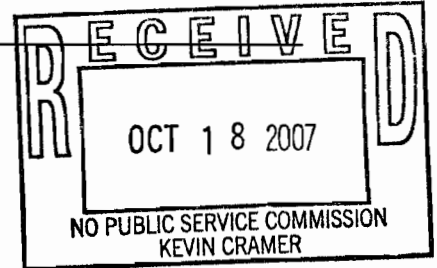

MEMORANDUM

DATE: October 18, 2007
TO: Illona Jeffcoat-Sacco, Executive Secretary
Public Service Commission
FROM: Al Wahl *AW*
RE: TransCanada Keystone Pipeline, PSC Case No. PU-06-421
(Siting Application) and PSC Case No. PU-07-142
(Certificate of Public Convenience and Necessity)



Enclosed for filing is a Memorandum for the captioned matters regarding the consideration of information not presented at hearing.

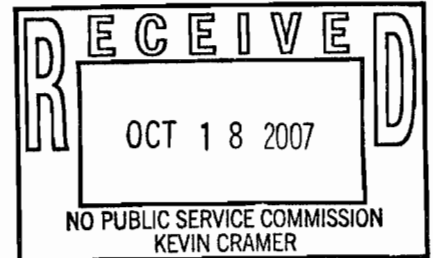
MEMORANDUM

DATE: October 18, 2007

TO: North Dakota Public Service Commission
Attention: Mr. Patrick Fahn, Utility Analyst

FROM: Al Wahl, Administrative Law Judge *AW*
North Dakota Office of Administrative Hearings

RE: Consideration of Information Not Presented At Hearing
TransCanada Keystone Pipeline, PSC Case No. PU-06-421
(Siting Application) and PSC Case No. PU 07-142
(Certificate of Public Convenience and Necessity)



Since the hearings held by the North Dakota Public Service Commission concerning TransCanada Keystone Pipeline, PSC Case No. PU-06-421 (siting application) and PSC Case No. PU-07-142 (certificate of public convenience and necessity), the Commission has received e-mails and letters from intervenors, persons who testified at the hearing, other persons, government agencies, and political subdivisions offering information concerning the proposed pipeline. The Commission has also received information from TransCanada in response to some of this information. All of this information has been filed as received by the Commission in the public input file for the case. The Commission has also obtained information through inquiry by members of its staff in response to some of this information. The hearings have been completed and closed. None of this information is part of the record of the hearings as evidence which can be considered by the Commission for its order upon TransCanada's applications. N.D.C.C. § 28-32-24.

The Commission may, however, consider this information in accordance with the requirements of N.D.C.C. § 28-32-25 for its order upon TransCanada's applications. The Legislature's provision of that procedure for the con-

sideration of information which was not received at a hearing must be considered to preclude any alternative for the consideration of this information.

The requirements of the statute do not distinguish among the providers of this information; that is, this information is equally subject to the limitations and requirements of statute whether it is provided by any person acting in any capacity (including parties and intervenors), a government agency or a political subdivision, or a member of the Commission's staff. (For this discussion, the terms "party" and "parties" include "intervenor" and "intervenors" in accordance with N.D. Admin. Code § 69-02-01-07(5).)

The statute has several requirements for the consideration of any of this information. First, the information must be "competent and relevant information or evidence." (The use of the phrase "information or evidence" for the provisions of the statute suggests that there may be a distinction between "information" and "evidence" in the context of the statute. Any distinction is not apparent to me in the circumstances of these cases. Information which the Commission would consider and information which parties would offer in response, each in accordance with the requirements of the statute, is "evidence" which the Commission may consider for its order. For my discussion and advice the words "information" and "evidence" are considered to be synonymous.) Generally speaking, when used with the word "evidence," the word "competent" is intended and understood to mean that the evidence is admissible. *See A Dictionary of Modern Legal Usage* 185 (2d ed. 1995); *Black's Law Dictionary (evidence, admissible evidence)* 595 (8th ed. 2004). And, generally speaking, relevant evidence is admissible, except as otherwise provided by law. N.D.R.Ev. 402. In other words, in the context of the statute, the requirement that any of this information the Commission would consider be "competent and relevant information or evidence" is reasonably applied to require that the information be admissible evidence. Whether evidence is admissible is, of course, subject to a panoply of statutes and rules. I advise the Commission that issues of admissibility for this requirement of the statute may be addressed and determined in accordance with

the further requirement of the statute for notice to the parties of any information the Commission would consider and any party's response.

The statute next requires that any of this information which the Commission would consider must be in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency. There may be some argument for distinguishing the information received by the Commission in the circumstances of these cases in the aftermath of the news of the hearings from information which the Commission has as institutional knowledge or through the efforts of its staff for the review of TransCanada's applications. But that argument is inconsistent with the unqualified provision of the statute, and militates against the statutory purposes and powers of the Commission in the service of the citizens of the state. I advise the Commission that the information which it has received by letters and e-mails from persons, government agencies and political subdivisions is "in its possession" in accordance with the requirement of the statute. I also advise the Commission that information obtained by members of its staff upon inquiry in response to any of this information may be furnished to the Commission for its consideration in accordance with the further provision of the statute.

The statute next requires that the Commission provide a copy or an abstract of the information it would consider to each party of record in these cases, and provide each party a reasonable time to file a written request to examine the information, to offer information or evidence in response (including testimony at a hearing), and to cross-examine the person who furnished the information. I advise the Commission that ten days (determined in accordance with N.D.R.Civ.P. 6) is a reasonable time for a party to file a written request to offer any information or evidence in response and to request a hearing to offer testimony or cross-examine the person or persons offering the information.

Although not specifically provided by statute, of necessity a party may also respond to the notice to object that the information the Commission would consider is not "competent and relevant information or evidence" in accordance with the requirement of the statute. Any objection would be addressed in accor-

dance with the Commission's rule, N.D. Admin. Code § 69-02-04-07. If, in addition to objecting to the information, the party also requested to offer information or evidence (including testimony) or to cross-examine the person or persons who provided the information, and if the party's objection is overruled, the party may, of course, proceed in accordance with the request.

Although the statutory provision for a party to make a written request to offer information or evidence in response to any information the Commission would consider seems to allow an inference that the request may be denied, the North Dakota Supreme Court has applied the statute to provide a right to respond—at least as to information or evidence other than testimony and to cross examine a person who provided the information the Commission would consider. *See Howes v. North Dakota Workers Compensation Bureau*, 429 N.W.2d 730 (N.D. 1988); *Stalcup v. Job Service North Dakota*, 1999 ND 67, 592 N.W.2d 549. Similarly, the provision of the statute that “[a]ny further testimony that is necessary shall be taken at a hearing to be called and held,” allows an inference that the Commission may refuse to hear further testimony which it finds is unnecessary for its consideration. But the North Dakota Supreme Court has not considered that question, and I advise the Commission that considerations of due process must be carefully evaluated for a decision whether to hear further testimony as necessary for a party's response to information which the Commission would consider.

If a party would cross-examine a person who has provided information which the Commission would consider, the party must do so at its, his or her expense, and absent the person's cooperation to attend a hearing for cross-examination must obtain the person's attendance by subpoena as provided and allowed by law. *Howes*, 429 N.W.2d 730, at 735–736; N.D.C.C. § 28-32-33(2).

If it is necessary for the Commission to hear further testimony for a party's response to information which it would consider or to provide for cross-examination of a person who has provided the information, the statute requires that it schedule a hearing for those purposes upon at least ten days' notice served upon the parties in accordance with the North Dakota Rules of Civil Procedure. While that hearing is, of course, a public hearing, it is not, I conclude and advise

the Commission, a hearing subject to the notice requirements of N.D. Admin. Code § 69-02-04-01 and the provisions of N.D.C.C. § 49-22-13. I also advise the Commission that any party may also cross-examine a person cross-examined by another party, but rebuttal testimony need not be allowed except as testimony by the written request of a party in accordance with the provision of the statute and the direction of the Commission.

Please advise me if the Commission has any further request for information concerning the application of N.D.C.C. § 28-32-25 in the circumstances of these cases.