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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6401

DATE RECEIVED: October 25, 2010

DATE ACTIVATED: January 19, 2011

EXPIRATION OF SOL: Earliest-December 22,
2014/Latest-January 22, 2015

MUR: 6432

DATE RECEIVED: November 15, 2010

DATE ACTIVATED: January 19, 2011

EXPIRATION OF SOL: Earliest-December 22,
2014/Latest-January 22, 2015

COMPLAINANTS:

Nebraska Democratic Party (MUR 6401)
Bold Nebraska (MUR 6432)

RESPONDENTS:

TransCanada Keystone Pipeline GP, LLC
Bruning for Attorney General
Governor Heineman Committee

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 441e
11 C.F.R. § 110.20

OTHER AGENCIES CHECKED:

Nebraska Accountability and Disclosure
Commission

I. INTRODUCTION

Complainants, the Nebraska Democratic Party and Bold Nebraska, filed substantially similar complaints alleging that TransCanada Corporation, a Canadian corporation ("TransCanada"), or one of its foreign subsidiaries actually made donations of \$2,500 each to two Nebraska state candidate committees that the committees reported as made by either "TransCanada Keystone Pipeline" or "TransCanada Keystone Pipeline LP." The Respondent,

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1 TransCanada Keystone Pipeline, GP, LLC, a "downstream" subsidiary of TransCanada, states
2 that the donations were, in fact, made by a domestic subsidiary of TransCanada using domestic
3 revenue and that no foreign national directed, controlled, or participated in the decision-making
4 process regarding the donations. Upon review of the complaint, responses, and available
5 information, there appears to be no basis for concluding that the Respondent was involved in
6 making prohibited foreign national contributions. Accordingly, as discussed below, we
7 recommend that the Commission find ~~no~~ reason to believe that TransCanada Keystone Pipeline,
8 GP, LLC violated 2 U.S.C. § 441e. Because the donations at issue were not made by a foreign
9 national, the state committees did not accept donations from a foreign national. Accordingly, we
10 also recommend that the Commission find no reason to believe Bruning for Attorney General
11 and the Governor Heineman Committee violated 2 U.S.C. § 441e, and close the file.

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Facts**

14
15 Respondent TransCanada Keystone Pipeline, GP, LLC ("Keystone"); is a limited liability
16 company registered in Delaware and headquartered in Texas with operations in Omaha,
17 Nebraska. Keystone Response at 2. Keystone is the general partner in TransCanada Keystone
18 Pipeline, LP ("Keystone LP"), a Delaware limited partnership. Keystone Supplemental
19 Response at 1 and Response, Ex. A (organizational chart).¹ Keystone jointly owns and controls
20 Keystone LP with a limited partner, TransCanada Keystone Pipeline, LLC, another Delaware
21

¹ In order to clarify two points in Keystone's response relating to the identity of the donor and the composition of funds used to make the donations, we invited Keystone to clarify those issues. It did so in a letter dated April 14, 2011. As noted *infra*, Keystone's supplemental response clarifies that Keystone LP was the donating entity but that Keystone directs all of its activities. It also clarified the funds composition issue, as explained in Footnote 6 and the accompanying text.

1 limited liability company. *Id.* Keystone and its limited partner are in turn, subsidiaries of a
2 Delaware corporation, TransCanada Oil Pipelines, Inc. All four entities are ultimately wholly-
3 owned by TransCanada Corporation, a Canadian corporation. Keystone Response, Ex. A.
4 TransCanada is an energy infrastructure company that, among other things, develops and
5 operates natural gas and oil pipelines in North America. Keystone LP is apparently responsible
6 for constructing and operating the U.S. portion of an oil pipeline that transports crude oil from
7 Alberta, Canada, to U.S. markets. *Sue TransCanada* March 14, 2008, press release available at
8 www.transcanada.com/3036.html.

9 As general partner, Keystone directs all of the activities of Keystone LP, and Keystone
10 employees approved and directed Keystone LP to make the donations at issue to the state
11 committees in this matter. Keystone Response at 2; Supplemental Response at 1. According to
12 Keystone, sometime before December 11, 2009, Beth Jensen, its Director of Government
13 Relations and a U.S. citizen, reviewed with outside counsel the permissibility and attendant
14 reporting requirements, under state law, of making donations to Nebraska state candidates.
15 Keystone Response at 2. Subsequently, Jensen approved donations of \$2,500 each to the
16 Governor Heineman Committee ("Heineman Committee") and Bruning for Attorney General
17 ("Bruning Committee"), the campaign committees of two Nebraska candidates. *Id.* Jensen sent
18 an email on December 11, 2009, instructing TransCanada's Accounts Payable staff to issue
19 checks from Keystone operating funds to the two state campaigns. *Id.*, Ex. B. The Accounts
20 Payable center, located in Calgary, Alberta, processed the checks. The Accounts Payable center
21 issued the checks on a Keystone-controlled "U.S. funds Citibank account" in the name of
22 Keystone LP and sent them to Jensen. *Id.* Jensen then forwarded the checks to Kissel E&S

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1 Associates, an Omaha, Nebraska-based outside consulting firm engaged by Keystone in its
2 government relations efforts. Kissel representatives hand-delivered the checks to the candidate
3 committees, apparently in January 2010. *Id.*; Bruning Committee Response to MUR 6401 at 1.

4 Copies of the checks show that each was drawn on an account of "TransCanada Keystone
5 Pipeline, LP, 450 1st Street S.W., Calgary Alberta 502 5H1." Keystone Response, Ex. C. A
6 printed notation on the check face underneath the amount reads "U.S. FUNDS, TransCanada
7 Keystone Pipeline, LP." *Id.* The checks also indicate the bank where the account was
8 maintained is Citibank, N.A., at an address in New York City.

9 As required under Nebraska law, on February 2, 2010, Jensen filed with the Nebraska
10 Accountability and Disclosure Commission ("NADC") a Form B-7, "Report of Political
11 Contributions of a Corporation, Union or Other Association," for each donation. In those forms,
12 Keystone asserts that Jensen erroneously identified TransCanada Corporation as the donor.
13 Keystone Response at 3, and Ex. D. The forms list another Omaha, Nebraska, address where
14 Keystone operates locally. Keystone Response at 2, Ex. D. The Form B-7s have since been
15 amended to show Keystone LP as the donor. *Id.*, Ex. E.

16 The Respondent Committees' initial disclosure reports show that they either incompletely
17 or erroneously reported the donations at issue.² The Heineman Committee reported its donation
18 as coming from TransCanada Keystone Pipeline at the 450 1st St. address printed on the check
19 but listed the city and state as Omaha, Nebraska, rather than Calgary. See MUR 6401 Complaint
20 attachment, Heineman Committee NADC Form B-1, Schedule B, page 10 of 11; MUR 6432

² It appears that only the most current version of the state disclosure reports are available on the NADC's website since the state committees' reports for the period in question now available on-line have been amended. The NADC website states that the website database is based on the paper records filed with the NADC and that the paper records constitute the official records. See NADC website at <http://nadc.nol.org/ccdb/search.cgi>.

1 Complaint, Ex. 1. The Bruning Committee reported its donation as coming from TransCanada
2 Keystone Pipeline LP with no address whatsoever. See MUR 6401 Complaint Amendment,
3 Bruning Committee NADC Form B-1, Schedule B, page 11 of 12; MUR 6432 Complaint, Ex. 2.

4 According to the complaint in MUR 6432, an auditor at the NADC discovered that the
5 street address in one of the disclosure reports belonged to TransCanada in Calgary, Alberta.³

6 MUR 6432 Complaint at 2 and Ex. 3. The Bruning and Heineman Committees each state that
7 the NADC contacted them on September 30, 2010, about the possibility that the Keystone LP
8 donation may not have been from a U.S. corporation. Bruning Committee Response at 1-2;
9 Heineman Committee Response at 1.⁴ That same day, each committee separately issued refund
10 checks to "TransCanada Keystone Pipeline, LP." See Bruning Committee Response, Ex. 3;
11 Heineman Committee Response at 5. Keystone states that the committees refunded the
12 donations "out of an abundance of caution" despite clarifying information it provided to them, a
13 statement echoed by the Bruning Committee. Keystone Response at 3; Bruning Committee
14 Response at 1-2.

15 B. Analysis

16 1. Alleged Foreign National Donations

17 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits a foreign
18 national, directly or indirectly, from making a contribution or donation of money or other thing

³ The MUR 6432 complaint and an attached Internet article state that the Calgary street address was listed in the Bruning Committee's state disclosure report. The attached copies of the original paper reports, filed on April 12, 2010, however, show that the Heineman Committee listed a street address and the Bruning Committee listed no address. See MUR 6432 Complaint at Ex. 1 and Ex. 2.

⁴ References to the Bruning and Heineman Committee Responses are to the committees' responses in MUR 6401. Both committees responded to the complaint in MUR 6432 by referencing their earlier MUR 6401 responses.

1 of value in connection with a Federal, State, or local election. 2 U.S.C. § 441e(a)(1)(A), (B);
2 11 C.F.R. § 110.20(b). A foreign national is also prohibited from directly or indirectly making
3 an expenditure, an independent expenditure, or a disbursement in connection with a Federal,
4 State, or local election. 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f). In addition,
5 Commission regulations prohibit foreign nationals from directing, dictating, controlling, or
6 directly or indirectly participating in the decision-making process of any person, such as a
7 corporation, with regard to such person's election-related activities, including decisions
8 concerning the making of contributions, donations, expenditures, or disbursements in connection
9 with elections for any Federal, State, or local office. 11 C.F.R. § 110.20(i).

10 The Act and Commission regulations define "foreign national" to include "foreign
11 principals," as defined in 22 U.S.C. § 611(b), and an individual who is not a citizen or national of
12 the United States and who is not a permanent resident. 2 U.S.C. § 441e(b). A "foreign
13 principal" includes "a partnership, association, corporation, organization, or other combination of
14 persons organized under the laws of or having its principal place of business in a foreign
15 country." 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)(3)).

16 In past advisory opinions, the Commission has permitted a U.S. subsidiary of a foreign
17 national corporation to make donations and disbursements in connection with state and local
18 elections when: (1) the donations and disbursements derive entirely from funds generated by the
19 subsidiary and not from funds provided by the foreign parent; and (2) when all decisions
20 concerning the donations and disbursements are made by U.S. citizens or permanent residents,
21 except for setting the overall budget for donations. See Advisory Opinions 2006-15
22 (TransCanada)(wholly-owned domestic subsidiaries of a foreign corporation that receive no

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1 subsidies from their foreign parent or other foreign national may make donations to state and
2 local candidates as long as no foreign national participates in the decision-making, except for
3 setting overall budget amounts, and they use funds generated by their domestic operations
4 maintained in U.S. bank accounts); 1992-15 (Nansay Hawaii)(wholly-owned subsidiary of a
5 foreign corporation that received some subsidies from its foreign parent may make donations in
6 connection with state and local elections where it currently had substantial net earnings
7 generated by its domestic operations placed in segregated accounts that received no subsidies,
8 and provided that, in the future, it could demonstrate through a reasonable accounting method
9 that it had sufficient funds in its accounts to make donations, other than funds given or provided
10 by its foreign national parent).

11 Keystone states that the donations to the state candidate committees were made with U.S.
12 operating funds from an account maintained in a U.S. financial institution. *Id.* at 3. It points out
13 that the attached photocopies of the donation checks were drawn on a New York Citibank, N.A.
14 bank account and bear the notation "U.S. Funds" on the check faces. It also explains that the
15 Canadian address on the checks is that of TransCanada's Accounts Payable center, an office that
16 merely processes payments authorized by operating units of TransCanada, including Keystone.⁵
17 *Id.* at 3. Finally, Keystone states that Keystone LP received no subsidies from foreign nationals

⁵ Keystone's response also maintains that the processing of the donation checks by TransCanada's Accounts Payable center does not run afoul of the foreign national prohibition. Keystone Response at 4. In a matter involving similar circumstances, the Commission found no reason to believe that Section 441e was violated where: the foreign parent processed and issued a donation check on an account of the domestic subsidiary donor; the donation was made from revenues generated by the domestic subsidiary; and the domestic subsidiary's president, a U.S. citizen, was the sole decision-maker with respect to the donation. See MUR 6099 (Waverly Glen Systems, Ltd.) First General Counsel's Report at 4.

1 and generated substantial net earnings from which it funded the donations.⁶ Keystone
2 Supplemental Response at 1-2. There is no information indicating that the donations were
3 derived from non-U.S. funds.

4 With respect to the status of those involved in making the donations, Keystone's response
5 identifies only Beth Jensen, a U.S. citizen, and describes her role as approving and directing the
6 disbursement of the donations. The response also states, however, that no foreign individual or
7 entity "participate[d] in the decision making process regarding the making of the contributions"
8 and none directed or controlled the donations. Keystone Response at 3; *see also Id.* at 1.

9 Consequently, it may be that Ms. Jensen was the sole decision-maker involved in making the
10 donations or that Keystone decided not to specifically identify other non-foreign nationals who
11 were involved in the decision-making process. In any case, we have no information that any
12 non-U.S. citizen or non-permanent resident was involved in decisions to make the donations. In
13 addition, we note that Keystone's upstream parent, TransCanada, has previously sought advice
14 regarding the legality of its domestic subsidiaries making donations in state and local elections in
15 the U.S. *See Advisory Opinion 2006-15.*

16 Based on Keystone's response, it appears that the donations to the Bruning and
17 Heineman Committees were made using funds generated by a domestic subsidiary that received
18 no subsidies from a foreign national, and that no foreign national was involved in the decision to

⁶ As stated in footnote 1, we invited Keystone to clarify its response as to the composition of funds used to make the donations. In its response, Keystone referred several times to Advisory Opinion 2006-15 in which its upstream parent company, TransCanada, sought guidance as to whether two of its subsidiaries, neither of which are involved in this matter, could make donations in connection with state and local elections. Specifically, the response states that "... consistent with Commission guidance to TransCanada in AO 2006-15, the contribution (*sic*) was made from U.S. dollar denominated operating funds of Keystone located in a U.S. financial institution." Keystone Response at 3. The initial response, however, did not say whether Keystone LP, like the subsidiaries in AO 2006-15, received any subsidies from TransCanada or another foreign national. As noted in the text, Keystone's supplemental response confirms that Keystone LP did not receive subsidies from foreign nationals.

1 make the donations. Accordingly, we recommend that the Commission find no reason to believe
2 that TransCanada Keystone GP, LLC, as the general partner that conducts the activities of
3 Keystone LP, violated 2 U.S.C. § 441e.

4 **2. Acceptance of Donations by State Committees**

5 The Act and Commission regulations prohibit a person, in pertinent part, from knowingly
6 accepting or receiving a donation made in connection with a state election from a foreign
7 national. *See* 2 U.S.C. § 441e(a)(2); 11 C.F.R. § 110.20(g).

8 The Bruning and Heineman Committees promptly refunded the donations when NADC
9 notified them of a potential problem with the donations despite continued statements from
10 TransCanada representatives that the donations were permissible. Bruning Committee Response
11 at 2, Ex. 3 (refund check); Heineman Committee Response at 1 and 5 (refund check). They both
12 contend that any potential violation was inadvertent and request that the Commission dismiss
13 them from the matters. *Id.*

14 Based on Keystone's response, it appears the donations to the state committees were not
15 made by a foreign national. Therefore, we recommend that the Commission find no reason to
16 believe that Bruning for Attorney General and The Governor Heinemann Committee violated
17 2 U.S.C. § 441e by accepting foreign national donations. We also recommend that the
18 Commission close the file.

19 **III. RECOMMENDATIONS**

- 20 1. Find no reason to believe in MURs 6401 and 6432 that TransCanada Keystone
21 Pipeline, GP, LLC violated 2 U.S.C. § 441e.
22
23 2. Find no reason to believe in MURs 6401 and 6432 that Bruning for Attorney General
24 violated 2 U.S.C. § 441e.
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3. Find no reason to believe in MURs 6401 and 6432 that the Governor Heineman Committee violated 2 U.S.C. § 441e.
4. Approve the attached Factual and Legal Analyses in MURs 6401 and 6432.
5. Approve the appropriate letters.
6. Close the files in MUR 6401 and MUR 6432.

Christopher Hughey
Acting General Counsel

5/19/11
Date

BY:


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