

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA

TRANSCANADA KEYSTONE PIPELINE, LP) CASE NO. PU-06-421
30-INCH CRUDE OIL PIPELINE/CAVALIER TO)
SARGENT COUNTIES SITING APPLICATION)

PUBLIC CONVENIENCE AND NECESSITY) CASE NO. PU-07-152

**OBJECTION TO MOTION FOR INTERVENTION TO APPEAR AS A PARTY AND
MOTIONS TO REOPEN THE HEARING RECORDS**

TransCanada Keystone Pipeline, LP, (Keystone) hereby files its objection to the Motion for Intervention to Appear as a Party and Motion to Reopen the Hearing Records filed herein by the City of Fargo (Fargo) on October 24, 2007. Fargo filed its motion almost two months after the close of the public hearings in this proceeding, which were held in late July and early September, 2007. Fargo had notice of the hearings, yet chose not to participate. Now, Fargo seeks to delay timely resolution of this proceeding, by raising issues that were fully addressed at the public hearings. Fargo has not demonstrated good cause for its failure to intervene in a timely manner, as required by Section 69-02-02-05 of the North Dakota Administrative Code. Moreover, Fargo has not alleged that material changes in fact or law have occurred since the close of the hearing, nor has it demonstrated that the public interest requires reopening the proceeding, as required by Section 69-02-06-01 of the Code. Further, the Commission already has the ability to consider the concerns raised by Fargo without granting the requested late intervention or reopening the proceeding. In these circumstances, Keystone submits that granting Fargo's motions would be profoundly unfair and would establish bad administrative precedent. Equally important, because the issues raised by Fargo have been addressed at the hearing and there is an existing process for considering the concerns alleged in Fargo's motions, the denial of Fargo's motions would in no way prejudice the citizens of Fargo.

A. Background

On April 11, 2007, TransCanada Keystone Pipeline, LP, (Keystone), filed an application for waiver of procedures and time schedules and consolidated applications for a certificate of corridor compatibility and a route permit authorizing construction of approximately 218 miles of 30-inch crude oil pipeline and associated facilities in Cavalier, Pembina, Walsh, Nelson, Steele, Barnes, Ransom, and Sargent Counties of North Dakota.

On April 11, 2007, Keystone filed an application for a certificate of public convenience and necessity (PC&N) under N.D.C.C. Chapter 49-03.1 for the Keystone Pipeline.

On May 2, 2007, the Public Service Commission deemed the application complete, and noticed and scheduled public hearings on this application for Monday, July 23, 2007 at 1:00 p.m. C.D.T. at Barnes County Courthouse, Valley City, North Dakota, and Tuesday, July 24, 2007 at 1:00 p.m. C.D.T. at the City Office Building, Park River, North Dakota.

On May 2, 2007, the Public Service Commission issued a Notice of Opportunity for Hearing in Case No. PU-07-152 stating that comments and requests for hearings must be received by June 22, 2007.

On June 21, 2007, the Public Service Commission received a Request for Public Hearing from the Dakota Resource Counsel (DRC) regarding the PC&N. The Public Service Commission scheduled a public hearing on that matter on July 23, 2007 at 9:00 a.m. C.D.T. at the Barnes County Courthouse, Valley City, North Dakota.

Fargo was legally provided notice of the hearings in this case pursuant to N.D.C.C. 49-22-13. The Commission caused legal notice to be published in the Fargo Forum in May and July, and legal notice of the continued September hearings was again published twice in August. In addition to the legal notice, the news media covered the hearings in Valley City and Park

River, and hearings were covered in the paper, on the radio and television in Fargo.

On July 11, 2007, Nicholas Delaney, attorney with the Rinke-Noonan Law Firm in St. Cloud, Minnesota, filed by facsimile with the Public Service Commission a Petition to Intervene in the above cases on behalf of the DRC, Ramona Klein, Merle and Linette Kratochvill, Janie and John Capp and Mark Novak, collectively referred to as "Petitioners". In addition the Petitioners requested that the Public Service Commission postpone the hearings.

On July 12, 2007, John and Janie Capp filed a letter request to intervene at the hearings on July 23 and 24 on the Keystone Pipeline. Capps also appear as Petitioners in the Rinke-Noonan Petition. The Public Service Commission approved the requests to intervene; however, the Public Service Commission denied the request to postpone the hearings.

On July 17, 2007, the Public Service Commission moved the place of the scheduled hearings to the Valley City Auditorium located at 320 Central Avenue South, Valley City, North Dakota and Park River, North Dakota.

In addition, the hearing was continued to September 5-6, 2007 at the Public Service Commission Chambers in Bismarck.

On October 8, 2007, the Public Service Commission notified the parties that the October 4, 2007 letter from city of Fargo Mayor Dennis R. Walaker was being placed in the official record and pursuant to Section 28-32-25 of the North Dakota Century Code the parties had an opportunity to examine and respond to the letter. On October 12, 2007, Keystone filed a letter dated October 11, 2007 that was sent to Mayor Walaker in response to the stated concerns about the evidence in the record regarding the Sheyenne River and Lake Ashtabula area.

On October 19, 2007, the North Dakota Water Users Association filed a letter requesting that the Commission reopen the record to "consider issues relating to safeguards in the routing

and construction of the Keystone pipeline in context with water supply issues for eastern North Dakota.

On October 24, 2007 the city of Fargo filed a Motion for Intervention to Appear as a Party and Motion to Reopen the Hearing Records.

Keystone objects to the Motions by the city of Fargo and the request to reopen the record made by the North Dakota Water Users Association for the following reasons.

B. No Legal Authority Exists to Grant Intervention by the City of Fargo at This Late Date.

1. The Motion by the city of Fargo is not timely filed. Section 69-02-02-05 of the North Dakota Administrative Code provides the petition to intervene in any proceeding must be filed at least 10 days prior to the hearing, but not after except for good cause shown. The hearings in this case were scheduled and held on July 23 and 24, 2007 and continued on September 5 and 6, 2007. The Motion to Intervene by the city of Fargo had to be filed on or before July 9, 2007, to be considered timely filed pursuant to Section 69-02-02-05 of the North Dakota Century Code. The Petition was not filed 10 days before the hearings and the Motion is in direct violation of Section 69-02-02-05. The petition was not filed until after the Commission and parties completed four days of hearings, after all public and party testimony was heard, and after both Keystone and the Intervenors filed their briefs, and Keystone filed its Proposed Findings, Conclusions, and Order. The petition was not filed until the case was ready to be decided by the Commission.
2. The city of Fargo has not stated any reason for good cause shown. Fargo was legally provided notice of the hearings in this case pursuant to N.D.C.C. 49-22-13. The

Commission caused legal notice to be published in the Fargo Forum in May and July, and legal notice of the continued September hearings was again published twice in August. In addition to the legal notice, the news media covered the hearings in Valley City and Park River, and the hearings were covered in the paper, on the radio and television in Fargo. Fargo has not alleged any "good cause" for its ignoring the legal notices and the publicity, until after all hearings before the Commission have been completed. Accordingly, the Motion to Intervene can not be granted.

3. Section 69-02-02-05 of the North Dakota Administrative Code provides that the Commission may grant intervention by a party only when intervention "would not unduly broaden the issues or delay the proceeding." (Emphasis added.) All that is left to be done in Case PU-06-421, is for the Commission to issue its findings and reasons for designation for the corridor and route. Intervention by Fargo at this late stage in the proceedings, would unduly delay the proceedings. Pursuant to Sections 49-22-08 and 49-22-08.1 N.D.C.C. the Commission shall issue its findings and reasons for designation of corridor and route no later than six months after the filing of a completed application. The Commission, due to staff time constraints, has already extended the deadline for its findings and designation from November 2, 2007, to December 12, 2007. Permitting Fargo to Intervene would cause significant further delays in violation of Section 69-02-02-05, and can not legally be granted.

C. The Issues Raised by the City of Fargo and the ND Water Users Board Have Been Addressed at Hearings.

1. The concern regarding water protection, and specifically the Sheyenne River and Lake Ashtabula area, has been expressed previously by the public witnesses, who attended and

participated in the hearings that were held by the Public Service Commission. The Commission also raised the same issue and questioned witnesses concerning the safety and risk to the Sheyenne River and Lake Ashtabula. These are the issues that the city of Fargo and the ND Water Users Board are seeking to raise in its petition and letter. While the city of Fargo neglected to attend and participate in the hearings despite several published notices and various news articles, water resource protection, risk assessment and emergency response planning as well as public health and safety issues were addressed by the testimony and evidence submitted by Keystone as well as from the Department of Health witnesses at the hearings.

2. It would appear that the city of Fargo has failed to review the Public Service Commission record that exists in these proceedings before suggesting that the Public Service Commission is not prepared to consider public health and safety in its determination. That information is already part of the record in this route and corridor proceeding. The Public Service Commission already has evidence and testimony regarding water resource protection, risk assessment and emergency response planning as well as public health and safety as mentioned by the city of Fargo. The Motion to Intervene and Motion to Reopen the Hearing Records is not only untimely; it is also inappropriate and unnecessary. The Motion to reopen the hearing records should be denied.
3. The motion from the City of Fargo does not offer any new evidence for the Public Service Commission to consider, it only raises a question about the risk of a possible spill and the potential impact on the Sheyenne River and Bald Hill Dam, (Lake Ashtabula). This issue was fully addressed at the hearings in Bismarck by Keystone witness, Heidi Tillquist.

Tillquist was asked about the risk analysis in Sheyenne River and Lake Ashtabula area, and in response to that inquiry Tillquist testified, in relevant part, as follows:

- a. In the Sheyenne River-Lake Ashtabula area the pipeline is over two and one-half linear miles away from the water body, so sub-surface transport is not a viable route for crude oil to reach the Sheyenne River or Lake Ashtabula. The terrain is flat to the Sheyenne River, so overland transport is not a viable route for the crude oil. All of the intermittent streams, except for one stream that is right at the Sheyenne River, are at least 1.6 miles away from the river and, when dry, would not be a viable route for crude oil to reach the Sheyenne River. (BII Tr. Pg. 363)
- b. The overall pipe that could contribute to a spill reaching the river is 2.8 miles. This results in a conservative risk of a spill reaching the river at once every 5,400 years. (BII Tr. Pg. 364)
- c. The Keystone Pipeline is located in the Sheyenne River-Lake Ashtabula area it is on a terrace where the slope is zero. (BII Tr. Pg. 367)
- d. The spill frequency figures considered any size spill. In order to get to the river a large spill of thousands of barrels would need to occur. To calculate the risk associated with a large spill, it would add a couple zeros to the already big frequency interval numbers. (BII Tr. Pg. 367-368)

D. Fargo has not met the Statutory Requirement for Reopening this Proceeding.

1. Section 69-02-06-01 of the North Dakota Administrative Code requires that a motion to reopen a proceeding filed after the close of a hearing must set forth the facts claimed to constitute the grounds requiring reopening, including any material changes of fact or law alleged to have

occurred since the conclusion of the hearing. The Commission may reopen a proceeding if it finds that the conditions of fact or law have so changed as to require reopening, or that the public interest so requires. Fargo neither cites the relevant statutory provision nor alleges that any material changes in fact or law have occurred after the close of the hearing. Accordingly, the sole criterion to be addressed in considering the motion to reopen is whether the public interest requires reopening the record at this time.

2. Keystone submits that the public interest does not require granting of Fargo's motion to reopen. First, the issues that Fargo seeks to address relate to alleged potential injury to water supply systems that now and in the future will rely on Lake Ashtabula and the Sheyenne River basin. As discussed above, those issues were addressed by competent testimony at the hearing by Keystone's expert witness, and were subject to cross-examination by Commission Staff and Intervenors, as well as questioning by the Commissioners. Moreover, the North Dakota Department of Health testified that the proposed Keystone route is safe. Second, as discussed below, and as recognized in Fargo's motion, pursuant to the memorandum of Presiding Administrative Law Judge Wahl, the Commission has a process available to consider Fargo's concerns, without reopening the record in this proceeding. In these circumstances, the public interest is fully protected.

E. Commission has Ability to Consider Letters as Part of Record Without Intervention and Without Reopening the Hearing and Without Causing Undue Delay

1. The Public Service Commission has received and filed the October 4, 2007 letter from city of Fargo Mayor Dennis R. Walaker regarding the city's water resource protection, risk assessment and emergency response planning concerns. To the extent that the Public

Service Commission desires to include these concerns expressed in Mayor Walaker's letter there is a process to do so, as described by ALJ Al Wahl in his Memorandum dated October 18, 2007. Wahl advised the Commission that information, if deemed competent and relevant, may be made part of the record in these proceedings if the opportunity for a response pursuant to Section 28-32-25, is given other parties.

2. To the extent that the city of Fargo or the North Dakota Water Users might argue they have a procedural or substantive right to have the hearing reopened, Section 69-02-01-10 of the North Dakota Administrative Code states that "this Article shall be liberally construed to secure the just, speedy, and inexpensive determination of the issues presented." (Emphasis added.) It is Keystone's concern, that granting of the Motion or request to reopen would substantially impede the Public Service Commission's final determination in this matter. Moreover, granting Fargo's motion would set a bad precedent. Interested persons would be able to sit back and observe the hearings in a case, and when the hearings were over, then seek to intervene. If this motion to intervene or motion to reopen is granted there will be no closure to hearings, proceedings would drag on costing utilities and the Public Service Commission in time and resources.

F. Adverse Impact to Keystone Will be Caused by Granting Intervention or Reopening Hearings on Keystone Pipeline.

1. Construction is scheduled to start in North Dakota in May of 2008. Granting intervention or reopening the hearing will cause undue delay in the issuing of a corridor and route permit.
2. Keystone's pipeline construction plan and spread lengths in North Dakota are based upon

a full 2008 construction season from mid May to late November. This time window is needed for the construction contractors to complete the scope of work. A delayed construction start will result in not completing work in 2008, which has significant impacts to the landowners and to the project costs.

3. Delays will result in not being able to complete reclamation on some landowners' property in 2008, thus inconveniencing them for a greater length of time and into a second year.
4. Granting intervention or reopening the hearing will cause a delay in the issuance of a corridor certificate and route permit. This is likely to significantly increase project costs. The potential impact to project costs in North Dakota could range from an estimated \$5 to \$10 million for a two week delay to \$30 to \$50 million for a delay to January 1, 2008. The potential cost impacts increase exponentially as risks of not completing the work in 2008 increase.

G. Fargo's Motion not Related to PC&N Case No. PU-07-152

1. Fargo in its Motion for Intervention seeks to intervene in not only the siting Case No. PU-06-421, but also in the PC&N Case No. PU-07-152. The city of Fargo Motion is irrelevant to the PC&N proceeding, and does not address any of the issues set out by the Commission in the PC&N case.
2. The PC&N action is a separate case from the route and corridor action, and does not concern the pipeline route or environmental impact of the pipeline. The record for the PC&N action is complete and none of the information that has been submitted relates to the PC&N issues.
3. The issues raised by Fargo are route and corridor issues, not PC&N issues. The Motion

for intervention in the PC&N case must be denied.

H. Conclusion

1. The Public Service Commission does not have legal authority to grant the intervention by the city of Fargo in either the siting case or the PC&N case for the Keystone pipeline.
2. The Public Service Commission should deny the requests of both the city of Fargo and the ND Water Users Association to reopen the hearing records, as both untimely and unnecessary, because a complete record on safety and risk for the Keystone Pipeline has been made.
3. Keystone respectfully requests the Public Service Commission to act with all due speed with entry of final Orders in these matters.

For the foregoing reasons, Keystone objects to the Motion to Intervene and Motion to Reopen the Record by the city of Fargo, and the request to reopen the record by the ND Water Users Board, and requests that the PSC deny the Motions for the reasons as stated herein.

Dated this 26 day of October, 2007.

Respectfully submitted,
TransCanada Keystone Pipeline, LP

By 

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