BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF:	)	**HP14-001**
	)	
	)	
PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	)	**INTERTRIBAL COUP'S REPLY TO TRANSCANADA'S POST-HEARING ARGUMENTS**

Comes now the Intervener Intertribal Council On Utility Policy, by and through its legal counsel, to briefly reply to the Closing Arguments of TransCanada in Docket HP14-001.

Over the course of the past five years, TransCanada failed to undertake any action of significance or substance under a permit issued in 2010 by the South Dakota Public Utility Commission ("Commission") Docket HP09-001, for the unprecedented proposed construction of a pipeline (Keystone XL) through the heart of the aboriginal and federal treaty recognized lands of the Great Sioux Nation in western South Dakota, across three major triburaries of the Missouri River, and over a portion of the largest fresh water aquifer uhder the surface of this continent. This region, sacredly and solemnly reserved to the Lakta, is the only part of the northern Great Plains where no oil, gas or dilbit pipeline has ever been built.

Because of TransCanada's failure to take any action under its permit over the past four years since its issuance, SDCL § 49-41B-27 required that TransCanada proceed through an ill-defined "recertifification" process demonstrating that it can still meet the one hundred and seven (107) conditions imposed by the 2010 permit as modified by TransCanada's subsequent refiling of a separate federal permit application with altered routes and additional requirements. Over a year ago, TransCanada filed its petition for recertification with the

Commission, which initiated a separate docket HP14-001. This comenced a nearly year long process which concluded in a full nine-day contested case administrative hearing this summer, with numerous intervening parties, wherein TransCanada put on its case through five supposedly substantive witnsseses, none of whom provided any substantial or authoritive testimony as to any role they had in TransCanada's actual compliance with any of the 107 conditions. At the end of the hearing TransCanada surprisingly announced that essentially it had actually already fully complied with the legal requirements of "recertificaiton" at the point when it filed its petition in 2014.

By the close of the nine-day hearing, the Petitioner, -- in response to the Standing Rock Sioux Tribe's motion (incorporated and renewed here by this reference) which was joined by all of the interveners present, pressing for dismissal and denial of TransCanada's recertification petition because the Petitioner had, in fact and in law, failed to meet its burden of proof, that is, to provide substantial evidence of its ability to comply with the any of six of the amended conditions it actually only mentioned in testimony, much less present any evidence for any of the unmentioned 101 conditional requirements, including any of those TransCanada sought to change or modify. TransCanada merely insists that it had satisfied its burden at the time they filed the certification when Mr. Taylor, attorney for TransCanada stated:

> *Final Point. The merits of what's gone on over the last nine days. The applicant met its burden of proof for certification in the written submission's that were filed nearly one year ago.*

Failing to cite any legal authority, relevant precedent or case law, TransCanada argues, from a hollow interpretation of the law, that by some sleight of hand in the act of signing and filing their petition for recertificaiton, the 'burden of proof' -- heretofore always bourne by an applicant/petitoner -- somehow magically shifted from themselves to any or all of the

opposing intervenors, who, under their version of reality, now needed to *disprove* the applicant's ability to meet the requirements of the original permit.

> *Keystone respectfully submits that it has proven that the project can still be constructed in compliance with the conditions imposed in 2010 and that the Intervenors have failed to submit any evidence based on which the Commission could deny Keystone's petition.*

This assertion ignores the fact that it has failed to successfully reclaim and restore the environmental conditions of productive farmland along the route of another pipeline it operates under similar conditions in eastern South Dakota.

Despite the fact that the Commission estabilshed a new docket for entire process, and conducted a full contested case hearing under the applicable administrative rules and staturory authorities, TransCanada doubled down in their closing brief to serve up the assertion that:

> *... This is not a new permit proceeding and Keystone is not required to re-prove what it proved in 2010.*

To accept TransCanada's assertiion here, we must suspend disbelief and swallow that they actually met their 'burden of proof' of future compliance back in 2010. What is most interesting about this bold assertion being fed to the Commission, as representatives of the people of South Dakota, is that TransCanada has never actually proved that it could meet, much less 'has met" ANY of the orignial conditions! In 2014-15, TransCanada has merely *re-promised* to comply with the 2010 conditions.

Over the past 5 years TransCanada has failed to provide any legal or factual evidence or support for its bold assertion that it has been able to satisfy the original conditions. TransCanada has even failed to take any steps at all towards satisfying those original conditions or the subsequent changes imposed by the federal filing. With a permit filled primarily with prospective conditions, TransCanada has failed to take any action whatsoever

towards submitting any required construction, reclamation or adverse weather plans. In five years, TransCanada has failed to even bother having an American engineer sign their draft engineering submittals for tunneling under any of the lifegiving waterways in Western South Dakota in direct violation of South Dakota law.

By its ruling throughout the hearing, the Commission has appeared to turn a willful blind eye to the toxic and corrosive content to be carried through the proposed pipeline, as well as deeming the climatic consequences of the ultimate combusion of said contents to be 'irrelevant' to the health, safety and welfare of the people of South Dakota. Again, we remind the Commission that its primary moral, ethical and legal responsibilities under the Constitution of the state of South Dakota are to steward the use of land, water and air resources for both the present and future generations of South Dakotans – for our posterity and not for the shareholders of TransCanada – and to look at and listen to what was ignored with regard to climate and weather and the change in conditions that have taken place since the setting of permit conditions in 2010.

Conclusion

Given the failure of TransCanada of ever met its burden of proof with its prospective promises in 2010 or to its signed recertification or repromise in 2014, and the legal responsibility of the Commisson to protect the interests of South Dakotans under our state constitution and applicable administrative statutes, rules and regulations, we respectfully request that the Petitioner's failed attempt at recertification be denied and dismissed. The appropriate action for TransCanada in this case is to reapply with its new federal plan, and not merey repromise to do that which it has not yet done.

Submitted this 30th day of October 2015,

Respectfully,

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CERTIFICATION OF SERVICE

I, Robert Gough, hereby certify that on the 29th day of October 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the **INTERTRIBAL COUP 'S REPLY TO TRANSCANADA'S POST-HEARING ARGUMENTS,** to the following:

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Dated this 29th Day of October 2015.

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