 1962) (common knowledge that water under pressure will seek path of least resistance)). "Adjudicative facts are those which relate to the immediate parties involved–the who, what, when, where and why as between the parties." *In re Dorsey & Whitney Trust Co. LLC*, 623 N.W.2d 468, 474 (S.D. 2001). They are facts about that there is no dispute. *See State v. Moschell*, 677 N.W.2d 551, 563 (S.D. 2004) (taking judicial notice that a cottontail rabbit is not a rodent "because in the taxonomic sense this issue is undisputed").

None of the documents DRA seeks to introduce contain adjudicative facts that would be the proper subject of judicial notice. Facts, opinions, and positions related to pipeline salvage, abandonment, pipeline setbacks, the Bemidji oil spill, maintaining depth of cover, and demand for crude oil–some of the subjects of the documents DRA asks be admitted–are not capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned. Rather, they concern complicated and sophisticated matters related to pipeline construction and operation or the operation of national and international petroleum markets – matters that are subject to differing interpretations and opinions by reasonable persons. To admit these documents through judicial notice would deprive the Applicant of the opportunity to question the source of the opinion evidence and would not provide the Commission with a reliable basis on which to decide this case. The fact that DRA seeks to introduce the documents as evidence related to policy issues, about which TransCanada should have an opportunity to respond, is itself proof that the documents cannot be judicially noticed as a whole.

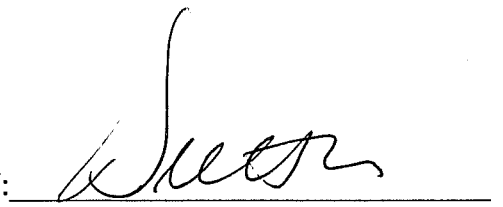
This is equally true of documents from the docket of the National Energy Board of Canada related to the Land Matters Consultative Initiative. Although a court may take judicial notice of matters of public record, the facts noticed must still not be subject to reasonable dispute, like the fact of a habeas applicant's prior judicial proceedings. *See Jenner v. Dooley*, 590 N.W.2d 463, 470 (S.D. 1999). The documents from the NEB docket that DRA offers do not establish adjudicative facts but discuss the issues being debated there. The situation is hardly analogous.

**Conclusion**

The fact that Keystone supplied a document to DRA in the course of discovery or even that a TransCanada employee may have authored a document does not make the document admissible if it is otherwise irrelevant, hearsay, or without foundation. Magazine articles, reports, and opinions authored by non-parties are plain hearsay and are not admissible in any circumstance. Thus, DRA asks that the PUC rely on documents that are clearly inadmissible and not evidence. DRA should not be allowed to circumvent the rules of evidence and procedure. Accordingly, Keystone respectfully requests that the PUC not consider the documents for any purpose related to the final disposition of this proceeding, including making Findings of Fact, Conclusions of Law, or imposing permit conditions.

Dated this 13 day of November, 2009.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 

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