

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.)

CIVIL NO. 08-08-C-0814
Agency Case No. PU-06-421

RETURN TO MOTION TO STAY PENDING
APPEAL AND MEMORANDUM IN
SUPPORT OF RETURN

Appellee TransCanada Keystone Pipeline LP, (Keystone) files this return to Appellants' Motion to Stay Order Pending Appeal, and in support of its return states:

I

EXECUTIVE SUMMARY

In order for the Appellants to succeed in their request for a stay of the Public Service Commission's (Commission), order granting Keystone a permit to construct the Keystone Pipeline in North Dakota, the Appellants have the burden of proving to this court the following:

1. A strong showing the applicant is likely to succeed on the merits of the appeal;
2. That unless a stay is granted, the Applicant will suffer irreparable injury;
3. That no substantial harm will come to other interested parties, and
4. That granting the stay will do no harm to the public interest.

Appellants are not entitled to a stay because they have failed to meet the "strong showing" that they are likely to succeed on the merits of appeal. There is a presumption of validity of the Commission's Findings Conclusions and Order that the Appellants have failed to rebut. The siting of a petroleum pipeline involves highly technical subject matter, and the Commission's expertise is given appreciable deference by the court. Keystone in this reply memorandum has addressed each specification of error alleged by Appellants, and cited to the Findings of Fact, Conclusions of Law and Order of the Commission, as well as citing to

supporting testimony from the transcripts of the hearings. These citations show that a preponderance of the evidence supports the Commission's Finding, Conclusions and Order, and that the Commission actions should be affirmed.

Appellants have failed to show that they will suffer irreparable injury unless a stay is granted. Keystone has made a detailed showing of the substantial injury that Keystone will suffer if a stay is granted. Keystone estimates that a stay in construction of the pipeline will cause Keystone to incur damages in the range of \$100 to \$390 million.

The granting of a stay will cause harm to the public, in the form of deferred property tax revenue of \$7.65 to \$9.38 million; the deferral of approximately \$32.9 million in amounts Keystone will spend in the local communities of North Dakota during the 2008 construction season; as well as the loss of oil production revenue for North Dakota producers and oil tax revenues for the state caused by the shortage of pipeline capacity in the state. In addition the Keystone pipeline will serve a need of the consumers in the United States for petroleum. A stay may adversely affect that demand.

Even if the Court finds that Appellants have made a strong showing that they are entitled to a stay of the Commission's order, before a stay can be issued Appellants are required to put up an undertaking by two sureties that will cover any damages incurred by Keystone as a result of the stay. The Appellants would have to put up an undertaking in the amount of \$100 to \$390 million before a stay could be issued by the court.

For these stated reasons Keystone respectfully requests the court to deny Appellants request for a stay of the Commission's order.

II.

STATEMENT OF THE CASE

A. PSC Case No. PU-06-421: Corridor Certificate and Route Permit

1. On April 11, 2007, TransCanada Keystone Pipeline, LP (Keystone) 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 in Cavalier, Pembina, Walsh, Nelson, Steele, Barnes, Ransom, and Sargent Counties of North Dakota. Approximately 218 miles of the crude oil pipeline is located in North Dakota.

2. On May 2, 2007, the Commission issued a Notice of Filing and Notice of Hearing setting forth the issues to be considered for the Keystone Application. Public hearings were scheduled for Monday, July 23, 2007 at 1:00 p.m. CDT in Barnes County in Valley City and for Tuesday, July 24, 2007 at 1:00 p.m. CDT in Park River.
3. On May 2, 2007, the Commission issued a Notice of Filing and Notice of Hearing, determined that the Application was complete and waived the procedures set forth in N.D.C.C. Section 49-22-08 and 49-22-08.1 to allow for a single consolidated application for Corridor Certificate and Route Permit.
4. On May 2, 2007, the Commission in its Notice of Hearing identified the following issues to be considered:
 1. Will the location, construction and operation of the proposed pipeline produce minimal adverse effects on the environment, natural resources and upon the welfare of the citizens of North Dakota?
 2. Is the proposed pipeline compatible with the environmental preservation and the efficient use of resources?
 3. Will the proposed pipeline corridor and route minimize adverse 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?
 4. Is it appropriate for the Commission to waive the procedures as requested in the application including the request for a single consolidated application for Corridor Certificate and Route Permit?
5. The hearing was continued to September 5-6, 2007 at the Public Service Commission Chambers in Bismarck.
6. At the Public Hearings in Valley City, Park River, and the September and November hearings in Bismarck, the Commission received 46 Exhibits from Keystone, 14 Exhibits from the City of Fargo, 18 Exhibits from the members of the public, and one Intervener Exhibit.
8. On October 24, 2007, Fargo filed a motion to intervene as a Party in the above action and to re-open the hearing.
9. On November 7, 2007, the Commission issued an order granting Fargo's motion. The Commission limited the scope of the reopened proceeding, as authorized under Section 69-02-02-05 of the North Dakota Administrative Code, to the safety and public health issues relating to the water supply of the City of Fargo from Lake Ashtabula and the Sheyenne River.
10. The parties agreed to a hearing date and the Commission issued an Order on November 8,

2007, determining that an emergency exists under the circumstances of this proceeding and that hearing be scheduled on an expedited basis as authorized under NDCC ss 49-22-13(4), and scheduling the hearing for November 27, 2007.

11. At the hearings in Bismarck on November 27th and 28th 2007, the Commission heard testimony from six witnesses called by Fargo, from one member of the public, and from one rebuttal witness called by Keystone.

12. After the November hearing was completed, Keystone and Fargo commenced confidential settlement negotiations in an attempt to resolve Fargo's intervention in Case No. PU-06-421. Keystone and Fargo entered into a stipulation on December 17th, 2007, and filed the Stipulation with the Commission on December 20th 2007. The Settlement Stipulation resolves Fargo's intervention in this proceeding. Pursuant to the Settlement Stipulation, Fargo filed a Motion to Withdraw as Party Intervener on December 20th 2007. As grounds for this motion, Fargo asserted that its concerns are addressed by the Settlement Stipulation and, in accordance with the Stipulation; Fargo supports Keystone's route and corridor in the Lake Ashtabula/Sheyenne River area.

13. Keystone and Appellants filed post hearing briefs on January 3, 2008, and Keystone filed proposed Findings of Fact, Conclusion of Law and Order.

14. Keystone obtained the services of a court reporter for the hearings and transcripts of the hearings were prepared and available to the Commission use during its deliberation and preparation of its Findings of Fact, Conclusions of Law and Order.

15. After a month and a half of deliberation, on February 21, 2008, the North Dakota Public Service Commission ("Commission") issued its Findings of Fact, Conclusion 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), including Certificate of Corridor Compatibility Number 101 and Route Permit Number 111 (the "Permit" or "Order"). The Permit constitutes a well-reasoned and detailed order, which includes 125 separate Findings of Fact, eight Conclusions of Law, and 34 Ordering Provisions.

16. Within the time prescribed by § 28-32-42 NDCC on March 24, 2008, Appellants filed a Notice of Appeal and Specification of Error.

17. On April 2, 2008 Appellants filed a Motion to Stay Order pending appeal. Appellants did

not file a notice for motion, but it was served by mailing on April 2, 2008 on Appellees. If the court trials this motion as a Rule 3.2 Motion, Appellees have until April 21, 2008 to respond to the Motion to Stay Order pending appeal.

B. Related PSC Case No. PU-07-152: Certificate of Public Convenience and Necessity

18. On November 21, 2007, the North Dakota Public Service Commission issued its Findings of Fact, Conclusions of Law, and Order in Case No. PU-07-152, granting Keystone a Certificate of Public Convenience and Necessity (PCN). The Commission made the following Findings of Fact (reference: copy of PC & N - Exhibit C):

- a. The Keystone Pipeline serves a national interest by providing refineries and markets with access to Canadian crude oil to meet growing United States demand for petroleum products.
- b. According to the Energy Information Administration (EIA), United States demand for petroleum products has increased by 17 percent or three million barrels per day (bpd) over the past 10 years and is expected to increase further. The EIA estimates that total United States petroleum consumption will increase by approximately 5.3 million bpd over the next 20 years, representing average demand growth of approximately 265,000 bpd each year.
- c. Growing oil production in Canada has the potential to decrease the United States' dependence on crude oil from more unstable parts of the world.
- d. Mark Makelky, Director of the North Dakota Pipeline Authority of the Industrial Commission of North Dakota testified that a direct benefit of the Keystone Pipeline is an additional delivery path for North Dakota produced crude oil to access Midwest markets. A majority of North Dakota crude oil is shipped through the Montana-Wyoming-Colorado-Nebraska pipeline infrastructure referred to as the "Guernsey Hub" which is filled to capacity with oil supplies from Canada. An indirect benefit of the Keystone Pipeline is the expected relief to current Guernsey Hub capacity strain. The result of the direct and indirect benefits of the Keystone Pipeline would be a potential for increased North Dakota crude oil production. Makelky stated that at least one North Dakota company has expressed an interest in connecting its facilities to the Keystone system.
- e. North Dakota produces approximately 100,000 bpd (barrels per day) of crude oil.
- f. Capacity bottlenecks of present pipeline infrastructure have created a situation where North Dakota crude oil has suffered price penalties of \$5.00 to \$30.00 per barrel.

- g. Makelky testified that, according to United States Department of Transportation statistics, pipelines are the safest method of transporting petroleum products. He also stated the pipelines are the most efficient and economical method of shipping the large quantities needed by the United States on a daily basis.
- h. The Keystone Pipeline will provide the following economic benefits for North Dakota:
 - i. Construction will involve two spreads in North Dakota with 500-600 workers for each spread.
 - ii. An additional 20 workers will be hired for construction of each pump station.
 - iii. 10-15% of the workforce will be hired locally.
 - iv. Food and lodging for construction will be approximately \$3.25 million dollars.
 - v. Based on 2005 property assessment and tax rate information, Keystone's North Dakota property taxes will be approximately \$5.2 million in the first year after construction, and will be continued to be paid over the lifetime of the pipeline.
 - vi. Direct and contract employees will be hired locally for pipeline operations.
 - vii. Keystone will pay sales and use taxes.

19. The appellants in this case were all parties to Keystone's application for PCN Case No. PU-07-152. The appellants did not appeal the Commission decision in PU-07-152, and the time to appeal the decision has expired.

III.

LEGAL STANDARD FOR DISPOSITION OF STAY REQUEST

1. North Dakota has adopted a five part test to determine whether a stay pursuant to Rule 62 NDR. C.V.P. is appropriate during the pending of appeal. In order for an applicant to obtain a stay pending appeal, the applicant is required to show to the court all of the following:

- A) A strong showing the applicant is likely to succeed on the merits of the appeal;
- B) That unless a stay is granted, the Applicant will suffer irreparable injury;
- C) That no substantial harm will come to other interested parties, and
- D) That granting the stay will do no harm to the public interest.

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

2. Appellants have the burden of making a strong showing that all four of the above requirements are met. As addressed below, Appellants' Motion and Memorandum falls far short of making this showing. Moreover, Appellants, in their Motion for Stay pending appeal, have failed to file any supporting documentation or to cite to the record for the following:

- A) That Appellants are likely to succeed on appeal;
- B) That Appellees will suffer irreparable injury if the stay is not granted.

3. Further, and also fatal to their motion, Appellants have failed to address or file a proposed supercedeas bond, as required by Rule 62 NDR Civ. Pro.

4. For all of these reasons, Appellants are not entitled to a Stay of the North Dakota Public Service Commission Order granting TransCanada a Certificate of Corridor Compatibility and Route Permit, and Appellants' Motion for Stay should be summarily denied.

**IV.
APPELLANTS HAVE FAILED TO MAKE THE SHOWING
REQUIRED FOR ISSUANCE OF A STAY**

A. Appellants Have Failed to Show that there is a Strong Likelihood they will Prevail on the Merits of their Appeal

In Brusegaard v. Schroeder 199 N.W.2d 921 (ND 1972), the Court cited Federal Red 62, which is similar to Rule 62(g) of the Federal Practice and Procedure Rules. Barron and Holtzoff-Wright, Vol. 3, Rules Edition of Federal Practice and Procedure (1971 pocket part, s 1377, at 333), and makes this commentary with respect to the federal rule, based upon their examination of federal cases:

“There is, of course, a considerable reluctance in granting an injunction pending appeal where to do so is, in effect, to give the appellant the ultimate relief he is seeking. The appellant will be required to show a great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits, and he must show irreparable injury from denial of the relief. But when these requirements are met, the power exists to grant such relief and it has been exercised.” 199 N.W. 2d at 925 (emphasis added).¹

In both their Motion for Stay and their Notice of Appeal, Appellants have failed to show that there is a strong likelihood, or indeed any reasonable likelihood, that they will prevail on the merits of their appeal. A review of the standard that Appellants must meet to prevail on their appeal, the deference that is owed to the PSC's determination, and the particular specifications of error that Appellants have raised in their Notice of Appeal, makes it abundantly clear that Appellants are highly unlikely to prevail on their appeal.

¹ In Bursegaard, the court, when determining whether a temporary stay shall be granted, stated that because it did not have the record of the trial before it could not investigate the merits of the appeal. In this case, the court has the records of the Administrative Proceedings before it and can judge the merits of the appeal, because the transcript was prepared after the hearings and before the Commission entered its Order.

1. Scope of, and Procedure on, Appeal from Agency Determination

§ 28-32-46 NDCC governs the scope of, and procedure on, appeal from determination of administrative agency and provides:

“A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court...the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency’s rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.” (Emphasis added)

2. North Dakota Case Law on Standard of Review on Appeal

North Dakota case law makes clear the limited scope of the court’s review on appeal from an agency determination, under § 28-32-46 NDCC. In determining whether or not an agency’s findings of fact are supported by a preponderance of the evidence the court does not make independent findings of fact or substitute its judgment for that of the agency, but determines only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence. *Howes v. North Dakota Workers Comp. Bureau*, 429 N.W.2d 730 (N.D. 1988), cert. denied, 489 U.S. 1014, 109 S. Ct. 1126, 103 L. Ed. 2d 189 (1989).

Pursuant to this section, the court must affirm the Worker’s Bureau’s decision unless its

findings of fact are not supported by a preponderance of the evidence or its conclusions are not supported by its findings of fact. In determining whether or not an agency's findings of fact are supported by a preponderance of the evidence, the court does not make independent findings of fact or substitute its judgment for that of the agency, but determines only whether or not a reasoning mind could reasonably have determined that the factual conclusions were supported by the weight of the evidence. *Hayden v. North Dakota Workers Comp. Bureau*, 447 N.W.2d 489 (N.D. 1989).

Under this section an agency's findings of fact will be affirmed on appeal unless they are not supported by a preponderance of the evidence. *Hintz v. North Dakota Workers Comp. Bureau*, 450 N.W. 2d 459 (N.D. 1991).

3. An Agency Determination Involving Highly Technical Subject Matter is Entitled to Appreciable Deference

The citing of a crude oil pipeline deals with highly technical subject matter, as evidenced by the expert testimony presented by Keystone's seven expert witnesses, and its 46 Exhibits. The North Dakota Supreme Court has ruled that if the subject matter of a question before an administrative agency is of a highly technical nature, the agency expertise in that area is entitled to appreciable deference, and the Supreme Court is reluctant to substitute its judgment for that of the administrative agency on such matters. *Montana-Dakota Utils. Co. v. Public Serv. Comm'n*, 413 N.W.2d 308 (N.D. 1987).

4. Agency Determinations are Entitled to a Presumption of Validity.

Findings of administrative agency made within its jurisdiction will not be upset unless there is showing that findings were made contrary to principles or statutory provisions of administrative procedure. *Superior Serv. Co. v. Nelson*, 94 N.W.2d 84 (N.D. 1958).

After determination has been made that the findings of fact are supported by the evidence or conceded to be supported by the evidence, the only review for the Supreme Court is to determine whether or not the conclusions and decision of the agency are supported by the findings of fact. *Haugland v. North Dakota Emp. Sec. Bureau*, 218 N.W.2d 181 (N.D. 1974).

5. Where there is Substantial Evidence to Support Agency's Findings, Courts may not Substitute their Judgment for that of the Agency

Where public service commission in its proceedings furnishes due process of law and

there is substantial evidence to support its findings, courts have no authority to substitute their judgment for that of the commission. *Williams Elec. Coop. v. Montana-Dakota Utils. Co.*, 79 N.W.2d 508 (N.D. 1956).

6. A Review of Appellants' Specifications of Error Makes Clear that they have Failed to Demonstrate the Required Showing of a Great Likelihood that they will Prevail on Appeal.

In Appellants' Notice of Appeal and Specifications of Error, Appellants made assertions that the Findings of Fact, Conclusions of Law and Order of the Commission are in violation of North Dakota law and that the Appellants are likely to succeed on appeal which Appellants did not support with citations to the record. It is Keystone's position that Appellants have failed to make a "strong showing" or "a great likelihood, approaching near certainty," that they will prevail in appeal. On the contrary, as discussed below, the testimony of all of the expert witnesses supports the Findings of Fact, Conclusions of Law and Order of the Commission. Furthermore, taking into account the required deference to the Commission, the highly technical subject matter, the presumption of validity, and the substantial evidence cited by the Commission, the Order of the Commission must be affirmed.

The following is a response to each of Appellants arguments, as set forth in their Notice of Appeal, with supporting reference to the transcript, findings and applicable North Dakota law.

6a. "The order does not comply with the statement of legislative policy for the siting of transmission facilities pursuant to N.D.C.C. § 49-22-02."

The Order in the case complies with NDCC §49-22-02. As required by this section, the Commission concluded that "the location, construction, and operation of the proposed pipeline, as conditioned in this Order, will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota," (Conclusion of Law No. 5).

The Commission also concluded that "the proposed pipeline corridor and route as conditioned in this Order, are compatible with environmental preservation and the efficient use of resources" (Conclusion of Law No. 6).

The Commission further concluded that the proposed pipeline corridor and route as conditioned in the Order will minimize adverse 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 (Conclusion of Law No. 7).

These conclusions by the Commission comply with the requirements of N.D.C.C. § 49-22-02.

6b. “The order does not properly consider adverse direct and indirect environmental effects of the proposed route pursuant to N.D.C.C. § 49-22-09(4).”

The Commission did consider the adverse direct and indirect environmental effects of the route in its Findings of Fact and Order.

5. Keystone is required to obtain a Presidential Permit from the United States Department of State (DOS) to authorize the construction of pipeline facilities across the United States border pursuant to the authority delegated to DOS by the President of the United States under Executive Order No. 13337. DOS is responsible for preparing an Environmental Impact Statement (EIS) for the entire project as required by the national Environmental Policy Act (NEPA). To comply with NEPA, the principal objectives of the EIS are to identify and recommend specific mitigation measures; and facilitate public and agency involvement in identifying significant environmental impacts. The final draft EIS concluded that the proposed project, if designed, constructed, and operated by Keystone, and additional permit conditions, would result in limited adverse environmental impacts.

The Commission made Findings of Fact concerning Pipeline Integrity, safeguarding against manufacturing and construction defects, safeguarding against corrosion, third part damage, and over pressure of the pipeline (F.O.F 10-19).

The Commission made Findings of Fact concerning the supervisory control and data acquisition (SCADA) system, 24 hour-a-day control center, mainline valves, SCADA operated valves that close within three minutes of an emergency shutdown, automated valves located up stream of rivers and aquifers, and check valves located downstream (F.O.F. 19-22).

The Commission made Findings of Fact concerning methods of leak detection and that Keystone will submit an Emergency Response Plan (F.O.F. 22-25).

40. The Commission has considered the proposed management of adverse impacts, the orderly siting of facilities, system reliability and integrity, the efficient use of resources, and alternative sites and finds Keystone’s corridor and route proposal has adequately considered avoidance areas.

In its Order the Commission made over 30 conditions a part of the Order, in addition to 16 conditions contained in the Commission's Tree and Shrub Mitigation Specifications that consider and deal with adverse direct and indirect environmental effects of the route.

The Commission complied with the provisions of N.D.C.C. § 49-22-09(4)

6c. "The order does not properly consider alternatives to the proposed route pursuant to N.D.C.C. § 49-22-09(5)."

The Commission properly considered alternatives to the proposed route and made the following Findings of Fact:

6. The Keystone Pipeline utilizes a conversion of a natural gas line in Canada running from Alberta, Canada to a point north of eastern North Dakota. Keystone states that the use of this converted gas line has both economic and environmental benefits. Keystone states that the use of the existing natural gas line in Canada defined where the project enters North Dakota. Keystone states that the location of a suitable crossing of the Missouri River at Yankton, South Dakota defined where the project exits North Dakota at the South Dakota border.

7. Keystone considered locating the pipeline within the Interstate Highway 29 (I-29) right-of way or adjacent to the I-29 right-of-way. According to the North Dakota Department of Transportation Policy Manual, location of the Keystone Pipeline within the I-29 right-of-way would not be permitted. Keystone contends that a pipeline route adjacent to the I-29 right-of-way would need to go around numerous overpasses, interchanges, and urban or developed areas further increasing the length and impact of the pipeline. Keystone states that a route along I-29 is not consistent with points Keystone has proposed for the United States/Canada border crossing location and the Missouri River crossing point.

8. Keystone considered a pipeline route adjacent to the existing Alliance Pipeline route. Keystone states such a route would be longer than the proposed route by over 100 miles.

9. We find that alternatives to the proposed route considered by Keystone would not minimize adverse effects and would likely increase the number of landowners affected and the environmental impact.

6d. "The order does not properly consider the irreversible and irretrievable commitments

of natural resources from the proposed route pursuant to N.D.C.C. § 49-22-09(6).”

The order considered the irreversible and irretrievable commitments of natural resources from the proposed route pursuant to N.D.C.C. § 49-22-09(6).

The Commission made the following Conclusions of Law:

4. Keystone is required to obtain written waiver under North Dakota Century Code Section 49-22-05.1 to locate the pipeline within 500 feet of an inhabited rural residence.

5. The location, construction, and operation of the proposed pipeline, as conditioned in this Order, will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.

6. The proposed pipeline corridor and route, as conditioned in this Order, are compatible with the environmental preservation and the efficient use of resources.

7. The proposed pipeline corridor and route, as conditioned in this Order, will minimize adverse 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.

8. The proposed project, as conditioned in this Order, is of such design and location that it will produce minimal adverse effects as defined under North Dakota Century Code Section 49-22-07.2.

The Commission included the following conditions in its Order:

10. The pipeline must be buried to a minimum depth from the ground surface to the top of the pipe of 48 inches in rangeland, 48 inches for cultivated land, 48 inches at the bottom of the ditch for road crossings, and 72 inches across undeveloped section lines.

11. All crossing of graded roads must be bored unless the responsible governing agency specifically permits Keystone to open cut the road.

12. Keystone shall study the feasibility of HDD at the crossings of the Tongue River; a tributary to the Tongue River running through section 18, Township 161 North, Range 56 West, Pembina County; the North Branch Park River; Middle Branch Park River; South Branch Park River; North Branch Forest River; Middle Branch Forest River; and Goose River, which are classified as valuable fisheries.

13. Pipeline construction at the Tongue River, North Branch Park River, North Branch Forest River, Middle Branch Forest River, and North Branch Turtle River crossings shall avoid tress to the extent practicable. If Keystone needs additional construction work space at stream or river crossing and would like to clear more than an 85 feet width of trees, Keystone shall submit a clearing plan with the Commission to be approved prior to start of construction. The plan shall indicate the width of the cut (up to 135 feet) and the distance from the crossing (number of feet on each side of the crossing) that is needed.

14. The width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less. The width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less.

15. Keystone shall promptly report to the Commission the presence in the permit area of any critical habitat of threatened or endangered species, or of bald or golden eagles that Keystone becomes aware of and that were not previously reported to the Commission.

16. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken.

17. All cultural resource mitigate plans must be submitted to the State Historic Preservation Office (SHPO) and approved by the SHPO prior to the start of any fieldwork or construction activity. Any route changes necessitated by requirements of the SHPO must be filed with the Commission and approved prior to the start of construction.

18. If a cultural resource, paleontological resources, archeological resource, historical resource, or gravesite is discovered during construction of the facility, earth disturbing activities in the immediate vicinity of the discovery must be halted. The resource must be marked, preserved and protected from any further disturbance until a professional examination can be made in consultation with the SHPO. A report of such examination must be filed with the SHPO and the Commission. Clearance to proceed must be given by the SHPO and the Commission.

19. During construction, at least 12 inches of topsoil, where available (or topsoil to the depth of cultivation, whichever is greater), over and along trench areas where cuts will be made, must be stripped and segregated from subsoil. Any area on which excavated subsoil will be placed must also be stripped of topsoil. After backfilling is completed, any excess subsoil must be placed over the excavation area, blending the grade into existing topography. Topsoil must then be replaced over areas from which it was stripped only after the subsoil is replaced.

20. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

21. All pre-existing roads and lanes used during construction must be restored to a condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition.

22. Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

23. Reclamation, fertilization and reseedling must be done by Keystone according to the Natural Resource Conservation Service unless otherwise specified by the landowner and approved by the Commission.

24. Keystone shall comply with the Commission's Tree and Shrub Mitigation Specifications attached to this order.

25. Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility including all fences and gates removed or damaged.

26. Keystone shall repair, replace, or compensate landowners where irrigation or drainage systems are damaged by construction.

28. Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

6e. "The order does not properly consider the effect of the proposed route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites pursuant to N.D.C.C § 49-22-09(9).

The Order makes the following Findings of Fact, which take in to consideration the effect of the proposed route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites pursuant to N.D.C.C. § 49-22-09(9).

Cultural Resources:

35. Keystone commissioned research and investigations and worked with federal and North Dakota governmental officials relating to the impact of the location, construction, and operation of the proposed pipeline on health and welfare, natural resources, and the environment. Keystone worked with federal, state and local agencies to avoid cultural resources, biological resources, wetlands, grasslands and other areas of interest to the agencies.

36. Keystone commissioned field surveys to determine the locations of prehistoric and historic cultural resources that could be affected by surface disturbance during pipeline construction. During 2006, Class I, Class II and Class III cultural resource investigations were completed. The Class I literature and files search was one mile wide centered on the proposed pipeline centerline. The Class II reconnaissance level vehicular survey covered 100% of the proposed pipeline route. The Class III cultural resource pedestrian inventory included a 31% sample of the proposed pipeline route, 300 feet wide centered on the proposed pipeline centerline. In addition to the pedestrian survey, 46 shovel test probes were excavated at locations with potential for buried cultural deposits.

37. As a result of the cultural resource evaluations, Keystone proposes to avoid 9 of the cultural sites by reroute of the pipeline. The Commission is uncertain whether the route proposed in the application includes the reroutes avoiding the 9 cultural sites. Also Keystone will bore underneath 10 historic period railroad segments that are potentially eligible for the National Register. 26 other cultural sites in the corridor will not be affected unless Keystone's pipeline route proposal changes. Four cultural sites remain unevaluated and the effect of the Keystone project has not been determined.

38. The record in this proceeding also indicates possible cultural resources located on properties of Francis Bures and Vaughn Zacharias. Keystone T16 at the Bures property and as shown in Exhibit T17 at the Zacharias property for the purpose of avoiding

possible cultural resources. The reroutes will not impact any of the cultural sites identified by the Class I, II or III surveys.

39. The Commission finds the measure proposed by Keystone are adequate provided requirements of the State Historic Preservation Office (SHPO) are followed. However, any route changes necessitated by requirements of the SHPO must be filed with the Commission and approved prior to the start of construction.

40. The Commission has considered the proposed management of adverse impacts, the orderly siting of facilities, system reliability and integrity, the efficient use of resources, and alternative sites and find Keystone's corridor and route proposal has adequately considered avoidance areas.

6f. "The order fails to properly identify all avoidance areas along the approved route pursuant to North Dakota Administrative Code § 69-06-08-02(2)."

The order identifies all avoidance areas along the approved route pursuant to North Dakota Administrative Code § 69-06-08-02(2), as demonstrated in the following Findings of Fact:

Exclusion and Avoidance Areas:

26. North Dakota Administrative Code Chapter 69-06-08 sets forth certain criteria to guide the Commission in evaluating the suitability of granting an application for a certificate of corridor compatibility and route permit. The criteria as set forth in North Dakota Administrative Code Section 69-06-08-02 are classified as Exclusion Areas, Avoidance Areas, Selection Criteria and Policy Criteria. A transmission facility route must not be sited within an Avoidance Area unless the applicant shows under the circumstances there are no reasonable alternatives. In determining whether an Avoidance Area shall be designated for a facility, the Commission may consider, among other things, the proposed management of adverse impacts; the orderly siting of facilities; system reliability and integrity; the efficient use of resources; and alternative routes. In accordance with the Commission's Section Criteria, a transmission route shall be approved if it is demonstrated that no significant adverse impacts will result from the location, construction, and maintenance of the transmission facility. In accordance with the Commission's Policy Criteria, preference may be given to an applicant demonstrating certain benefits of the transmission facility.

27. Keystone evaluated a corridor width of one-mile for the exclusion, avoidance, selection and policy criteria of the Commission.

Exclusion Areas:

28. The proposed route of the Keystone Pipeline crosses no exclusion areas as defined by the North Dakota Public Service Commission.

Avoidance Areas:

29. The proposed route of the Keystone Pipeline will cross avoidance areas as defined by the Commission including 0.8 miles of the Tetrault Woods State Forest in Pembina County, 19 residences within five hundred feet, one parcel of irrigated land at milepost 204 to 204.5, and potential cultural resource sites.

Tetrault Woods State Forest

30. The proposed alignment of the Keystone Pipeline Project where it crosses the Pembina River near Walhalla is east of the area generally considered the Pembina Gorge. The proposed route will cross the Pembina River at the Tetrault Woods State Forest. The Tetrault Woods State Forest is a Commission designated avoidance area.

While not classified as a Wild, Scenic, or Recreation river and therefore not a Commission designated area, the Pembina River is listed on the National Rivers Inventory (NRI) maintained by the National Park Service. State and federal agencies must avoid or mitigate actions that would adversely affect designated NRI river segments. The Pembina River is identified as having Outstandingly Remarkable Values in the Scenery, Geology and Wildlife categories.

31. Keystone initially proposed an open cut crossing for the Pembina River. Keystone has testified that, in working with the North Dakota Forest Service, construction techniques and mitigation procedures were developed to avoid forested areas. Horizontal directional drilling (HDD) will be used to drill under the Pembina River and Tetrault Woods State Forest as indicated by Exhibit T28, a drawing of the HDD proposal. The drawing shows the start point and end point of the directional drill, the pipeline depth will be a minimum of 35 feet under the river and 40 feet under the trees in the adjacent area. The pipeline will not impact the forested areas of the Tetrault Woods State Forest or the Pembina River.

32. We agree with the use of HDD in the Pembina River crossing area as proposed by Keystone and the location as shown by Exhibit T28. The construction, operation and maintenance of the Keystone Pipeline must not impact the Pembina River or the forested areas of the Pembina River crossing or the Tetrault Woods State Forest.

500 Foot Buffer

33. Under N.D.C.C. §49-22-05.1, areas within five hundred feet of an inhabited rural residence are designated avoidance areas. The five hundred foot avoidance area criteria for an inhabited rural residence may be waived by the owner of the inhabited rural residence in writing. Michael Koski, project director of the consulting team assigned to the Keystone project, testified that twenty-three residences are potentially located within the 500 foot avoidance area. Of these, 18 residence owners had signed written waivers of the 500 foot avoidance area. Koski stated that reroutes and route refinement of the project has resulted in the movement of the line to a point greater than 500 feet away from four of those residences. Exhibit T-14 consisted of copies of the “Waiver of 500 Foot Buffer Zone Avoidance Area Requirement” documents signed by the 18 residence owners. On January 29, 2008 Keystone filed a copy of a waiver of the 500 foot buffer zone avoidance area requirement for the 19th residence.

Irrigated Land

34. Regarding the parcel of irrigated land crossed by the proposed route of the Keystone Pipeline, Keystone indicates that North Dakota Administrative Code §69-06-08-102 (h) exempts underground transmission facilities such as the buried Keystone pipeline from analysis for impacts to irrigated land. However, Keystone will coordinate with landowners during construction to minimize irrigation and drainage systems disruptions and compensate for damages and resulting lost production. Keystone will repair, replace, or compensate landowners where irrigation or drainage systems are damaged by construction.

6g. “The order fails to properly address the requirement that the Applicant show, for each avoidance area, that not reasonable route alternative was available, as required by North Dakota Administrative Code § 69-06-08-02(2).”

The order addresses the requirement that Applicant show for each avoidance are, that no reasonable route alternative was available, as required by North Dakota Administrative Code § 69-06-08-02(2).

The Commission required Keystone to avoid the Tetrault Woods State Forest by horizontal direction drilling the Pembina River and Forest at a depth of 40 feet below the trees. (See F.O.F. 29 and Exhibit T-28).

The Commission also required Keystone to avoid all residences within 500 feet unless Keystone obtains a waiver (F.O.F. 33).

The Commission required Keystone to avoid cultural resources (F.O.F. 35-40) and entered as a condition of the Order No. 18, that if any cultural resource is discovered construction must be halted until examination by the State Historic Preservation Officer is completed and clearance to proceed is given by the Commission.

6h. “The order fails to properly address the selection criteria in North Dakota Administrative Code § 69-06-08-02(3), which require that the Applicant demonstrate that significant adverse impacts to, *inter alia*, agricultural lands, the visual integrity of adjacent areas, wetlands, woodlands and wooded areas, human health and safety, animal health and safety, and plant life be kept to an acceptable minimum.

Throughout the Order, the Commission addresses the selection criteria in North Dakota Administrative Code § 69-06-08-02(3), which requires that the Applicant demonstrate that significant adverse impacts to, *inter alia*, agricultural lands, the visual integrity of adjacent areas, wetlands, woodlands and wooded areas, human health and safety, animal health and safety, and plant life be kept to an acceptable minimum.

6i. “The order fails to properly address the policy criteria in North Dakota Administrative Code § 69-06-08-02(4), which give preference to, *inter alia*, proposals that utilize existing and proposed rights-of-way and corridors.

The order addresses the policy criteria in North Dakota Administrative Code § 69-06-08-02(4), which give preference to, *inter alia*, proposals that utilize existing and proposed rights-of-way and corridors.

The Commission addressed utilizing existing rights-of-way and made the following Findings of Fact:

6. The Keystone Pipeline utilizes a conversion of natural gas line in Canada running from Alberta, Canada to a point north of eastern North Dakota. Keystone states that the use of this converted gas line has both economic and environmental benefits. Keystone states that the use of the existing natural gas line in Canada defined where the project

enters North Dakota. Keystone states that the location of suitable crossing of the Missouri River at Yankton, South Dakota define where the project exits North Dakota at the South Dakota border.

7. Keystone considered locating the pipeline within the Interstate Highway 29 (I-29) right-of-way or adjacent to the I-29 right-of-way. According to the North Dakota Department of Transportation Policy Manual, location of the Keystone Pipeline within the I-29 right-of-way would not be permitted. Keystone contends that a pipeline route adjacent to the I-29 right-of-way would need to go around numerous overpasses, interchanges, and urban or developed areas further increased the length and impact of the pipeline. Keystone states that a route along I-29 is not consistent with points Keystone has proposed for the United States/Canada border crossing location and the Missouri River crossing point.

8. Keystone considered a pipeline route adjacent to the existing Alliance Pipeline route. Keystone states such a route would be longer than the proposed route by over 100 miles.

9. We find that alternatives to the proposed route considered by Keystone would not minimize adverse effects and would likely increase the number of landowners affected and the environmental impact.

In addition to the foregoing assertions of error, the Appellants allege that the following findings of fact are not supported by a preponderance of the evidence. Keystone disagrees and lists portions of the transcript that support each finding.

7a. Finding of Fact No. 9 that “alternatives to the proposed route considered by Keystone would not minimize adverse effects and would likely increase the number of landowners affected and the environmental impacts.”

The I-29 corridor was considered for possible location of the Keystone Pipeline. Keystone rejected the options of locating the pipeline within the I-29 right-of-way or adjacent to the I-29 right-of-way. (BI Tr. Pg. 66)

According to the North Dakota Department of Transportation Policy Manual, location of the Keystone Pipeline within the I-29 right-of-way would not be permitted. (BI Tr. Pgs. 122-123)

Location of the pipeline route adjacent to the I-29 right-of-way was rejected because I-29 includes numerous overpasses and interchanges which would require the project to deviate away

from the corridor at frequent locations, increasing the length and impact of the pipeline; interstate highways tend to connect areas of development, which would result in the need for further deviation from the corridor, increasing length and impact; and the I-29 corridor is not consistent with control points for the project route, including the U.S./Canada border crossing location and the Missouri River crossing point. (BI Tr. Pgs. 85-86)

Aligning the Keystone Pipeline route and corridor adjacent to the existing Alliance Pipeline route would increase the length of the Keystone Pipeline by over 100 miles, which would increase the number of landowners affected and have a greater environmental impact. (BII Tr. Pgs. 506-507)

The proposed route and corridor across the entire State of North Dakota minimize the impact to the environment and to the landowners of the State of North Dakota. (BI Tr. Pg. 80)

7b. Finding of Fact No. 40 that “the Commission has considered the proposed management of adverse impacts, the orderly siting of facilities, system reliability and integrity, the efficient use of resources, and alternative sites and finds Keystone’s corridor and route proposal has adequately considered avoidance areas.”

Construction Impact Mitigation

Keystone Pipeline has prepared a detailed Construction Mitigation and Reclamation Plan (CMR Plan) that describes procedures for crossing agricultural, cultivated lands, wetlands, streams and the procedures for restoring or reclaiming and monitoring those features crossed by the project. The CMR Plan is a summary of the commitments that Keystone has made for environmental mitigation, restoration and post monitoring compliance, and the adoption of these procedures minimizes the impact associated with the project. (VC Tr. Pg. 162)

Keystone’s CMR Plan is a compilation of mitigation requirements that minimizes the impacts to land during construction. It covers all types of land the pipeline crosses including wetlands, water bodies, grassland, and pastureland. It also covers noise and dust control during construction, management of weeds, fire prevention and spill prevention and containment during construction. (BI Tr. Pgs. 198-199)

The CMR Plan also covers dust control, control of noxious weeds, topsoil removal, storage and replacement, erosion and sediment control and reclamation. (VC Tr. Pg. 167)

Keystone will use ripping tools or para-plows to relieve compaction along the right-of-way, to return the agricultural land to the same compaction as adjacent land, and to return agricultural fields to their previous productivity. (VC Tr. Pg. 176)

The CMR Plan provides that Keystone will restore the land to the best of its ability to its original productivity. (VC Tr. Pg. 164)

FERC, the agency that predominantly regulates gas pipelines, typically requires topsoil to be removed up to a depth of 12 inches. (BI Tr. Pgs. 282-283)

To the extent practical, all effects of pipeline construction will be mitigated. All lands disturbed will be returned to their current land uses. No permanent direct or indirect adverse affects effects are anticipated. (BI Tr. Pgs. 158-159)

Keystone will bore the pipeline beneath any paved or well-maintained road. (VC Tr. Pg. 174)

Environmental Preservation

The Keystone Pipeline Project does not cross public water supply wetlands or surface water supply in lakes. (BI Tr. Pg. 140)

Keystone must obtain a Clean Water Act Section 404 Permit from the Corps of Engineers, as well as a Section 401 Water Quality Certificate from the State of North Dakota. These permits will ensure protection of wetlands and other water bodies. (BI Tr. Pg. 145)

The North Dakota Health Department (DOH) division of water quality is responsible for water quality in the state. (BII Tr. Pgs. 509, 511)

Jim Horner, a geologist with DOH who deals with water quality testified that he was comfortable and satisfied with the location of the Keystone Pipeline Project from a groundwater perspective. (BII Tr. Pgs. 515-516)

Michael T. Sauer is a senior scientist from the division of water quality DOH. Sauer administers the Clean Water Act Section 401 program for the state. Section 401 is a water quality certification process that applies to the Section 404 permitting process administered by the U.S. Corps of Engineers. (BII Tr. Pg. 533-34)

A Section 404 permit cannot be issued to the Keystone Pipeline Project without a Section 401 water quality certification from the DOH. Anything DOH puts into the Section 401

certification relative to water quality is transcribed verbatim into the Section 404 permit, as a condition of the 404 permit. (BII Tr. Pg. 535)

Clean Water Act Section 401 deals with surface water components, river crossings, wetland crossings and considers the construction methods used in river crossings. (BII Tr. Pg. 538)

DOH does not have the Section 404 application from the U.S. Corps of Engineers. Once the Section 404 application is complete it is put out for public review and review by other agencies. (BII Tr. Pgs. 534-535)

DOH has the ability to change the route of the Keystone Pipeline Project with a denial of the 401 certificate. DOH will be looking closely at the Sheyenne River crossing relative to water quality, and ecological community structure dynamics on the river. (BII Tr. Pgs.544-545)

The North Dakota Game and Fish Department has indicated that it does not believe that the Keystone Pipeline Project will have any significant effects on wildlife or wildlife habitat, including rare or protected species provided best management practices are implemented. (BI Tr. Pg. 136)

Keystone, consistent with consultations with the U.S. Fish and Wildlife Service (USFWS) and consistent with discussions with the North Dakota Game and Fish Department, surveyed all the areas identified as being potential habitat for species on the endangered species list. (BI Tr. Pgs. 155, 188)

Keystone will be obtaining either a concurrence letter or a biological opinion from the USFWS. Keystone is not applying for a take permit and does not anticipate USFWS including a take permit in its opinion. (BI Tr. Pgs. 163, 190-191)

Seventy percent (70%) of the project surface disturbance will occur on agricultural lands that are annually tilled. These are lands that are already taken out of native habitat status. (BI Tr. Pg. 148)

Irreversible and irretrievable commitments of natural resources are anticipated to be minimal for the proposed project. Surface water will be used short term for hydrostatic testing but no extended consumptive use of water resources. All areas of natural vegetation within the right-of-way will be reclaimed, and no agricultural lands will be taken permanently out of production except for land used to install above ground facilities, (i.e. pump stations and valves).

(BI Tr. Pgs.149, 158, 161, 167) (Ex. T-2 Application for Certificate of Corridor Compatibility Pg. 16)

Impact to animal health and safety will be minimized through sound construction and operation practices. (BI Tr. Pgs. 146-147)

Impact to plant life would be limited to the disturbed portions of the right-of-way. (BI Tr. Pg. 162)

Keystone will allow trees and shrubs to regenerate along the construction right-of-way and down to an approximate 30 foot strip over the permanent right-of-way. (BI Tr. Pg. 165)

Keystone has identified five locations where more than 110 feet of tree clearance may be needed for extra work space (EWS) in tree areas. This EWS would be limited to 25 feet beyond the standard 110-foot construction right-of-way. (Ex. T-33)

Keystone will inventory trees and shrubs in a wood lot and riparian areas by using a sampling method. Trees in a shelter belt or narrow wind break 30 feet or less would be actually counted for the inventory. (BI Tr. Pgs. 218-219, Ex. T-4)

As recommended by the North Dakota State Forester, Keystone has proposed to inventory trees in wind break and shelter belt areas that are 1-inch diameter at breast height and in non-wind break and non-shelter belt areas to inventory trees that have a 3-inch diameter at breast height. (BI Tr. Pg. 220 Ex. T-4)

Keystone agrees to inventory for replacement of all shrubs in areas where the topsoil is disturbed and not preserved. (BI Tr. Pg. 221 Ex. T-4)

Keystone needs 25-35 feet to weld and place the pipe on skids and to have equipment to travel along and pick up the pipe and place it in the ditch. (BI Tr. Pg. 222-223)

All the dirt that comes out of the trench (spoil) needs to be placed in the easement area. (BI Tr. Pg. 222)

Due to these construction and safety concerns, Keystone cannot safely limit the tree cuts to 50 feet width in wood lot areas. Keystone agrees to limit the width of construction right-of-way through these woody areas (in excess of 50 feet in length) to 85 feet where practical. (BI Tr. Pg. 223 Ex. T-4)

The proposed alignment of the Keystone Pipeline Project where it crosses the Pembina River is east of the area generally considered the Pembina Gorge. The pipeline will be

horizontally directionally drilled under the river. The depth of the pipeline will be a minimum of 35 feet under the river and 40 feet under the trees. (Park River (PR) Tr. Pg. 161) (BI Tr. Pg. 109) (BI Tr. Pgs. 138-139) (Ex. T-28)

The proposed facility will not affect any noise sensitive land uses; have no visual effect on adjacent areas, no impact on any extraction or storage resources and no permanent impact on wetlands. (BI Tr. Pgs. 142-144) (Ex. T-29)

Keystone will manage the sound levels of the five pump stations in North Dakota to EPA guidelines of 55 dBA at the nearest noise sensitive area. No residences or businesses are located within the 55 dBA perimeters from the pump station. (Ex. T-29)

The proposed facility would have no impact on communication facilities. (BI Tr. Pg. 146)

7c. Finding of Fact No. 54 that “neither the Fordville Aquifer nor the public wells in the Fordville Aquifer will likely be exposed to crude oil contamination or BTEX contamination.”

Keystone evaluated the risk of a spill from the proposed Keystone Pipeline route to the Fordville Aquifer. (BII Tr. Pgs. 304)

This analysis included evaluation of terrain, stream flow, overland transport, sub-surface transport, combined with probability of spill. (BII Tr. Pg. 304)

The margin of the Fordville Aquifer at its closest point is approximately three linear miles away from the Keystone Pipeline route. (BII Tr. Pg. 305)

The groundwater wells in the Fordville Aquifer are 6.5 miles from the Keystone Pipeline. (BII Tr. Pg. 305)

The depth of the groundwater in the Fordville Aquifer is 0 to 30 feet and averages 20 feet. (BII Tr. Pg. 306)

The soils in the area are permeable with infiltration rates of 0.4 to 12.6 feet per day. (BII Tr. Pg. 306)

There is a 200 foot in elevation from the pipeline over the three miles to the margin of the aquifer. This calculates to a 1.3% slope and is relatively flat. This slope will not significantly enhance overland transport. (BII Tr. Pg. 307)

If a spill occurred, most spills would be contained in the pipeline trench or slightly adjacent to it. (BII Tr. Pg. 307)

There is a check valve in the Fordville Aquifer area around mile post marker 49. (BII Tr. Pg. 408)

If a very large spill occurred, the oil could come out of the trench and move following the terrain downhill. The overland movement is limited to a few hundred feet and no more than a half mile, because the crude oil adheres to soils and vegetation. Because of the distance oil would have to travel between the pipeline and the Fordville Aquifer, overland transport is eliminated as a viable exposure route. (BII Tr. Pg. 307)

Transport down a dry stream channel was eliminated as a viable route, since oil would only have to travel the three and one-half river miles to reach the margin of the aquifer. If a spill reached a dry channel, oil would adhere to soils and vegetation. Even with a large spill volume, the movement of oil would be limited to no more than one-half mile. As a result, the chance of a spill reaching the aquifer via a dry stream channel is highly improbable. (BII Tr. Pgs. 309-310)

The entire Middle Branch and the North branch of the Forest River across the majority of the Fordville Aquifer are gaining stream reaches, meaning that groundwater from the Fordville Aquifer is pushing up from below and flowing into these streams. (BII Tr. Pg. 311, 314) (Exh. T-9)

In the area of the gaining stream reaches, the chance of a spill is no more than once in 4,800 years. If a spill occurred and it was large enough to get to a flowing stream channel, and if it reached the Fordville Aquifer, it would float on the water. Dissolved constituents from the oil could not enter the aquifer itself since it is a gaining stream reach (i.e., water from the aquifer is entering the stream). In addition, there would be time for emergency response teams to get there, contain, and start cleanup. (BII Tr. Pg. 313)

In a gaining stream reach, there is no chance for the contaminants to push down and get into the aquifer itself. (BII Tr. Pg. 314)

The northern portion of the North Branch of the Forest River is a losing stream reach, where water from the stream enters the Fordville Aquifer. There are 1.9 miles of pipe where a hypothetical oil spill could potentially transport oil to the margin of the aquifer, assuming water was flowing at the time of the spill. Using the most conservative spill frequency, a spill is estimated in the losing stream reach to occur no more than once in 8,300 years. (BII Tr. Pgs. 315-316) (Exh T-9)

For a spill to reach the losing stream reaches, it would have to be large enough to get to the river channel, then be transported downstream to the margin of the Fordville Aquifer which would take two hours. It is five miles to the surficial portion of the aquifer, and ten miles to the wells. However, the public wells are not along the stream channel where a hypothetical oil spill would be contained. Consequently, for the public wells to become contaminated, the oil's dissolved constituents (e.g. BTEX compounds) would need to be transported subsurface in the aquifer for miles to reach the well intakes. Crude oil and its constituents would not move that far. (BII Tr. Pgs. 317-318)

Only five percent of the recharge of the Fordville Aquifer comes from the upper reaches of the North Branch of the Forest River. Because it is such a small fraction of the total recharge, any contaminants would be diluted. (BII Tr. Pg. 318)

Trace metals in the crude oil are complexed with the crude oil itself, meaning that they prefer to be with the hydrocarbons with which they are bound. Therefore, their toxicity is lower since they are less bioavailable than free elements. (BII Tr. Pgs. 323-324)

Crude oil floats on top of surface water and groundwater. Typically, oil is confined by the soils and materials around it. The crude oil would not move great distances. It has a high affinity to soil, and it is hard for crude oil to move in the soil. (BII Tr. Pg. 326 -327)

The crude oil itself would not migrate substantially. The dissolved constituents, such as the BTEX compounds would likely move only hundreds of feet. Consequently, in the event of a spill, crude oil would not likely be transported three miles to reach the aquifer, nor would the constituents be capable of reaching the public water wells. Therefore, subsurface transport is eliminated as a viable exposure route. (BII Tr. Pg. 306, 325)

If the BTEX contamination got into the aquifer, the compounds movements would be limited to hundreds of feet, not miles. The contaminants will not reach the public water wells. (BII Tr. Pg. 319)

Considering a combined chance of a spill occurring in the 1.9 miles, feeding into the losing stream portion of the North branch of the Forest river, the spill would have to be large enough to get out of the trench and would have to get into a flowing intermittent stream, be transported all the way downstream, and then dissolved constituents would have to get into the Fordville Aquifer in sufficient concentrations is highly improbable. The chance of these

constituents then traveling miles from the stream channel to reach the public wells is highly improbable. (BII Tr. Pgs. 319-320)

Jim Horner, North Dakota Department of Health – Groundwater Quality, concurred with Keystone’s spill risk analysis witness, Heidi Tillquist, in her testimony concerning the location of the Keystone Pipeline in the Lake Ashtabula and Fordville Aquifer areas. (BII Tr. Pg. 530)

Horner agreed that the location of the Keystone Pipeline in the Fordville area is safe in its present location and that Horner is not concerned about the risk of the Keystone Pipelines to the Fordville Aquifer. (BII Tr. Pgs. 530-531)

7d. Finding of Fact No. 68 that “the proposed Keystone pipeline route in the Fordville area represents the minimal environmental impact and minimal impact to the landowners compared to either the east route or west route concepts.”

At the public hearings in Valley City and Park River, some members of the public suggested that the pipeline route should be moved either to the east of the Fordville Aquifer or further to the west. (BI Tr. Pg. 74)

Keystone looked at a route concept to the east of the Fordville Aquifer. (BI Tr. Pg. 76)

The east route concept involved a route length of 160 miles, was 15 miles longer than the proposed Keystone Pipeline route, involved more road crossings, more stream crossings and approximately 2 more miles (29 more acres) of wetland crossings. (BI Tr. Pg. 76)

The west route concept involved a route 8-9 miles west of the current proposed Keystone location. The western route concept is three miles longer than the currently proposed Keystone Pipeline route and involves over ten times the quantity of wetlands (2.7 more miles and 43 more acres of wetlands). (BI Tr. Pg. 77)

Both the eastern and western route concepts in the Fordville area would affect a greater number of landowners and are inferior from an environmental impact standpoint to the proposed Keystone route alignment. (BI Tr. Pg. 77)

The Fordville alternative route concepts would have a greater environmental impact than the proposed Keystone Route. (BI Tr. Pg. 123)

The proposed Keystone Pipeline alignment in the Fordville area represents the minimal environmental impact and minimal impact to the landowners. (BI Tr. Pg. 77)

Keystone has acquired easements from 230 of the 358 property owners or 64% of the easements along the section of the proposed Keystone right-of-way that would be affected by the eastern route concept. (BI Tr. Pg. 76)

Keystone has acquired easements from 70 of the 118 tracts of land or 59% of the easements along the proposed Keystone right-of-way that would be affected by the western reroute concept. (BI Tr. Pg. 77)

The western route concept in the Fordville Aquifer area would only decrease the risk of a spill reaching the Fordville Aquifer slightly. (BII Tr. Pg. 336)

A leak would have to be thousands of barrels in order to get out of the pipeline trench, start moving across the ground, get into the channel and then get downstream in sufficient volumes to cause any adverse effects downstream. That size of spill would be capable of being detected and would trigger the emergency response plan. (BII Tr. Pg. 336)

Regardless of whether the proposed Keystone Route or the western route concept is used, there is not any way for the contaminants within the oil to traverse the distance to get to the public water intakes. (BII Tr. Pg. 340)

The western route concept in the Fordville area would have a known environmental impact that will occur on the wetlands. The known impact on wetlands has a greater weight than a rare, hypothetical event, which conservatively would be expected to occur no more than once in 8,300 years and even then would be highly improbable to get to the public wells. (BII Tr. Pg. 358)

The total proposed Keystone route alignment through the State of North Dakota crosses approximately 14.7 miles (197 acres) of wetlands. This amounts to approximately 6% of the total construction disturbance. (Ex. T-2 Pg. 31, Ex. T-10a)

The Keystone pipeline is safe where it is proposed to be located in the Fordville area. It does not pose a significant threat to the Fordville Aquifer, so moving it is not going to significantly change the overall assessment. (BII Tr. Pg. 381)

7e. Finding of Fact No. 76 that “the evidence in the record shows the proposed Keystone pipeline route will not impact public water systems.”

Spill Risk Analysis

Preliminary spill analysis was done for the Keystone Pipeline Project by DNV Energy, a

recognized industry expert. (BII Tr. Pg. 292)

DNV estimated the chance of a leak for the Keystone Pipeline to be no more than one every 7 to 11 years over the entire length of the pipeline. (BII Tr. Pg. 293)

Using the most conservative frequency interval of 7 years, the DNV estimate equates to a spill of no more than one in 42 years on the 218 miles of pipeline in North Dakota. (BII Tr. Pg. 293)

Approximately 80% of the aquifers along the entire Keystone Pipeline Project are overlain by low permeability soils and confining materials that would inhibit the infiltration of crude oil to the aquifers. (BI Tr. Pg. 296)

Additionally, the majority of aquifers are more than 50 feet deep, so the majority of aquifers crossed by the pipeline have a low susceptibility to contamination and the chance of a spill occurring at a location that could impact an aquifer is very low. (BI Tr. Pg. 296)

Studies show that if a spill does happen to reach an aquifer, the extent of contamination is actually quite small in area. (BI Tr. Pg. 297)

At the Bemidji, Minnesota spill, where 10,000 barrels (42,000 gallons) were released, the BTEX, (benzene, toluene, ethyl benzene and xylene), plume moved 170 yards from the crude oil source over a 20-year period. (BII Tr. Pgs. 296, 298-299)

In 500 sites with BTEX contamination, the EPA found that BTEX moves much slower than the groundwater because of natural attenuation, i.e. microbes eating the hydrocarbons. (BII Tr. Pg. 297)

At these 500 sites 75% of BTEX plume moved less than 250 feet from the source of contamination and in 80% of the cases the plume was stable or decreasing in size. (BI Tr. Pg. 297)

Since 2002, the median-sized oil spill (half spills more and half spills less) reported to PHMSA is 12 barrels or 500 gallons. (BII Tr. Pg. 295)

At the Bemidji spill vegetation across the majority of the site looks just like the non-contaminated right-of-way. Where vegetation is sparse, topsoil had been stripped and never replaced. (BII Tr. Pgs. 299-303)

Most spills are small. In order for the oil spill to get out of the trench and mobilize itself to get into a stream channel, it would have to be a large spill, (thousands of barrels.). (BII Tr. Pg. 311)

Pipeline Leak Detection/Emergency Response Facts

The Keystone Pipeline Project will have a SCADA system (Supervisory Control and Data Acquisition) system. It is comprised of three components: (i) equipment installed at the pump stations and valve sites; (ii) a communications link so the equipment can speak to the host system in the control center in Calgary; and (iii) the host system installed in the operations control center in Calgary that allows the operator to remotely control and operate the pipeline. (BII Tr. Pgs. 433-437)

The host system is a fully redundant system. There is one operating system plus a “hot standby” system that can be utilized in the event of trouble with the primary system. (BII Tr. Pgs. 436-437)

Within the host system are automatic systems that ensure that the line cannot be over-pressurized at any time. There are also protective features in the local systems installed at the pump stations to ensure that, in the event of a communications failure, the local equipment will take over and ensure that the line cannot be over-pressurized. (BII Tr. Pg. 435)

Keystone will have a number of complimentary leak detection systems available within the operations control center, which is manned on a 7-day a week basis, 24 hours a day. (BII Tr. Pg. 436)

The first system consists of the operators monitoring the system. They monitor the flow information coming back from the remote locations and typically are capable of detecting leaks very rapidly down to a level of 25 to 30 percent of the pipeline flow rate. (BII Tr. Pg. 436)

The second system is a software based, volume-balance system that looks at the volume going into the system and out of the system and compares the two. This system is capable of detecting leaks down to a limit of about five percent. (BII Tr. Pgs.436-437)

The third part of the leak detection system is a computational pipeline monitoring system that breaks the pipeline down into smaller segments bounded by flow measurement equipment.

It measures volume into and out of a segment every few seconds and looks for discrepancies. Any discrepancies are added up quickly and an alarm will sound. (BII Tr. Pg. 437)

Keystone estimates that leaks at the 1.5 to 2 percent threshold will be detected by the computational monitoring system within 140 minutes. Very small leaks, which could be measured in drips per hour, may take up to 90 days to detect. Leaks just below the 1.5 percent threshold would be discovered much sooner than 90 days. (BII Tr. Pgs. 438-439)

The final system used to detect leaks is direct observation, which includes aerial patrols, ground patrols, public and landowner awareness programs, design to encourage reporting of leaks and other events that may suggest a threat to the integrity of the pipeline. (BII Tr. Pg. 437)

Control center operators monitor the volume balance system, and if they notice a discrepancy that is not large enough to trigger an automatic alarm, they will take action to verify such as shutting down the pipeline and isolating it into segments to determine if a segment is losing pressure. (BII Tr. Pgs. 439-440)

Leaks that are small in nature will come to the surface due to the fact that the dirt placed over the top of the pipeline has not been compacted to the same degree as the virgin ground on either side. Small leaks don't leave the right-of-way, but migrate to the surface following the path of least resistance. (BII Tr. Pg. 462)

Keystone's leak detection system meets or exceeds the requirements of 49 CFR Part 194 and 49 CFR Part 195. (BII Tr. Pg. 491)

Keystone has prepared a preliminary Emergency Response Plan (ERP) as prescribed by 49 CFR Part 194 and contained in Appendix A of the application (July 6th supplemental filing). (BII Tr. Pg. 442) (Ex. T-27)

Keystone will prepare and submit a completed ERP to PHMSA (Pipeline Hazardous Materials Safety Administration) for review in the first quarter of 2009, prior to the commencement of operations. (BII Tr. Pg. 482)

Under the ERP, Keystone will have first responders (Keystone employees or contract personnel), on call 24 hours a day 365 days per year, located at various points along the Keystone Pipeline Project, typically near High Consequence Areas. (BII Tr. Pg. 445)

Under the ERP Keystone will deploy site specific emergency response equipment at various points along the Keystone Pipeline Project. (BII Tr. Pg. 450)

Under the ERP the pipeline is divided into three response zones. Response zone one begins at the Canada/U.S. border and proceeds to a point just in the southern part of South Dakota where response zones two and three then cover the balance of the system. (BII Tr. Pg 442-443)

Keystone maintains a 24-hour response or contact phone number which is posted on all of the right-of-way signs, facility signs, published within all of Keystone's public awareness materials and provided annually to all property owners along the pipeline route. (BII Tr. Pg. 443)

Under the ERP, spill detection and on-scene spill mitigation procedures are identified which would include the SCADA system which will continuously monitor the pipeline conditions and update information provided to the OCC operator. (BII Tr. Pg. 448)

If there was a leak from the Keystone Pipeline Project, DOH would be involved in the assessment and abatement of the leak, and require the leak to be cleaned up, excavation, and whatever else is required. (BII Tr. Pg. 570)

The Keystone Project will be monitored 24-hours a day, 365-days a year. It will have a computer system that will detect changes in pressure along the pipeline and ensure that all of the facilities are working properly. (VC Tr. Pg. 180)

7f. Finding of Fact that “the proposed Keystone Pipeline route in the Lake Ashtabula/Sheyenne River area represents minimal environmental impact and minimal impact to the landowners compared to the east route concept, and that neither the Sheyenne River nor Lake Ashtabula will likely be exposed to crude oil contamination or BTEX contamination.”

At the public hearing in Valley City, a suggestion was made to move the pipeline to the east further away from the Sheyenne River and Lake Ashtabula. (BI Tr. Pg. 78)

Shifting the pipeline one and one half to two miles to the east puts the pipeline in the drainage system of the Maple River which drains into the Sheyenne. It would also move the Pipeline closer to shallow aquifers and involves crossing one and a half more miles of wetlands. (BI Tr. Pg. 78)

The Sheyenne River Alternative Route Concept would have a greater environmental impact than the proposed Keystone Route. (BI Tr. Pg. 123)

The proposed Keystone Pipeline alignment in the Sheyenne River-Lake Ashtabula area minimizes the impact to the landowners and to the environment. (BI Tr. Pg. 79)

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)

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)

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)

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. P. 367-368)

The Keystone Pipeline is safe where it is proposed to be located in the Sheyenne River and Lake Ashtabula area. The risks to the Sheyenne River and Lake Ashtabula are low. In discussing the proximity of the Keystone Pipeline to Lake Ashtabula, Jim Horner concurred with the testimony of Heidi Tillquist, that the pipeline is safe at its present location. Mike Sauer testified that he will be looking very closely at the Sheyenne River crossing relative to water quality. (BII Tr. Pgs. 381, 384, 530)

At the public hearing in Valley City a suggestion was made to move the pipeline to the east further away from the Sheyenne River and Lake Ashtabula. (BI Tr. Pg. 78)

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The proposed Keystone Pipeline alignment in the Sheyenne River-Lake Ashtabula area minimizes the impact to the landowners and to the environment. (BI Tr. Pg. 79)

Appellants allege that the following Conclusions of Law are not supported by its Findings of Fact.

Keystone believes that the Conclusions of Law are supported by the Findings of Fact and have referenced the findings made by the Commission.

8a. The Commission's Conclusion of Law No. 5 that "the location, construction, and operative of the proposed pipeline, as conditioned in this Order, will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota."

8b. The Commission's Conclusion of Law No. 6 that "the proposed pipeline corridor and route, as conditioned in this Order, are compatible with the environmental preservation and the efficient use of resources."

8c. The Commission's Conclusion of Law No. 7 that "the proposed pipeline corridor and route, as conditioned in this Order, will minimize adverse 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."

8d. The Commission's Conclusion of Law No. 8 that "the proposed project, as conditioned in this Order, is of such design and location that it will produce minimal adverse effects, as defined under North Dakota Century Code Section 49-22-07.2."

The Commission made 125 Findings of Fact, many of them dealing with the issues cited by the Appellants, and most all of them already dealt with in this brief. The following is a list of several of the findings the Commission made concerning the effects of the pipeline on the environment, and the citizens of North Dakota.

The Commission found that the Keystone pipeline:

- According to the Department of State's Environmental Impact Statement, will result in limited adverse environmental impacts. (FOF 5)
- Alternatives to the route would not minimize adverse effects of pipeline. (FOF 9)
- Represents minimal environmental impact and minimal impact to landowners in the Fordville area. (FOF 68)
- Will not impact public water systems. (FOF 76)
- Represents minimal impacts to landowners in the Sheyenne River/Lake Ashtabula area. (FOF 88)

- Will have no significant impact relative to noise generated at the pump stations. (FOF 111)
- To the extent practical, all effects of the pipeline construction will be mitigated. (FOF 118).
- Agricultural land will be returned to the same compaction as adjacent land, and agricultural fields returned to their previous productivity.

The Appellants allege that the Commission did not sufficiently address the following evidence presented by the Appellants.

It is Keystone's position that the Commission did address Appellants evidence listed as represented by the Findings of Fact made by the Commission.

9a. "Evidence presented by Appellants regarding the frequency and volume of future leaks and spills along the Keystone pipeline."

The Commission made Findings of Fact concerning frequency and volume of future leaks and spills: F.O.F. 10-19 dealing with pipeline integrity, F.O.F. 20-25 dealing with leak detection,

F.O.F. 23 citing Appellants' evidence concerning leaks which comes from Exhibit I-1, "A Frequency-Volume Study of Keystone Pipeline" prepared by DWV Consulting for Keystone.

Keystone's expert on leak detection, Brian Thomas, testimony supports the Commission findings.

Keystone estimates that leaks at the 1.5 to 2 percent threshold will be detected by the computational monitoring system within 140 minutes. Very small leaks, which could be measured in drips per hour, may take up to 90 days to detect. Leaks just below the 1.5 percent threshold would be discovered much sooner than 90 days. (BII Tr. Pgs. 438-439)

The final system used to detect leaks is direct observation, which includes aerial patrols, ground patrols, public and landowner awareness programs, design to encourage reporting of leaks and other events that may suggest a threat to the integrity of the pipeline. (BII Tr. Pg. 437)

Control center operators monitor the volume balance system, and if they notice a discrepancy that is not large enough to trigger an automatic alarm, they will take action to verify such as shutting down the pipeline and isolating it into segments to determine if a segment is losing pressure. (BII Tr. Pgs. 439-440)

Leaks that are small in nature will come to the surface due to the fact that the dirt placed over the top of the pipeline has not been compacted to the same degree as the virgin ground on either side. Small leaks don't leave the right-of-way, but migrate to the surface following the path of least resistance. (BII Tr. Pg. 462)

Keystone's leak detection system meets or exceeds the requirements of 49 CFR Part 194 and 49 CFR Part 195. (BII Tr. Pg. 491)

9b. "Evidence presented by Appellants regarding risks to public and private water supplies from the route chosen by the Applicant and approved by the Commission."

Appellant's own witnesses Jim Homer and Mike Sauer from the State Health Department testified that the pipeline was satisfied with the location of the Keystone Pipeline and that it was safe in its present location. (B 11 Tr. Page 530-531).

Homer also testified that he concurred with Keystone's spill risk analysis. Witness Heidi Tillquist in her testimony concerning the location of the Keystone Pipeline in the Lake Ashtabula and Fordville Aquifer area (B 11 Tr. Pg. 530).

9c. "Evidence presented by Appellants regarding safer alternatives to the route chosen by the Applicant and approved by the Commission through the Forest River Watershed."

Appellants did not present any expert testimony that contradicted Keystone's expert testimony concerning the location of the pipeline in the Forest River Watershed.

Because the proposed route of the Keystone Pipeline through the Fordville area is safe and not a danger to the Fordville Aquifer, looking at the western route concept is not warranted.

While the western route concept could slightly increase the transit time for crude oil to reach the Fordville Aquifer, the western reroute concept would only result in an incremental change in risk. While it might be "safer" as Horner testified, it would only slightly decrease the already highly improbable risk of a spill reach the Fordville Aquifer.

On the other hand, the western route concept would have a known impact on 2.7 additional miles of wetland (40 additional acres). This amounts to almost a 20 percent increase in wetlands impacted across the entire state of North Dakota. Tillquist testified that the known impact to wetlands outweighed the highly improbable event of crude oil getting into the Fordville Aquifer and the highly improbable even of BTEX copouts reach the public wells in the aquifer.

B. Appellants have failed to make the required strong showing that they suffer irreparable

injury if a stay of the Commission Order is not granted.

Appellants allege that if the Commission's Order is not stayed, Keystone may commence eminent domain proceedings against appellants.

Eminent domain proceedings are authorized by N.D.C.C. §49-19-12 for common pipeline carriers. The Commission in its PCN Order has found Keystone to be a common pipeline carrier subject to chapter 49-19.

Chapter 32-15 N.D.C.C. provides for the procedure to be followed in an eminent domain action and establishes the method for the determination of damage suffered by landowners.

The Commission in its Order has made the permit for the pipeline conditional on segregating and replacing 12 inches of topsoil, and requirement for limiting the width of trees that can be cut and requiring replacing of trees and shrubs on a 2-1 basis on the landowners property.

Irreversible and irretrievable commitments of natural resources are anticipated to be minimal for the proposed project. All areas of natural vegetation within the right-of-way will be reclaimed, and no agricultural lands will be taken permanently out of production except for land used to install above ground facilities, (i.e. pump stations and valves). (BI Tr. Pgs.149, 158, 161, 167) (Ex. T-2 Application for Certificate of Corridor Compatibility Pg. 16). Any damages caused will be ascertainable and compensable damages, which will be determined in the eminent domain proceedings pursuant to Chapter 32-15 N.D.C.C.

C. Keystone will suffer substantial harm if a stay is granted.

As shown in the attached Affidavits of Dean Cowling and L.A. Gray, and as discussed below, Keystone will suffer substantial harm if a stay is granted.

1. I am advised by counsel that litigation of the pending appeal in this case is expected to take between four to six months. I am further advised by counsel that, if a further appeal was taken to the State Supreme Court, litigation could be extended for six to nine months. Therefore, if a stay of Keystone's permit authority is granted pending the outcome of the appeal, it is very unlikely that Keystone would be able to commence construction in North Dakota during the 2008 construction season, which ends in November. Furthermore, the uncertainty of the pipeline route in North Dakota would impact other engineering and construction related activities along the entire length of the project which would limit the amount of work completed in 2008 and shift work into 2009 and 2010.
2. Completion of the North Dakota portion of the pipeline in 2008 is critical to placing the initial

phase of the project in service in 2009.

3. A stay of Keystone's permit authority pending an appeal would also result in a one-year delay in initiating and completing the conversion of pipe from natural gas service to oil service, as well as new pipeline construction in Canada, which is scheduled to begin in May 2008. In addition, a stay would delay the pump station construction program, which is scheduled to begin in May 2008, in both the United States and Canada.
4. A one year delay in initiating and completing construction in North Dakota, and in placing the initial phase of the project in service, will have significant negative impacts on: (a) Keystone; (b) North Dakota counties and residents; (c) North Dakota oil producers; (d) residents and counties in other states; (e) the public interest in North Dakota; and (f) the national interest.
5. A stay of the permit which negates Keystone's ability to conduct the construction work planned for North Dakota in 2008, and which delays the initial in-service date of the project by one year will have a total estimated construction cost impact of approximately \$425 to \$355 million
 - a. This includes an estimate of \$175 million for impacts to Allowance For Funds Used During Construction for a one year delay and as detailed in the Affidavit of Loys A. Gray III, the cost impact of deferring construction in North Dakota into 2009 will range from approximately \$50 to \$70 million.
 - b. In addition, a conservative estimate of the premium associated with shifting a significant amount of construction work in other States and Provinces along the pipeline route from 2008 to 2009 and 2010, would add an estimated \$200 million.
6. In the event that the pending appeal was resolved, and a stay lifted, by August 2008, Keystone may be able to salvage part of the 2008 construction season. Even in this scenario, however, significant incremental costs would be incurred.
 - a. As stated in Mr. Gray's affidavit, \$12.7 million in costs associated with canceling short-term pre-construction activities would be incurred in North Dakota.
 - b. In addition cost increases in the range of \$30 to \$40 million in order to expedite 2008 construction in North Dakota.
 - c. A similar range of costs would be incurred to expedite pipeline construction on the Canadian portion of the project ranging from \$30 to \$40 million. In addition, costs in the range of \$30 to \$50 million to expedite the pump station construction program to recover from a late start.
 - d. Accordingly, even if Keystone was able to recover from a late construction start and salvage its 2009 in-service date, incremental costs on the order of \$100 to \$140 million would be incurred.
 - e. Moreover, even with these expenditures, Keystone's ability to meet its 2009 in-service date would be placed in jeopardy by an August 2008 construction start date. Assuming that the in-service date was late by the associated 3 month

delay in starting construction from May to August an additional \$75 million is the estimated impact to Allowance For Funds Used During Construction.

7. The Keystone Pipeline construction is to be performed in two approximate 130-mile construction spreads (contractors) in 2008 (reference Exhibit A – Construction Spread Plan). One spread starts at milepost 0 at the US/Canadian border and works southerly, and the second spread starts at milepost 130 in northern Barnes County and works southerly. Clearing of the right of way for the pipeline in North Dakota, which is the initial phase of the pipeline construction process, is scheduled to start immediately upon the lifting of the spring thaw road bans (estimated to be mid May).

8. Acquisition of the right-of-way for the pipeline in North Dakota is over 96% complete. Easements have been acquired on a negotiated basis from 341 of the 355 landowners, comprising over 210 miles of the 218 miles the pipeline crosses in North Dakota. While eminent domain proceedings have been commenced against the 14 owners of the un-acquired tracts of land, Keystone continues to seek acquisition of easements from these remaining landowners on a negotiated basis.

9. Granting a stay pending the outcome of an appeal will result in the deferral of monies anticipated to be spent in North Dakota communities. Keystone estimates that it will spend approximately \$32.9 million in local North Dakota communities in 2008 during construction of the Keystone project. These expenditures will include food and lodging expenditures during construction, purchase of construction materials and supplies to be sourced locally and locally hired labor. A delay in the start of construction for a year will defer these economic benefits from coming into these communities for a year.

10. The following pre-construction activities are currently underway. Many of these activities will be interrupted by the granting of a stay:

- A. Offloading and stockpiling of line pipe;
- B. Mobilization of construction contractor supervision personnel;
- C. Offloading of construction equipment and materials;
- D. Mobilization of construction management, survey and environmental personnel;
- E. Completion of welding procedures; and
- F. Notification of landowners and county officials of the imminent start of construction.

11. The following pre-construction activities are scheduled to start before mid May. These activities will be interrupted by the granting of a stay:

- A. Staking of the pipeline centerline and limits of the construction right of way
- B. Counting and documenting of trees to be removed from the right of way;
- C. Biologist surveys for threatened or endangered species;
- D. Biologist surveys for migratory bird nests and raptors;
- E. Biologist surveys for weeds;
- F. Remaining cultural resource surveys;
- G. Pre-construction meetings with contractors;

- H. Contractor yard preparation and set up of construction offices;
- I. Notifications to landowners and county officials;
- J. Mobilization of construction workers;
- K. Health, safety, and environmental training of construction workers; and
- L. Completion of a pre-construction conference with ND PSC staff scheduled for May 8, 2008 at 9:00 AM

12. A stay pending the outcome of the appeal would result in the following impacts to Keystone's construction program, each of which have cost implications:

- A. Demobilization and termination of construction management, survey, and environmental personnel;
- B. Demobilization and termination of contractor personnel;
- C. Approximately 265 miles of line pipe that has already been purchased and is currently being stock-piled. This line pipe must be stored requiring that ends be covered and the pipe mill coating protected from ultraviolet sunlight (see photos of pipe delivered to pipe stockpile yards, attached as Exhibit B);
- D. Mainline valves and other materials must be warehoused;
- E. Pipe yards must be re-leased for another year. Some leases require Keystone to remove the pipe by year end of 2008 and the landowner could require Keystone to move the pipe to another location;
- F. Certain environmental surveys completed to date will be required to be completed again due to the time sensitive nature of the survey observations;
- G. Termination of agreements for local housing facilities for worker lodging;
- H. Termination of agreements with local service suppliers;
- I. Termination of pipeline contractors' agreements with specialty subcontractors (clearing, road boring, horizontal directional drilling, etc);
- K. Project management and key engineering, survey, land, and environmental personnel will have to be maintained for continuity until construction starts in 2009; and
- L. First year landowner crop damages have been compensated to many landowners and cannot be recovered, resulting in the necessity of paying an additional year for crop losses.

13. If a stay is granted, the pre-construction activities already underway and those planned between now and mid May would be cancelled. The near-term cost impacts associated with the above listed items, resulting from a stay of construction are estimated at \$12.7 million. These costs would be incurred as a result of even a short-term delay, regardless of whether the 2008 construction season is lost.

14. 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 (reference Exhibit C attached, which includes construction march charts for Spreads 1 and 2). This complete time window is needed for the construction contractors to complete the scope of work. As discussed in the affidavit of Dean Cowling, the grant of a stay pending the outcome of the appeal will result in loss of the 2008 construction season. This will increase the project costs and will also greatly increase the risk of not completing the project on schedule in 2009.

15. The US pipeline industry is in a period of expansion that is unprecedented in the post-World War II period. The demand for pipeline construction contractors and workers is exceeding supply. Last year, Keystone had to alter its original construction plan due to this demand and shift construction work into 2009 for Spreads 3, 4, and 5. Additionally, Keystone had to include payment penalties to its pipeline contractors in its construction contracts in the event construction is cancelled in 2008. Granting a stay will cause Keystone to incur cancellation fees for the Spread 1 and 2 pipeline construction contractors. These costs are \$12.5 million if notices to the contractors are given on or before May 1 (reference Exhibit D – note that these costs are not estimated). These costs would increase to \$13.5 million if notice is provided to contractors after May 1, 2008.

16. The lengths of Spreads 1 and 2 were planned based on the ability to construct from mid-May until mechanical completion on November 30, 2008. Line fill with crude oil for startup of the pipeline is planned to begin in Canada on November 1, 2009, and the line fill is estimated to reach the US border on December 15, 2009. With Spreads 1 and 2 completed in 2008, there would be no risk of the pipeline not being complete to receive line fill on December 15, 2009. Line fill would continue from the US border on toward Spread 3. Granting a stay will result in Keystone needing to achieve mechanical completion for Spreads 1 and 2 by October 31, 2009, to ensure mechanical completion and to complete commissioning activities prior to receipt of line fill on December 15, 2009. This cannot be accomplished with just two pipeline construction spreads. To facilitate completion of construction in time to accept line fill, it is my opinion that the two construction spreads will have to be made into three construction spreads. The lengths of these spreads would be shorter, thus, reducing the contractors' volume of work and increasing the cost of the work. The cost impact of conducting North Dakota construction in three spreads in 2009 is estimated to be in a range of \$10 million to \$15 million.

Granting a stay that moves pipeline construction in North Dakota into 2009 will significantly increase pipeline construction costs for Spreads 1 and 2. The construction work would have to be re-scheduled and re-contracted for 2009. The 2009 demand for pipeline construction contractors will remain high and the large diameter pipeline construction contractors are already committed under contract to Keystone and other major projects for 2009. Keystone's ability to contract additional pipeline construction resources in 2009 is limited. These limitations will result in higher pricing, assuming the work can be contracted at all. It is my opinion that this delay to 2009 will result in a 10 to 20% increase in costs in order to get contract commitments from pipeline construction contractors for 2009. The impact to pipeline construction costs from re-contracting for a delay of Spreads 1 and 2 to 2009 is estimated to be in a range of \$15 to \$30 million.

17. North Dakota has periodically had extremely wet weather, even including flooding in May, June and July in the areas of the proposed Keystone pipeline. Wet weather greatly slows the pace of construction. With line fill scheduled for December 15, 2008, there would be very little margin for other than normal inclement weather. Granting a stay greatly increases the risk of mechanical completion of the pipeline not being achieved for receipt of the line fill as planned, such that Keystone's in service date could not be met, resulting in significant additional cost impacts to the project.

18. Based on the foregoing, it is my professional opinion that grant of a stay will increase the cost of pipeline construction in the range of \$50.2 million to \$71.2 million; the benefits to the local North Dakota economy from the expenditure of approximately \$32.9 million during construction will be deferred; and the risk of completing the project on the planned schedule will be greatly increased.

19. In the event that the pending appeal was resolved, and a stay lifted, by August 2008, Keystone may be able to salvage part of the 2008 construction season. Even in that scenario, however, significant incremental costs would still be incurred. The \$12.7 million in costs associated with canceling short-term pre-construction activities would be incurred. In addition, costs in the range of \$30 to \$40 million would be incurred in order to expedite 2008 construction. Even with these expenditures, Keystone's ability to meet its 2009 in-service date would be placed in jeopardy by a summer 2008 construction start date.

20. During the course of the discussions necessary to secure these land rights, the nature and timing of Keystone's construction was communicated to landowners. If a stay of Keystone's North Dakota PSC permit to construct the pipeline is granted, which makes it impossible to construct in North Dakota in 2008, landowners who are currently expecting construction to be complete in 2008 may experience disruption of their 2008 farming plans or other inconvenience.

21. All major environmental permits have been acquired for the Keystone Pipeline, and the majority of non-environmental permits have been acquired except the South Dakota siting permit, for which South Dakota has formally approved conditions, and which is expected to be issued in the very near future. The remaining permits are anticipated to be received before the end of April. If a stay of Keystone's permit to construct the pipeline is granted, which makes it impossible to construct in North Dakota in 2008, some environmental and non-environmental permits will have to be re-applied for 2009 construction inconveniencing regulatory agencies and causing Keystone to incur additional costs.

D. Granting a stay will harm the public interest.

1. In addition to the cost impacts to Keystone and its shippers, a stay of the Keystone's permit authorization from the PSC to construct the pipeline project will delay the substantial benefits that the project will bring to the State, counties, and citizens of North Dakota. Keystone's application cited the economic benefits brought about by construction activity. Keystone also estimated that pipeline operations would increase tax revenues to the state and counties crossed by the pipeline. Keystone estimated that the project would pay approximately \$5.3 million in property taxes in North Dakota in the first year of operations. This estimate was based on the capital costs of \$2.1 billion projected at that time. Recently, TransCanada issued a statement revising the overall projected capital costs of the project to \$5.2 billion. (Reference: Keystone Press Release - Exhibit C) A stay of the permit, which results in a one-year delay of the in-service date of the initial phase of the project, will cost the eight counties in the range of \$7.65 to \$9.38 million in tax revenues. The estimated tax revenues to North Dakota counties, based on the revised capital cost estimate, are set forth below:

State/County	Estimated Tax Dollars per state/county (\$US) July 2007
NORTH DAKOTA	\$7,650,000 to \$9,385,000
Pembina	\$800,000 to \$1,000,000
Cavalier	\$200,000 to \$250,000
Walsh	\$900,000 to \$1,100,000
Nelson	\$1,400,000 to \$1,700,000
Steele	\$1,000,000 to \$1,200,000
Barnes	\$1,450,000 to \$1,800,000
Ransom	\$950,000 to \$1,160,000
Sargent	\$950,000 to \$1,175,000

2. On October 30, 2007, North Dakota's Office of Management and Budget presented a report to the state legislature's Budget Section regarding the impact of price "discounts" imposed on oil production in the state, caused by a shortage of pipeline capacity. The report stated that, as North Dakota's oil production began rising two years ago, a shortage of pipeline capacity helped to drive down prices. The report indicated that this discounting of oil prices cost North Dakota producers at least \$211.4 million between December 2005 and April 2007. As a result, the state's treasury lost \$16.6 million in tax collections over the same period, according to the OMB report. (Reference: OMB Report - Exhibit D)

3. A stay of the permit to construct the Keystone Pipeline project, which delays Keystone's 2009 in-service date by a year, would extend the shortage of pipeline capacity for another year. This would negatively impact North Dakota oil producers and exacerbate the revenue and tax losses that are being incurred due to the current oil pipeline capacity shortfall in the state and surrounding area.

4. A stay of the permit to construct Keystone that results in a one year delay of the initial in service date would cost North Dakota oil producers in the order of \$170 million, taking into account the OMB estimate, on an annualized basis.

5. A stay of the permit to construct Keystone that results in a one year delay of the initial in-service date would cost the state's treasury an amount on the order of \$13 million in lost tax royalty revenue, taking into account the OMB estimate, on an annualized basis.

6. The Bismarck Tribune has reported that the President of the North Dakota Petroleum Council stated these figures are similar to the industry's own estimates of lost revenue and that more pipeline capacity is required to alleviate this price constraint. (Reference: Bismarck Tribune – Exhibit E)

7. A stay of the permit to construct Keystone jeopardizes timely completion of the project and creates uncertainty and confusion among the shippers who are relying on Keystone to transport oil to refineries and markets in the U.S. in 2009 and 2010.

8. The United States Department of State has found that the Keystone project is in the national interest. The North Dakota PSC has found that the project is in the public convenience and

necessity. A stay of Keystone's permit authority, which delays or places the viability of the project at risk, would be contrary to those specific findings.

9. A stay which jeopardizes timely completion of the project creates uncertainty and confusion among the shippers who are relying on Keystone to transport oil to refineries and markets in the U.S. in 2009. This uncertainty also negatively impacts U.S. consumers who need increased supplies of reliable Canadian crude oil at a time when current oil supply circumstances reflect prices above \$95 per barrel. Finally, as more fully discussed below, a delay in the Keystone project, and the negative signal that a delay would send to potential future pipeline projects, would hurt North Dakota oil producers and exacerbate the revenue and tax losses that are being incurred due to the current oil pipeline capacity shortfall in the state.

V.

APPELLANTS ARE REQUIRED TO POST A SUPERCEDEAS BOND IN SUCH AMOUNT THAT WILL PAY ALL DAMAGES SUSTAINED BY KEYSTONE DUE TO A STAY

Rule 62 (d) ND R Civ. Pro provides that:

“If an appeal is taken, the appellant by giving a supercedeas bond may obtain a stay subject to the exceptions contained in subdivisions (a). The bond may be given at or after the filing of the Motion of Appeal. The stay is effective when the supercedeas bond is approved by the court.”

Rule 62(j) ND Civ Pro establishes the understanding to stay other executions and provides as follows:

“If the judgment appealed from directs the doing of any particular act or thing and no express provision is made by statute in regard to the undertaking to be given on appeal therefrom, the execution thereof is not stayed by the appeal therefrom unless an undertaking is entered into on the part of the appellant, in such sum as the court shall direct, and by at least two sureties, to the effect that the appellant will pay all damages which the opposite party may have sustained by not doing the particular thing or act directed to be done by the judgment appealed from and to such further effect as the court in its discretion directs.”

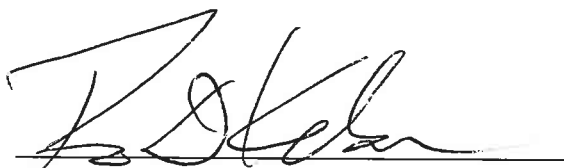
The costs incurred by Keystone in the event of a stay will be substantial. A stay pending disposition of the pending appeal is likely to make it impossible to commence construction in North Dakota in 2008. In the event the 2008 construction season is lost, Keystone will incur costs in the range of **\$425 to \$445 million**. These costs are detailed in the Affidavits of Mr. Cowling and Mr. Gray. The \$425 to \$445 range is summarized at Paragraph 27 of Mr. Cowling's affidavit and consists of: (i) costs in the range of \$50 to \$70 million associated with cancellation of 2008 pre-construction and construction activities, construction in extra, shorter spreads in 2009, and recontracting premiums for 2009 construction; (ii) \$175 million in

impacts to Allowance for Funds Used During Construction caused by a one-year delay in construction; and (iii) a conservative estimate of \$200 million reflecting the premium associated with shifting a significant amount of construction work in other States and Provinces from 2008 into 2009 and 2010.

Even in the event that the pending appeal was resolved and a stay lifted as early as August 2008, and Keystone was able to salvage a portion of the 2008 construction season, substantial costs, in the range of **\$100 to \$140 million** would be incurred. These costs are summarized at Paragraph 28 of Mr. Cowling's affidavit and include: (i) the \$12.7 million in costs associated with cancellation of near-term activities referenced in Mr. Gray's affidavit; (ii) cost increases in the range of \$30 to \$40 million to expedite construction in North Dakota in 2008; (iii) cost increases in the range of \$30 to \$40 million to expedite pipeline construction on the Canadian portion of the project; and (iv) costs in the range of \$30 to \$50 million to expedite pump station construction across the project.

Should the Court determine that a stay is warranted, the Appellants are required to post an undertaking by at least two sureties in an amount that will pay all damages that Keystone will sustain as a result of staying the Commission's permit to construct the Keystone pipeline. In order for the undertaking to pay all of Keystone's damages it would need to be in the amount of \$425 to \$445 million. At the minimum the undertaking must be in an amount of \$100 to \$140 million. If Appellants are unable to post a bond in such amount a stay of the Commission's permit to construct the Keystone pipeline may not be granted.

Dated this 21 day of April, 2008.



THOMAS D. KELSCH, State Bar ID No. 03918
KELSCH, KELSCH, RUFF & KRANDA
Attorneys for TransCanada Keystone Pipeline, LP
103 Collins Avenue, P.O. Box 1266
Mandan, North Dakota 58554-7266
(701) 663-9818