

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

TransCanada Keystone Pipeline, LP	:	OAH File No. 20070181
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30-Inch Crude Oil Pipeline Cavalier to Sargent Counties Siting Application	:	Case No. PU-06-421
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	:	

POST-HEARING BRIEF

I. INTRODUCTION

The Public Service Commission (“the Commission”) held hearings in the above matter on November 27 and 28, 2007 to consider the potential adverse impacts of the siting application of TransCanada Keystone Pipeline, LP (“TransCanada Keystone”) on safety and public health issues relating to the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River. Joint Intervenors Dakota Resource Council, John and Janie Capp, Ramona Klein, Merle and Linette Kratochvil, and Mark Novak (“Joint Intervenors”) appeared at these hearings by counsel. The Joint Intervenors now submit this post-hearing brief in response to the new evidence entered into the record at these hearings and to repeat their request that the Commission deny the siting application of TransCanada Keystone.

II. STATEMENT OF LAW

The North Dakota Century Code sets forth the policy of the State of North Dakota in siting energy transmission facilities such as the 30-inch petroleum pipeline TransCanada Keystone proposes to construct through North Dakota:

The legislative assembly finds that the construction of energy conversion facilities and transmission facilities affects the environment and welfare of the

citizens of this state. *Therefore, it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state* by providing that no energy conversion facility or transmission facility shall be located, constructed, and operated within this state without a certificate of site compatibility or route permit acquired pursuant to this chapter. This legislative assembly hereby declares it to be the policy of the state to site energy conversion facilities and to route transmission facilities in an orderly manner compatible with environmental preservation and the efficient use of resources. *In accordance with this policy, sites and routes shall be chosen which minimize human and environmental impact* while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion. NDCC 49-22-02 (2007) (emphasis added).

The North Dakota Century Code further enumerates specific factors that the Commission must consider in evaluating applications and designation of sites, corridors, and routes:

1. Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.
2. The effects of new energy conversion and transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed energy conversion facility.

4. Adverse direct and indirect environmental effects which cannot be avoided should the proposed site or route be designated.
 5. Alternatives to the proposed site, corridor, or route which are developed during the hearing process and which minimize adverse effects.
 6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
 7. The direct and indirect economic impacts of the proposed facility.
 8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
 9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.
 10. The effect of the proposed site or route on areas which are unique because of biological wealth or because they are habitats for rare and endangered species.
 11. Problems raised by federal agencies, other state agencies, and local entities.
- NDCC 42-22-09 (2007) (emphasis added).*

Finally, the North Dakota Century Code defines criteria for exclusion and avoidance areas for evaluating the suitability of a transmission facility corridor and route. *NDCC 69-06-08-02 (2007)*. In particular, this section of the Century Code designates mandatory exclusion areas that must be excluded from consideration as part of a route for a transmission facility, together with a reasonable buffer zone to protect the integrity of the exclusion area. *NDCC 69-06-08-02(1) (2007)*. This section of the Century Code further designates avoidance areas that must be excluded from consideration of a route for a transmission facility, together with a reasonable buffer zone to protect the integrity of the avoidance area, unless the applicant can demonstrate

that there is no reasonable alternative. *NDCC 69-06-08-02(2) (2007)*. If an avoidance area is identified, the plain language of this section of the Century Code places the burden on the applicant to demonstrate that all available alternatives have been examined and that no reasonable alternative exists before an avoidance area may be considered for routing a transmission facility. *Id.* The Century Code explicitly states that economic reasons alone do not justify including an avoidance area within a proposed transmission facility route. *Id.*

If the Commission finds that TransCanada Keystone has failed to demonstrate that the pipeline route proposed in its application complies with the policy set forth by the North Dakota Legislature and the specific statutory criteria enumerated above, including the criteria for mandatory exclusion and avoidance areas, then TransCanada Keystone's application in this matter must be denied. In the particular context of the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River, the Commission must require TransCanada Keystone to demonstrate that the pipeline route chosen for its application would minimize potential adverse impacts to environmental and human health when compared with other potential routes the applicant could have selected, that the proposed pipeline route is supported by the specific selection criteria in the North Dakota Century Code, and that TransCanada Keystone has not improperly included exclusion or avoidance areas as part of its proposed pipeline route.

III. ARGUMENT

As set forth in the October 15, 2007 post-hearing brief filed on behalf of the Joint Intervenors in this matter, the petroleum pipeline proposed by TransCanada Keystone presents significant environmental risks. Enhancing this risk, the particular route proposed by TransCanada Keystone through the State of North Dakota traverses numerous waterways, wetlands, shallow aquifers and important watersheds that would be exposed to serious

contamination by toxic chemicals in the event of a pipeline leak or spill. This is certainly the case with the Lake Ashtabula and Sheyenne River watersheds that were the focus of the November 2007 hearings, as well as many other water resources along the proposed pipeline route that consist of, or feed into, private and municipal drinking water supplies. Other routes TransCanada Keystone could have chosen through the state, whether to the west or the east, would not present the same level of risk to water resources, and consequently to environmental and human health. Specifically, TransCanada Keystone could have chosen a route through the state that excludes the Lake Ashtabula and Sheyenne River watersheds. These water resources, which constitute an important municipal water source for the City of Fargo, are statutorily defined avoidance areas. *NDCC 69-06-08-02(2)(f)* (2007). In addition, the portion of the Sheyenne River Valley to the south of Baldhill Dam that TransCanada Keystone proposes to cross with its pipeline is an officially designated national and state scenic byway that also qualifies as a statutory avoidance area. *NDCC 69-06-08-02(2)(a)-(b)* (2007). A petroleum flow of 435,000 barrels per day, which may ultimately increase to 590,000 barrels per day or more, travelling through a high-pressure pipeline across some of the most sensitive and scenic water resources in the State of North Dakota, merits a special level of scrutiny on the part of the Commission and requires far more careful planning and due diligence than has yet been demonstrated by TransCanada Keystone in its application and public testimony.

1. TransCanada Keystone has failed to demonstrate that the route it has chosen for its petroleum pipeline, adjacent to and traversing Lake Ashtabula and the Sheyenne River, would minimize adverse human and environmental impacts in the context of the water supply of the City of Fargo. The North Dakota Century Code requires that the applicant TransCanada Keystone demonstrate that its proposed petroleum pipeline poses, not a

subjectively “acceptable” level of risk determined by the applicant’s private risk management consultants, but an objectively minimal level of risk to the environment and the welfare of the citizens of North Dakota. *NDCC 49-22-02 (2007)*. As part of this showing, TransCanada Keystone must demonstrate that the route proposed for the pipeline minimizes human and environmental impacts. *Id.* With regards to the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River, TransCanada Keystone has not made the objective showing required by North Dakota law. Specifically, the Century Code requires that the Commission consider, inter alia, the following specific criteria with regard to TransCanada Keystone’s siting application:

- The effects of the location, construction and operation of the proposed pipeline on public health and welfare, natural resources and the environment. *NDCC 49-22-09(1) (2007)*.
- Adverse direct and indirect environmental effects that cannot be avoided should the proposed pipeline route be designated. *NDCC 49-22-09(4) (2007)*.
- Alternatives to the proposed pipeline route that minimize adverse effects. *NDCC 49-22-09(5) (2007)*.
- Existing plans of the state, local government, and private entities for other developments in the vicinity of the proposed route. *NDCC 49-22-09(8) (2007)*.

Expert witnesses offering testimony on behalf of the City of Fargo addressed serious omissions in the risk analysis and routing analysis performed by TransCanada with relation to the City of Fargo’s water supply. Testimony offered by witness Bruce Grubb on behalf of the City of Fargo established the reliance by Fargo on Lake Ashtabula and the Sheyenne River as important sources of potable water for the city. Testimony offered by witness Dave Koland demonstrated the future increased reliance by the City of Fargo on Lake Ashtabula and the

Sheyenne River as the city's water needs expand and the Red River Valley Water Supply Project diverts additional needed water from the Missouri River to the north end of Lake Ashtabula. Mr. Koland also expressed his professional opinion that the TransCanada Keystone pipeline, as currently routed, would pose a risk to the Red River Valley Water Supply Project. Witness Bruce Long then addressed the potential harm to the City of Fargo's water intake and treatment system in the event of contamination from a petroleum spill and provided details of monitoring and early warning measures in use on other U.S. waterways. Mr. Long also emphasized the limited capacity of the City of Fargo for raw water storage in the event the city's water intakes needed to be shut down for a period of time. Specific inadequacies in TransCanada Keystone's routing analysis with relation to the City of Fargo's water supply were outlined in the testimony of witness Barton Schultz, in particular the lack of consideration given by TransCanada Keystone to Lake Ashtabula and the Sheyenne River as sources of water for the City of Fargo. Finally, witness Mark Deutschman presented a critique of the risk analysis model employed by TransCanada Keystone in measuring the likelihood of a leak or spill and the range of effects that could stem from such an event. In particular, the testimony of Mr. Deutschman demonstrated the necessity of looking at the full range of potential risks from the pipeline, not the single numerical value presented by TransCanada Keystone. Although the worst case scenario may be less likely than other, less serious outcomes, it nevertheless needs to be recognized and taken into account in responsible risk analysis and mitigation.

In response to these concerns, TransCanada Keystone presented a risk analysis of the City of Fargo's water supply that had not been prepared until immediately prior to the November 2007 hearings. (Exhibit T-39) The quickly compiled risk analysis was based on limited data and little real insight into the local topography, soil composition or drainage patterns. TransCanada

Keystone risk analyst Heidi Tilquist stated in her testimony that the hydrologist responsible for identifying intermittent stream channels and predicting drainage patterns in the Lake Ashtabula/Sheyenne River watersheds had based his information on aerial photos taken from Google Earth. (Transcript, p. 987-88) Ms. Tilquist further stated that, while she may have walked over portions of the land herself, she did so only once in November 2007 and had no knowledge of how water flowed over the land during spring flooding or times of heavy rainfall. (Transcript, p. 989) Nowhere did Ms. Tilquist suggest that she had consulted local experts or landowners to determine historical drainage patterns in the watersheds or to learn in more detail how water – and other fluids, such as petroleum – would typically flow over the land and ultimately drain into the lake or river. *Id.* Simply gathering historical data from local sources would be a basic method of testing the conclusions that Ms. Tilquist had drawn from having a hydrologist look at pictures on Google Earth, but this was not done. Ms. Tilquist further stated in her testimony that she had not looked at underground springs or stream channels that might carry a petroleum spill from the underground pipeline that TransCanada Keystone is proposing, despite the fact that this information could impact the conclusions of her analysis. (Transcript, p.1066-67) At least one explanation for these material omissions may have been time limitations, due to the fact that TransCanada Keystone had not undertaken this risk analysis prior to November 2007. As Ms. Tilquist testified, “I would say that it would take quite a long time because you’d probably have to go and get groundwater studies, looking at the movement, rate of movement, soil conductivity. I mean, the more sophisticated you want to make your model and try to look at this, the longer it’s going to take to generate this information.” (Transcript, p. 999) TransCanada Keystone may have felt that a proper risk analysis could not be completed in time for the November hearings, but the testimony of the experts for the City of Fargo and of Ms.

Tilquist make clear that a more detailed risk analysis is in fact necessary in order to accurately measure and assess the level of environmental and public health risks that would result from this particular portion of the pipeline route.

In addition to these specific omissions in TransCanada Keystone's risk analysis for the Lake Ashtabula/Sheyenne River watersheds, TransCanada Keystone failed to present any evidence that it had adequately considered alternative routes that would minimize the risks outlined by experts for the City of Fargo. When asked why TransCanada Keystone had not already done comparative risk analyses for alternate routes for the Lake Ashtabula/Sheyenne River portion of the pipeline, witness Heidi Tilquist again suggested that this failure was the result of time constraints: "Risk assessment takes a while to do, and they will – as this process evolves, they will be looking at that. What we look at when we're routing is a lot of these factors, but these very detailed, specific analyses come up when we've got specific issues and we'll be doing these things, but it's – this level of detail can't – isn't done when we're doing macro-level routings." (Transcript, p. 1012) TransCanada Keystone cannot meet its statutory obligation of demonstrating that its proposed route minimizes risk to the environment and human health without first demonstrating that it has properly identified and analyzed alternate routes that might pose a lesser risk. The testimony of both the experts for the City of Fargo and the risk analyst for TransCanada Keystone, as outlined above, clearly show that the applicant in this matter has not met its burden of proving that the pipeline route being proposed would minimize human and environmental impacts, as required by North Dakota law.

2. TransCanada Keystone has failed to demonstrate that there is no reasonable alternative to the route it has chosen, including the avoidance areas consisting of the City of Fargo's water supply from the Lake Ashtabula reservoir and the Sheyenne River. The

North Dakota Century Code designates avoidance areas that “shall not be considered in the routing of a transmission facility unless the applicant shows that under the circumstances, there is no reasonable alternative.” *NDCC 69-06-08-02(2)* (2007). Provision is also made for a reasonable buffer zone to protect the integrity of the designated avoidance area, such as the watershed that surrounds and drains into a water supply. *Id.* Economic reasons alone do not justify including avoidance areas in a pipeline route. *Id.* Avoidance areas defined by the Century Code include reservoirs and municipal water supplies. *NDCC 69-06-08-02(2)(f)* (2007). The pipeline route proposed by TransCanada Keystone runs adjacent to the Lake Ashtabula reservoir and traverses the Sheyenne River, both of which, as water supplies for the City of Fargo are statutorily defined avoidance areas under the plain language of the Century Code. The point where the proposed pipeline route traverses the Sheyenne River also qualifies as an avoidance area due to the fact that this portion of the Sheyenne River Valley is part of a designated national and state scenic byway. *NDCC 69-06-08-02(a)-(b)* (2007). Although by statute TransCanada Keystone bears the burden of demonstrating that no reasonable alternative exists to routing the proposed pipeline parallel to and across these avoidance areas, the applicant has not made any substantial showing that all alternatives have been examined, or that no reasonable alternative exists. Indeed, evidence presented at the November 2007 hearings suggests that TransCanada Keystone has performed only the most cursory analysis of alternate routes along this portion of the proposed pipeline. (Transcript p. 1012-13) As recognized in the above-cited section of the Century Code, time and expense do not justify this omission on the part of the applicant. TransCanada Keystone had full opportunity to perform adequate route analyses that would comply with North Dakota law prior to filing its siting application in this matter. The applicant chose to proceed with less than the necessary information and is now

unable to meet the burden of demonstrating that no reasonable alternative exists to routing the proposed pipeline along and across vital municipal water sources, which are statutorily defined avoidance areas. Because the applicant has failed to meet its burden on this issue, the Commission cannot approve the route as it has been proposed by the applicant.

3. The Settlement Stipulation concluded between the City of Fargo and TransCanada Keystone on December 18, 2007 does not adequately address the statutory requirements outlined above for siting a petroleum pipeline in the State of North Dakota. The Settlement Stipulation, which was not negotiated with or agreed to by any of the Joint Intervenors, requires of TransCanada Keystone only the most basic notice requirements and pipeline design features. The Joint Intervenors, the citizens of North Dakota and the Commission would have the right to expect these minimal measures to be taken by the applicant even in the absence of a separate contractual obligation. As set forth above, the statutory obligations for TransCanada Keystone in selecting a route for its proposed pipeline are more stringent than the concessions made in the Settlement Stipulation. This Commission has the power to, and indeed is obligated to hold TransCanada to the higher statutory standards set forth in the North Dakota Century Code. Where the route chosen by the applicant fails to minimize risk to the environment and human health and where, as in this case, the applicant has failed to adequately consider alternate routes that might serve to mitigate this risk, then the Commission is obligated to deny the siting application for that route.

The Settlement Stipulation between the City of Fargo and TransCanada Keystone outlines two basic categories of requirements of TransCanada Keystone: first, to provide information to the City of Fargo regarding pipeline design, emergency response planning and future pipeline infrastructure; and second, to implement specific design features along an

approximately 25-mile stretch of the pipeline. The information and notice requirements made of TransCanada Keystone do nothing to mitigate potential adverse impacts from the pipeline on the City of Fargo's water supply. Under these vaguely worded provisions, TransCanada Keystone is required only to "present information" to the City of Fargo. The Stipulation contemplates that this presentation of information will take place by deadlines that fall outside the anticipated window for the Commission to issue a ruling in this matter. As such, there is no recourse for the City of Fargo or the Commission if the analysis done and the mitigations measures taken by TransCanada Keystone fail to adequately address the issues of design and emergency response planning. In addition, the Stipulation does not state whether the specific design features agreed to were already part of TransCanada Keystone's design plan, or whether these are actually new design features that would impact the risk analysis presented in prior hearings. Indeed it is difficult to make that determination as no specific design plans for the pipeline have been produced by TransCanada Keystone as part of these proceedings. Furthermore, no information has been provided, either with the Stipulation or elsewhere, as to what impact these design features would have on the relative safety of the pipeline with regards to the City of Fargo's water supply. Finally, neither information and notice requirements nor added design features address the question of whether the route proposed by TransCanada Keystone along Lake Ashtabula and the Sheyenne River is the safest possible route for the environment and the citizens of North Dakota. Without answering this vital question, the terms of the Settlement Stipulation between TransCanada Keystone and the City of Fargo have no bearing on whether the pipeline route complies with the specific statutory requirements set forth in the North Dakota Century Code.

IV. CONCLUSION

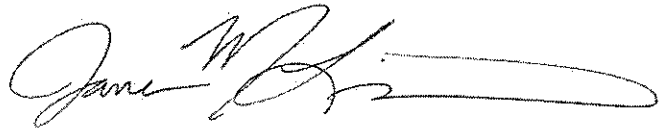
As set forth above, TransCanada Keystone has failed to demonstrate that its proposed pipeline route along Lake Ashtabula and the Sheyenne River minimizes potential risk to the health of the public and the environment, or that the proposed route complies with the specific selection criteria set forth in the North Dakota Century Code and would be safer than all available alternatives. TransCanada Keystone has further failed to demonstrate that its proposed pipeline route complies with all requirements relating to statutory exclusion and avoidance areas, or that no reasonable route alternatives exist outside of those exclusion and avoidance areas. Finally, the Settlement Stipulation agreed to by the City of Fargo and TransCanada Keystone fails to address the statutory compliance issues set forth in this post-hearing brief. Therefore, based on all the evidence presented in this matter, including the new evidence presented at the hearings of November 27 and 28, 2007, and for all the reasons set forth herein, the Commission should deny the siting application filed by TransCanada Keystone in this matter.

Dated this 7th day of January, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the Post-Hearing Brief to which this Certificate is attached were served on the 7th day of January, 2008 by e-mail addressed to:

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