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April 2, 2008

RECEIVED

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PUBLIC SERVICE COMMISSION

Debra Simenson
Burleigh County Clerk of Court
PO Box 1055
Bismarck ND 58502-1055

RE: Dakota Resource Council et al. v. Public Service Commission, et al.
Case No. 08-08-C-00814

Dear Ms. Simenson:

Enclosed for filing in the above referenced case:

1. MOTION TO STAY ORDER PENDING APPEAL AND MEMORANDUM IN SUPPORT THEREOF
2. AFFIDAVIT OF SERVICE BY MAIL

Thank you for attention to this matter. If you have any questions please contact Derrick Braaten the attorney on this case.

Sincerely,

Trina Gilhooly
Assistant

Encs.

c: Jana Linderman *(by fax only 866-484-2373)*

398 **PU-06-421** Filed: 4/3/2008 Pages: 14
Motion to Stay Order Pending Appeal and Memorandum in Support Thereof

Intervenors

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STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council, Janie and John Capp, Ramona Klein, Linette and Merle Kratochvil, and Mark Novak, Appellants vs. Public Service Commission, and TransCanada Keystone Pipeline, LP, Appellees	Case No. 08-08-C-00814 Agency Case No. PU-06-421 MOTION TO STAY ORDER PENDING APPEAL AND MEMORANDUM IN SUPPORT THEREOF

The Appellants Dakota Resource Council, Janie and John Capp, Ramona Klein, Linette and Merle Kratochvil, and Mark Novak ("Appellants"), pursuant to N.D.C.C. § 28-32-48, hereby submit this Motion to Stay Order Pending Appeal and in support thereof state:

FACTS

1. On February 21, 2008, the North Dakota Public Service Commission ("Commission") issued its Findings of Fact, Conclusions of Law and Order in the matter of TransCanada Keystone Pipeline, LP 30-Inch Crude Oil Pipeline/Cavalier to Sargent Counties Siting Application (Case No. PU-06-421).
2. The Commission's order granted to TransCanada Keystone Pipeline, LP ("TransCanada Keystone") a Certificate of Corridor Compatibility and Route Permit to construct a 218-mile, 30-inch crude oil pipeline with associated facilities and pipeline interconnections in Cavalier to Sargent Counties, North Dakota. The order allows TransCanada Keystone, among other things, to commence eminent domain

proceedings against landowners along the pipeline route to acquire easements and, subject to the conditions of the order, to commence construction of the pipeline in North Dakota.

3. On March 24, 2008 the Appellants filed a Notice of Appeal and Specifications of Error, appealing from the Commission's order pursuant to N.D.C.C. §§ 28-32-42 and 49-22-19.

4. Appellant Dakota Resource Council is a non-profit organization with a mission to protect North Dakota's land, air, water, rural communities and agricultural economy. DRC members include community members and property owners along the planned route of the Keystone pipeline with both general community interests and direct private property interests in the impacts of the pipeline. Individual Appellants Janie and John Capp, Ramona Klein, Linette and Merle Kratochvil, and Mark Novak are property owners along the planned route of the Keystone pipeline with direct private property interests in the impacts of the pipeline.

5. DRC and the other individual Appellants will be directly and materially impacted by actions taken by TransCanada Keystone pursuant to the Certificate of Corridor Compatibility and Route Permit, including but not limited to, the commencement of condemnation proceedings to obtain easements for the pipeline and the commencement of construction activities for the pipeline.

APPLICABLE LAW

6. Pursuant to N.D.C.C. § 28-32-48, an appeal from an order of an administrative agency does not stay the enforcement of the order unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs,

orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order. N.D.C.C. § 28-32-48 does not specify the standard the court should use to determine whether a stay is appropriate or the terms and conditions the court should impose as part of the stay.

7. While appeals of administrative agency determinations are governed primarily by the Administrative Agencies Practice Act (N.D.C.C. § 28-32-01 *et seq.*), the rules of civil procedure may provide additional guidance. *See* N.D.R.Civ.P. 81(b). The courts have defined a four part test to determine whether a stay pursuant to N.D.R.Civ.P. 62 is appropriate during the pendency of an appeal in order to maintain the status quo amongst the parties:

    a. First, whether the appellant is likely to succeed upon appeal;

    b. Second, whether the appellant will suffer irreparable injury if the stay is not granted;

    c. Third, whether substantial harm would come to another party if the stay is granted; and

    d. Fourth, whether granting the stay would harm the public interest.

    See Cass County Electric Cooperative v. Wold Properties, Inc., 253 N.W.2d 323, 327 (N.D. 1977).

8. Staying the effect of a final order pending appeal serves the purpose of maintaining the status quo amongst the parties and protecting the fruits of the outcome of the appeal for the prevailing party. The courts have held that it is appropriate to grant an appellant's request to stay the effects of a final order when not doing so would

virtually dispose of the appeal and destroy any possibility of its efficacy to the appellant. *See* Brusegaard v. Schroeder, 199 N.W.2d 921, 926-27 (N.D. 1972).

ARGUMENT

9. Appellants are likely to succeed upon appeal. Appellants' Notice of Appeal and Specifications of Error, as filed on March 24, 2008, sets forth four distinct grounds for appeal pursuant to N.D.C.C. § 28-32-42, any one of which would justify granting the Appellants' request to vacate the Commission's final order in PSC Case No. PU-06-421 and remand the matter to the Commission for further proceedings. These grounds for appeal are substantially justified in light of the Commission's order and the record in this case.

    a. First, N.D.C.C. § 28-32-46(1) provides for appeal from an agency order that is not in accordance with the law. As set forth in Appellants' Notice of Appeal, the Commission's final order fails to comply with several express provisions of N.D.C.C. Chapter 49-22 and North Dakota Administrative Code Chapter 69-06, which govern the pipeline siting application that is the subject of the order. Among other things, the Commission's order fails to properly apply the express legislative standard of N.D.C.C. § 49-22-02 that any pipeline route chosen should minimize adverse human and environmental impacts. In particular, the order fails to consider or to properly analyze and compare the relative environmental impacts of available alternatives to the approved route and ignores uncontroverted evidence of safer alternatives to the approved route. For example, the testimony of Jim Horner of the North Dakota Department of Health that a western re-route in the vicinity of the Fordville

aquifer would be safer than the route proposed by the Applicant was not contradicted by witnesses for TransCanada Keystone, but the Commission's order accepts the route as proposed by the Applicant. The order also fails to properly take into account alternative routes that avoid eastern North Dakota's sensitive water resources altogether, for example, routes through the western part of the state, or routes that follow existing pipeline corridors. In addition, the Commission's order fails to identify the full range of adverse environmental impacts from the pipeline, particularly impacts to public and private water resources. Notably, the order does not properly identify or address potential impacts to private wells along the pipeline. The Commission's order also fails to properly identify all avoidance areas along the pipeline route pursuant to North Dakota Administrative Code § 69-06-08-02(2) – in particular the federally and state designated Sheyenne River Valley Scenic Byway – and ignores the express statutory requirement that the Applicant must demonstrate no reasonably available alternatives before an avoidance area may be considered for a pipeline route.

b. Second, N.D.C.C. § 28-32-46(5) provides for appeal from an agency order that contains findings of fact that are not supported by a preponderance of the evidence. As specifically enumerated in Appellants' Notice of Appeal, the Commission's final order relies upon a series of findings of fact that are not supported by a preponderance of the evidence in the record. Among other things, the Commission's order errs in finding that alternatives to the approved route would not minimize adverse human and environmental

impacts. The record demonstrates that the Commission did not fully consider alternatives to the approved route, and there is insufficient evidence in the record to support the Commission's finding that these alternatives would not minimize adverse impacts when compared to the route approved by the Commission. The Commission also errs in its finding that avoidance areas were adequately considered, when the order fails to properly identify all avoidance areas and fails to account for the requirement that the Applicant demonstrate no reasonable alternatives before avoidance areas may be properly considered. In addition, the Commission's findings of fact related to impacts on the Fordville Aquifer and the Sheyenne River watershed improperly ignore uncontroverted evidence of the frequency and volume of pipeline leaks from a study prepared for TransCanada Keystone and offered into evidence by the Appellants, and these findings of fact also fail to give adequate consideration to safer alternative routes along those two portions of the pipeline.

c. Third, N.D.C.C. § 28-32-46(6) provides for appeal from an agency order that contains conclusions of law that are not supported by the findings of fact. As specifically enumerated in Appellants' Notice of Appeal, the Commission's final order relies upon conclusions of law that are not supported by the findings of fact. The Commission errs in concluding that the pipeline will produce minimal adverse effects on the environment and the public welfare, that the pipeline is compatible with environmental preservation, that the pipeline will minimize adverse human and environmental impact and that the

design and location of the pipeline ensure that it will produce minimal adverse effects. In particular, the Commission's findings of fact do not support a conclusion that alternatives were adequately examined or considered, that the safest available route was identified and approved, that the full range of impacts to private wells and other water resources were adequately identified or taken into account, or that environmentally sensitive avoidance areas were properly identified and found to be necessary to the approved route. As such, the Commission's findings of fact do not support the conclusions of law identified in Appellants' Notice of Appeal.

d. Fourth, N.D.C.C. § 28-32-46(7) provides for appeal from an agency order that fails to sufficiently address the evidence presented to the agency by the Appellants. As set forth in Appellants' Notice of Appeal, the Commission's order fails to properly address at least three categories of evidence offered into the record by the Appellants. First, the order does not mention or sufficiently address evidence of the frequency and volume of future pipeline leaks and spills along the Keystone pipeline, as derived from a study prepared specifically for TransCanada Keystone and offered into evidence at hearing by Appellants. The study indicates that leaks are likely to occur along the pipeline as often as once every 7 years, and that small leaks (which are the most common) are likely to go undetected for substantial periods and can release large volumes of crude oil during that time. Second, the order does not sufficiently address evidence from Appellants and local residents of risks to public and private water supplies from the Keystone pipeline. In particular,

the order acknowledges that private water wells along the route do exist but were never specifically identified or the risk to them analyzed by either TransCanada Keystone or the Commission. These private wells provide the primary or sole source of potable water and water for livestock and irrigation for many residents and farmers along the pipeline route. Third, the order does not mention or sufficiently address evidence presented by Appellants regarding safer alternatives to the route approved by the Commission through the Forest River watershed, including evidence that a western re-route would be safer and evidence that retention dams to the west of the approved route would provide added protection to water supplies if a western re-route were to be substituted.

10. Appellants will suffer irreparable injury if a stay of the Commission's order is not granted. The purpose of Appellants' appeal in this matter is to reverse and vacate the Commission's order approving a specific route for the Keystone pipeline. The effect of the Commission's order is to allow TransCanada Keystone to proceed with land acquisition via eminent domain and construction activities for the pipeline along the approved route in North Dakota. Should Appellants prevail on appeal, at a minimum, the Commission will be required to reconsider whether the pipeline route should remain as currently approved, or whether all or portions of the route should be modified. In the interim, TransCanada Keystone has the ability to proceed with condemnation proceedings against individual landowners and to commence construction activities for the pipeline along the approved route, including digging up productive topsoil and subsoil to lay and bury pipe across the property of individual

landowners, digging trenches and boring holes at road crossings and water body crossings, disturbing wetlands and clear cutting trees and shrubs from windbreaks, shelterbelts and other wooded areas. With respect to the specific route that was approved by the Commission, these are precisely the activities that this appeal seeks to prevent. Not granting a stay of the Commission's order would effectively dispose of the relief that Appellants are seeking and would cause material and irreparable injury to the interests that Appellants are seeking to protect.

11. No substantial harm would come to any other party if the stay is granted. On the contrary, granting the stay would preserve the status quo amongst the parties and preserve the fruits of the appeal for whichever party prevails. Granting a stay would have no material adverse impact on the Commission or its activities. As to the other Appellee, TransCanada Keystone, granting a stay would temporarily preclude those activities along the approved route that can proceed only under a valid Certificate of Corridor Compatibility and Route Permit, including acquiring easements via eminent domain and commencing construction of the pipeline. However, it is precisely these activities that would require disproportionate expenditure of resources to undo in the wake of this appeal and that would cause material and irreparable harm to Appellants during the pendency of this appeal. In the interim, TransCanada Keystone has the ability to proceed with other pre-construction activities not requiring a final Certificate of Corridor Compatibility and Route Permit, for example: the preparation of final water crossing designs, the preparation of final cultural resource mitigation plans, the preparation of an emergency response plan, and the preparation of a written integrity management program. These are all pre-requisites to commencing

construction and operation of the pipeline that would not be precluded by staying the Commission's final order. It is in the manifest interest of all parties, including TransCanada Keystone, to have final certainty as to the route of the pipeline prior to taking actions that could not be easily undone after the fact, such as the forcible transfer of right-of-way easements or the substantial disturbance of farm soil, trees, wetlands and water crossings that would result from commencing construction of the pipeline.

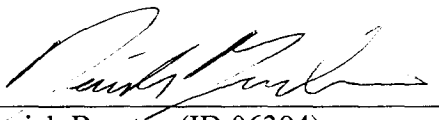
12. No harm to the public interest would result on account of the stay. The temporary stay of activities under the Certificate of Corridor Compatibility and Route Permit would have no discernible adverse impact on the public interest. On the contrary, granting the stay would serve the public interest. The public interest would not be benefited if construction activities, and the related adverse impacts to productive farm soil, trees, wetlands and water crossings, were to commence only to be rendered obsolete and have to be undone following the outcome of this appeal. Similarly, the public interest would not be benefited by using judicial resources to seize private property via eminent domain, only to have those seizures rendered illegitimate by the outcome of this appeal. The public interest would best be served by ensuring that, whenever private property is seized and pipeline construction activities begin, the pipeline route and the order approving it are in full compliance with the law.

The Appellants therefore respectfully request that the Court, after hearing or submission of briefs pursuant to N.D.C.C. § 28-32-48, grant this motion to stay the effect of the February 21, 2008 Commission order pending the outcome of this appeal.

Dated this 2nd day of April, 2008.

Respectfully submitted,

SARAH VOGEL LAW FIRM, PC
By:



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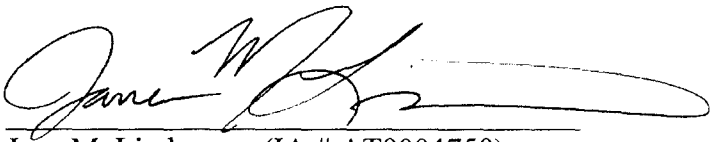
PLAINS JUSTICE
By:



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ATTORNEYS FOR APPELLANTS

STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council, Janie and John Capp, Ramona Klein, Linette and Merle Kratochvil, and Mark Novak, Appellants v. Public Service Commission, and TransCanada Keystone Pipeline, LP, Appellees	Case No. 08-08-C-00814 Agency Case No. PU-06-421 **AFFIDAVIT OF SERIVICE BY MAIL**

On April 2, 2008, I, Trina Gilhooly, served the party(s) described below with the documents described below by depositing such documents in the United States mail (at Bismarck, North Dakota), with postage prepaid. The address of each party served is the last reasonably ascertainable post office address of such party. I am of legal age and not a party to this action.

Document Served:

1. MOTION TO STAY ORDER PENDING APPEAL AND MEMORANDUM IN SUPPORT THEREOF

Names & Address of Party(s) Served:

Illona Jeffcoat-Sacco
Executive Secretary
Public Service Commission
600 E Boulevard Avenue
Department 408
Bismarck, ND 58505

Wayne Stenehjem
Attorney General
600 E Boulevard Avenue
Department 125
Bismarck, ND 58505

Thomas Kelsch
Kelsch Kelsch Ruff & Kranda
103 Collins Avenue
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Mandan, ND 58554-7266

Trina Gilhooly

State of North Dakota)
)ss
County of Burleigh)

On April 2, 2008, before me personally appeared Trina Gilhooly, known to me to be the same person described in and who executed the within and foregoing instrument and acknowledged to me that she executed the same.

Notary Public

DONNA M ABRAHAMSON
Notary Public
State of North Dakota
My Commission Expires May 27, 2011