

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

**TransCanada Keystone Pipeline, LP
30-Inch Crude Oil Pipeline/Cavalier to Sargent
Counties
Siting Application**

Case No. PU-06-421

**TransCanada Keystone Pipeline, LP
Keystone Pipeline
Public Convenience & Necessity**

Case No. PU-07-152

ORDER ON MOTIONS TO INTERVENE AND REOPEN

November 7, 2007

Background

On April 11, 2007, TransCanada Keystone Pipeline, LP ("Keystone") filed an application for a 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 ("Keystone Pipeline") in Cavalier, Pembina, Walsh, Nelson, Steele, Barnes, Ransom, and Sargent Counties of North Dakota, Case No. PU-06-421.

Also on April 11, 2007, TransCanada filed an application for a certificate of public convenience and necessity (PCN) under N.D.C.C. chapter 49-03.1 to construct and operate the Keystone Pipeline, Case No. PU-07-152.

On October 19, 2007, the North Dakota Water Users Association filed a letter in Case No. PU-06-421 requesting that the Public Service Commission ("Commission") reopen the record to consider issues relating to the safeguards in the routing and construction of the Keystone Pipeline in the context of water supply issues for eastern North Dakota.

On October 23, 2007, Eric R. Johnson, City Attorney for the City of Fargo, North Dakota ("Fargo"), filed a Motion to on behalf of Fargo to Intervene in the captioned proceedings. Fargo states that the siting of the Keystone Pipeline along the proposed route would present potential public health and safety risks that may adversely affect the welfare of a substantial number of citizens of North Dakota due to undesirable impacts upon the water supply of Fargo and other North Dakota communities who will rely on water resources that either arise in or flow through Lake Ashtabula and the Sheyenne River Basin now and in the future. Fargo requests that if adequate protection of these water resources is not made part of the Keystone Pipeline project, that the

Commission deny any certification of public convenience and necessity and deny the issuance of any certificate of corridor compatibility and route permit authorization.

The city of Fargo requests the Commission to:

1. Grant the City of Fargo's Motion for Intervention to Appear as a party; and,
2. Grant the City of Fargo's request under N.D. Admin. Code §69-02-06-01 to reopen the proceedings in these matters to receive competent and relevant information and materials submitted with the Motion, and any other such information, materials, and testimony that may be presented during any reopened proceedings.

On October 26, 2007, Keystone filed its Objection to Motion for Intervention to Appear as a Party and Motions to Reopen the Hearing Records, and on November 2, 2007, Keystone filed a Supplemental Objection. Keystone argues that the City of Fargo had notice of the hearings and yet chose not to participate. Keystone states that Fargo was legally provided notice of the hearings pursuant to N.D.C.C. §49-22-13 in that 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 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. Keystone argues that Fargo has not alleged any "good cause" for its ignoring the legal notice and publicity until after the hearings had been completed.

Keystone argues that no legal authority exists to grant intervention to Fargo at this late date. Keystone states that the Motion by Fargo is not timely filed. Keystone points out that N.D. Admin. Code §69-02-02-05 provides that a 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. In these proceedings hearings were held on July 23 and 24, 2007 and continued on September 5 and 6, 2007. The petition by Fargo was not filed until all of the hearings had been completed, and briefs and proposed findings were filed with the Commission.

Keystone argues that N.D. Admin. Code §69-02-02-05 provides that the Commission may grant intervention by a party only when intervention would not unduly broaden the issues or delay the proceeding. Since all that is left for the Commission to do is issue its order, intervention by Fargo at this late stage in the proceedings would unduly delay the proceedings. Keystone points out that N.D.C.C. §49-22-08.1 requires that the Commission to issue an order no later than six months after the filing of a completed application, and that the Commission has already extended the deadline from November 2, 2007 to December 12, 2007.

Keystone argues that the issues raised by Fargo and the North Dakota Water Users have been addressed at hearings. Keystone states that the concern regarding water protection, and specifically the Sheyenne River and Lake Ashtabula area, was

expressed by public witnesses who attended and participated in hearings held by the Commission, and the Commission also raised issues and questioned witnesses concerning the safety and risk to the Sheyenne River and Lake Ashtabula. Keystone states that these are the issues Fargo and the North Dakota Water Users Board are seeking to raise. Keystone states that while Fargo neglected to attend and participate in the hearings, water resource protection, risk assessment and emergency response planning as well as public health and safety issues were addressed by testimony and evidence submitted from Keystone as well as from Department of Health witnesses at the hearings. Keystone states that Fargo does not offer any new evidence for the Commission to consider; it only raises a question about the risk of a possible spill and the potential impact on the Sheyenne River and Lake Ashtabula.

Keystone argues that Fargo has not met the statutory requirement for reopening this proceeding. Keystone states that N.D. Admin. Code §69-02-06-01 requires that a motion to reopen a proceeding after the close of 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. Keystone states that 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. Keystone states that Fargo neither states the relevant statutory provision nor alleges that any material changes in fact or law has occurred since the close of the hearing. Therefore, Keystone states that the sole criterion to consider is whether the public interest requires reopening the record at this time.

Keystone asserts that the public interest does not require granting of Fargo's motion to reopen. Keystone states that the issues 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 Basin. Keystone states that 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. Keystone also points out that the North Dakota Department of Health testified that the proposed Keystone route is safe.

Keystone states that the Commission has the ability to consider letters and other materials as part of the record without intervention and without reopening the hearing and without causing undue delay. Keystone points out that Administrative Law Judge Al Wahl has outlined a process available to the Commission to consider Fargo's concerns and the concerns of the North Dakota Water Users without reopening the record in this proceeding. Keystone states that the Commission has indicated its intent to follow that procedure with respect to a significant amount of late-filed information, that there is no reason to treat Fargo's late-filed information differently. Keystone states that in these circumstances, the public interest is fully protected.

Keystone argues that granting intervention or reopening the proceeding would substantially impede the final determination in this matter. Furthermore Keystone states

that granting Fargo's motion would set a bad precedent because interested persons would be able to sit back and observe hearings in a case, and when hearings are over, seek to intervene.

Keystone states that if this motion to intervene or motion to reopen is granted, there will be no closure to hearings, and proceedings would drag on costing utilities and the Commission in time and resources. Keystone asserts there will be adverse impacts to the company if the Commission grants the requests to intervene or reopen the hearings. The impacts include:

1. Undue delay in the issuing of a corridor and route permit;
2. A delayed construction start will result in not completing work in North Dakota in 2008 as currently planned.
3. Delays will result in incompleteness of reclamation on some property which will inconvenience landowners for a greater length of time; and
4. Delays will likely significantly increase project costs.

Keystone argues that Fargo's motion is not related to the PC&N case, Case No. PU-07-152. Keystone states that the issues raised by Fargo are route and corridor issues and that Fargo does not address any of the issues in the PC&N case. Keystone argues that the record for the PC&N case is complete.

On November 5, 2007, Fargo filed a Response to the Supplemental Objection. Fargo states that any harm from a small delay should be balanced with the Commission's obligation to provide a reasonable opportunity for Fargo to appear and participate in view of the nature, scope and importance of this pipeline siting and routing matter. Fargo also states that there appears to have been no evidence introduced as to the nature of the oil that will be pumped through the pipeline, and that it is the understanding of Fargo's consultants that the crude oil to be transported through the pipeline may contain extremely hazardous substances. Fargo also contends that comments offered during the hearings did not probe in any substantive way into the safety concerns being expressed by Fargo.

Discussion

Section 28-32-28 of the North Dakota Century Code provides:

An administrative agency may grant intervention in an adjudicative proceeding to promote the interests of justice if intervention will not impair the orderly and prompt conduct of the proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon the intervention. The agency shall give reasonable notice

of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an adjudicative proceeding.

Section 69-02-02-05 of the North Dakota Administrative Code provides in part as follows:

Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.

Section 69-02-02-05(2) of the North Dakota Administrative Rules provides that “[a] petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause.”

The Commission finds that good cause exists for granting the City of Fargo’s motion for intervention in that Fargo has legal and public health interests that may be substantially affected by the siting of this pipeline. The Commission also finds that Fargo’s intervention will not unduly broaden the issues or delay the proceeding, and that intervention will promote the interests of justice. The intervention will be limited to safety and public health issues relating to the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River.

The City of Fargo has also filed a motion under Section 69-02-06-01 to reopen the proceedings in Case Nos. PU-06-421 and PU-07-152. In a letter to the Commission dated October 18, 2007, the North Dakota Water Users Association also requested that the Commission reopen the record in Case No. PU-06-421 to consider issues relating to the safeguards in the routing and construction of the TransCanada Keystone Pipeline in the context of water supply issues for eastern North Dakota.

Section 69-02-06-01 of the North Dakota Administrative Code provides authority for the Commission to reopen a proceeding for the purpose of taking additional evidence. The rule provides:

69-02-06-01. Petition to reopen. At any time after the conclusion of a hearing, but before the final order is issued or a rule is adopted, any party may file a petition to reopen the proceeding for the purpose of taking additional evidence.

1. Contents. The petition must set forth clearly the facts claimed to constitute the grounds requiring reopening the proceeding, including

any material changes of fact or law alleged to have occurred since the conclusion of the hearing.

2. Service. A copy of the petition to reopen must be served by the petitioning party upon all parties and a certificate to that effect must be attached to the petition when filed with the commission. The original and seven copies must be filed with the commission.
3. Responses. Within ten days following the service of a petition to reopen, any other party may file a response. The response must be served on the parties and the original response and certification of service and seven copies must be filed with the commission. Failure to file a response is a waiver of any objection to the granting of the petition.
4. Order to reopen. If the Commission has reason to believe the conditions of fact or law have so changed as to require, or that public interest requires, the reopening of a proceeding, the commission may issue an order to reopen.

The Commission finds that public interest requires the reopening of the proceedings in Case No. PU-06-421. The issues raised by Fargo concerning the health and safety of its citizens who rely on water supply from Lake Ashtabula and the Sheyenne River involve the public interest and cannot be ignored by the Commission in the interest of expediency.

The North Dakota Water Users Association is not a party in Case No. PU-06-421, and it has not petitioned to intervene as a party in the proceeding. Under Section 69-02-06-01 of the North Dakota Administrative Code, only parties to a proceeding may petition to reopen.

Fargo's Motion for Intervention to Appear as a Party and Motion to Reopen Proceedings is for both Case Nos. PU-06-421 and PU-07-152. The issues raised by Fargo relate only to Case No. PU-06-421.

Order

The Commission orders:

1. The City of Fargo's Motion to Intervene as a Party and Motion to Reopen Proceedings for Case No. PU-06-421 is GRANTED.
2. The City of Fargo's Motion to Intervene as a Party and Motion to Reopen Proceedings for Case No. PU-07-152 is DENIED.
3. The North Dakota Water Users Association's request to reopen proceedings in Case No. PU-06-421 is DENIED.

4. Admission as an intervenor shall not be construed as recognition by the Commission that an intervenor might be aggrieved by an order of the Commission in this case.
5. The intervention, as authorized under Section 69-02-02-05 of the North Dakota Administrative Code, is limited to the safety and public health issues relating to the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River.

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner

Voting Nay

Susan E. Wefald
President


Kevin Cramer
Commissioner

DISSENT AND CONCURRING OPINION IN PART

Commissioner Susan E. Wefald

November 7, 2007

**TransCanada Keystone Pipeline, LP
30-Inch Crude Oil Pipeline/Cavalier to
Sargent Counties
Siting Application**

Case No. PU-06-421

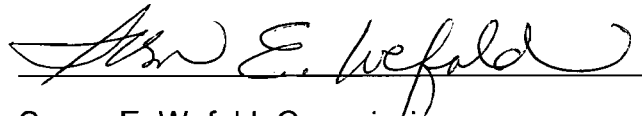
I voted no on this order because it sets bad precedence for the Commission to allow intervention at this very late stage in the process. The Commission must follow established legal procedures when making decisions on siting pipelines, and other siting cases. The Commission received the application from the City of Fargo to intervene and reopen the proceedings almost two months after all hearings had been completed, and after all late filed exhibits and proposed findings and fact and conclusions of law had been filed by existing parties with the Commission. Dakota Resource Council and the citizens it represents intervened in a timely manner and participated in all hearings. Mr. and Mrs. Capp intervened in a timely manner and participated in all hearings. It creates unacceptable regulatory uncertainty for the future for the Commission to so completely change the normal process of collecting information and making a decision in this case.

I am especially concerned about the impact this decision could have on parties with limited funds. Parties with limited funds do not have money to repeat steps in the procedure, and may be disadvantaged by actions of this kind by the Commission.

It was not necessary to take this very unusual step. The Administrative Law Judge in this case, Judge Al Wahl, sent information to the Commission setting out a process for the Commission to include information which it wished to consider in its final order. The process was to notice the information to the parties and provide an opportunity for the parties to comment and request a hearing if necessary to cross examine the person providing the information. The Commission is using this process for quite a few letters and comments it has received in the last few weeks. This process would also have worked well to incorporate the information received from the City of Fargo which has been docketed in this case in numbers 181, 201, and 217.

Therefore, I disagree with Ordering Clause number one of the Commission's Order: The City of Fargo's Motion to Intervene as a Party and Motion to Reopen Proceedings for Case PU-06-421 is GRANTED.

I concur with Ordering Clauses two and three.

A handwritten signature in cursive script, reading "Susan E. Wefald", written over a horizontal line.

Susan E. Wefald, Commissioner