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PUBLIC SERVICE COMMISSION



Ken Crowl
Manager US Pipeline Compliance
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July 18, 2012

Mr. Patrick Fahn
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VIA COURIER

**TransCanada Keystone Pipeline
PSC Case No. PU-04-421**

Dear Mr. Fahn,

TransCanada is voluntarily providing the Public Service Commission the enclosed updated copy of the Keystone Emergency Response Plan to the PSC with the understanding that it will be kept confidential. This letter reiterates the applicability of exemptions under North Dakota Open Records law and the federal Freedom of Information Act.

Although North Dakota does not defer to Freedom of Information Act (FOIA) exemptions, the federal security issues are also important for the Commissioners to consider. Under federal law, TransCanada has an affirmative duty to prevent the disclosure of security sensitive information pertaining to critical infrastructure, including the Keystone Pipeline, and therefore we request due consideration be given to the confidentiality provisions regarding federal security issues as well as state exemptions.

I. STATE EXEMPTIONS

Confidentiality should be preserved for the Keystone Emergency Response Plan and Integrity Management Plan (hereafter "Plans") under exemptions provided under State law.

A. Confidentiality of the Plans should be preserved under the Security System Plan Exemption.

The North Dakota Open Records Statute, N.D.C.C. §44-04-18 et seq., governs the release of records. As detailed below, the statute provides an exemption for emergency response and security plans for critical infrastructure.

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§44-04-24. Security System Plan - Exemption.

1. A security system plan kept by a public entity is exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.
2. As used in this section:
 - a. "Critical infrastructure" means public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, **and similar key resources**, whether physical or virtual, so vital to the state that **the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.**
(Emphasis added)
 - b. "Security system plan" includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations or portions of any such plan relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, **or any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity; threat assessments; vulnerability and capability assessments conducted by a public entity, or any private entity; threat response plans; and emergency evacuation plans.**
(Emphasis added)

Under the state statutory definition, the Keystone Pipeline, its facilities and the interconnecting pipelines are critical infrastructures whose destruction or incapacity would have a debilitating impact on public safety. By their very nature, emergency response plans and integrity management plans contain security sensitive information. The Plans contain specific information on threat assessments, vulnerability and security measures, and emergency response procedures. The release of these Plans, and the security sensitive information contained within, would irreparably compromise the security of these vital assets, create risk of harm to the public and accordingly such information must be withheld from any Open Records response.

B. Other Exemptions Apply to Any Information Contained in the Plans not Exempted under §44-04-24

The security sensitive information contained within the Plans is inextricably intertwined with the remainder of the information, and accordingly cannot be redacted or excerpted in any meaningful way. Further, any information contained in the Plans that is determined not to fall under the Exemption provided in §44-04-24 falls under §§ 44-04-18.4(2)(a), 44-04-18.4(2)(b), 44-04-18.4(2)(c) and 44-04-18.4(2)(d).

Because the Plans contain proprietary information regarding design, construction and operating specifications for the Keystone Pipeline, release of this information would substantially harm

TransCanada's competitive position. This information has not been released to the public because competitors could use it to their advantage by adjusting their materials, design, operations or techniques, thereby deriving "independent economic value" from information that would not have been otherwise ascertainable. Protection from this kind of competitive injury is anticipated under state law.

North Dakota Century Code § 44-04-18.4(2) authorizes protection for commercial, financial, proprietary, and trade secret information if privileged and if the information has not been previously publically disclosed. N.D.C.C. § 44-04-18.4(1). Commercial and financial information can be protected from disclosure if the information has not been previously disclosed and disclosure would impair the Commission's ability to obtain similar information in the future N.D.C.C. §§ 44-04-18.4(2)(a) and 44-04-18.4(2)(b). Proprietary and trade secret information can be protected when the information derives independent economic value from not being generally known to or readily ascertainable by other persons, and is the subject of reasonable efforts to maintain its secrecy. N.D.C.C. §§ 44-04-18.4(2)(c) and 44-04-18.4(2)(d).

II. FEDERAL EXEMPTIONS

Under Federal Law, the Plans Fall Squarely under Exemption 3 & 4. Understanding the nature of these exemptions and the analysis under federal law may assist the Commissioners.

A. Exemption 3--Information Specifically Exempted by Other Statutes

Unlike other FOIA exemptions, if the information requested under FOIA meets the withholding criteria of exemption 3, the information *must* be withheld. The Plans submitted to PHMSA and to the North Dakota PSC contain sensitive security information (SSI) that is controlled under 49 CFR parts 15 and 1520. Records and information determined to be SSI under Part 15 are specifically exempt from public disclosure under FOIA pursuant to exemption 3 (5U.S.C. 552(b)(3)).

The nation's pipeline network and related facilities have been determined to be critical infrastructures. Critical infrastructures have been defined under section 214 of the Homeland Security Act and 42 USC § 5195C, as those systems and assets so vital to the United States that the incapacity of such systems and assets would have a debilitating impact on the United States. Any public release of SSI related to the location of the valves, the specific components, facility threat analysis and related safety information on the Keystone pipeline could irreparably compromise its security and accordingly, such information must be withheld from any FOIA response.

B. Exemption 4 --Trade Secrets and Confidential Commercial or Financial Information

Exemption 4 of FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Any information contained in the Plans that could be determined not to meet the criteria of SSI under Part 15 falls under FOIA Exemption 4 because it is information that TransCanada would not generally release to the public.

Exemption 4 of FOIA exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Note that under Federal case law, information may qualify as commercial even if the interest of the provider in gathering, processing, and reporting the information is noncommercial. *Critical Mass Energy Project v. NCR*, 975 F.2d 871, 871 (D.C. Cir, 1992) (information on safety of nuclear power plants gathered by organization of nuclear power organizations formed to improve safety and reliability of nuclear power plants). Applying Exemption 4 to these documents serves the federal government’s interest in the protection of private sector critical infrastructures information. According to the test articulated in *Critical Mass*, if a person provides information to a U.S. agency voluntarily, the information is confidential if “it is of a kind that the provider would not customarily release to the public.” *Critical Mass*, 975 F.2d at 880. Such information is exempt from FOIA’s scope.

For the foregoing reasons, we request that the enclosed Keystone Emergency Response Plan be kept confidential and not be released for public disclosure. If you have any questions, you may contact me at (832) 320-5462.

Sincerely,

A handwritten signature in black ink that reads "Ken Crowl". The signature is written in a cursive, slightly slanted style.

Ken Crowl
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