

Fahn, Patrick J.

From: Fahn, Patrick J.
Sent: Friday, October 12, 2007 10:43 AM
To: Al Wahl
Cc: -Grp-PSC Commissioners; -Grp-PSC Legal; -Grp-PSC Public Utilities; tdkelsch@kelschlaw.com; Todd Kranda; 'Nicholas R. Delaney'; Janie Capp
Subject: TransCanada Keystone Pipeline, LLC- Case No. PU-06-421 and PU-07-152 - Consideration of Information not presented at a Hearing
Attachments: Memorandum to Commission Regarding Evidence.DOC

Judge Wahl,

At its October 12 Special Meeting, the Commission considered the attached October 11 staff memorandum and agreed that the issue described should be referred to you for determination.

The question that needs to be addressed is how should information that is filed after the hearings have been completed be considered from an evidentiary standpoint by the Commission. The Commission specifically would like to know what options there are for bringing late filed information into the record as evidence that can be considered by the Commission in making its decision.

Please consider, in your determination, the various ways this late information is filed with the Commission, including correspondence by mail and email from intervenors (but not filed via counsel), correspondence from persons that have not intervened but testified under oath at one of the hearings, correspondence from persons that have not intervened or testified under oath at one of the hearings, correspondence from governmental agencies and political subdivisions, and information that staff has found in the course of investigating a comment from one of the persons mentioned.

What procedures are required to bring this information into the record as evidence to be considered by the Commission?

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MEMORANDUM

TO: Commissioners Wefald, Cramer and Clark

FROM: Bill Binek and Pat Fahn

DATE: October 11, 2007

RE: TransCanada Keystone Pipeline, LLC. –Case Nos. PU-06-421 and
PU-07-152 – Consideration of Information not presented at a Hearing.

The Commission has received letters and e-mails containing information from parties and the public regarding this case since the conclusion of the public hearings. Information has been received from intervenors, public witnesses not included as intervening parties that testified at one or more of the public hearings, public individuals that are not included as intervening parties and that did not testify at any of the public hearings, and from governmental agencies and political subdivisions. The question that needs to be addressed is how should information that is filed by such persons or entities after hearings have been completed be considered from an evidentiary standpoint by the Commission? I suggest that this issue be referred to the Administrative Law Judge for determination.

N.D.C.C. §28-32-24(1) provides:

The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence. An administrative agency, or any person conducting proceedings for it, may waive application of the North Dakota Rules of Evidence if a waiver is necessary to ascertain the substantial rights of a party to the proceeding, but only relevant evidence shall be admitted. The waiver must be specifically stated, orally or in writing, either prior to or at the hearing or other proceeding.

N.D.C.C. §28-32-25 provides:

In any adjudicative proceeding, an administrative agency may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at the hearing. It may do so after first transmitting a copy of the information or evidence or an abstract thereof to each party of record in the proceeding. The agency must afford each party, upon written request, an opportunity to examine the information or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence. Any further testimony that is necessary shall be taken at a hearing to be called and

held, giving at least ten days' notice. Notice must be served upon the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure. This section also applies to information officially noticed after the hearing when the issuance of any initial or final order is based in whole or in part on the facts or material noticed.