

STATE OF SOUTH DAKOTA )  
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:SS  
COUNTY OF HUGHES )

IN CIRCUIT COURT  
  
SIXTH JUDICIAL CIRCUIT

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32CIV16-33

IN THE MATTER OF PUBLIC UTILITIES  
COMMISSION DOCKET NO. HP14-001, )  
ORDER ACCEPTING CERTIFICATION OF )  
PERMIT ISSUED IN DOCKET HP09-001 TO :  
CONSTRUCT THE KEYSTONE XL )  
PIPELINE :

**APPEAL BRIEF OF TRANSCANADA  
KEYSTONE PIPELINE, LP,  
IN RESPONSE TO  
INDIVIDUAL APPELLANTS**

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Appellee TransCanada Keystone Pipeline, LP (“Keystone”) offers this brief in response to the discovery-related argument raised by Appellants Joye Braun, John H. Harter, Terry and Cheryl Frisch, Chastity S. Jewett, Paul F. Seamans, Cindy Myers, RN, Elizabeth Lone Eagle, Dallas Goldtooth, Bruce Boettcher, Gary F. Dorr, Arthur R. Tanderup, and Wrexie Lainson Bardaglio (“the Individual Appellants”). Keystone has responded to the Individual Appellants’ other arguments in a separate brief responding to the common arguments made by Dakota Rural Access, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Intertribal Council on Utility Policy, and the Individual Appellants.<sup>1</sup>

### **Statement of the Issues**

1. Did the Commission abuse its discretion in precluding some of the Individual Appellants from testifying at trial or offering exhibits or witnesses based on their failure to answer discovery?

The Commission entered an order that a number of intervenors who did not respond to discovery were allowed to participate in the hearing, but could not testify or offer exhibits or witnesses.

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<sup>1</sup> The Individual Appellants are represented on appeal by Peter Capossela. In proceedings before the Commission, Mr. Capossela represented the Standing Rock Sioux Tribe, which did not appeal. The Individual Appellants were all unrepresented in the proceedings before the Commission.

## Statement of the Case and Facts

Keystone relies on the facts and procedural history stated in its separate brief responding to common arguments raised by several Appellants, including the Individual Appellants. Facts relevant to the discovery issue addressed in this brief are included in the argument.

### Argument

#### **1. The PUC's discovery order is expressly authorized by statute.**

The Individual Appellants argue that the Commission erred in entering an order dated April 17, 2015, granting in part Keystone's motion for discovery sanctions from some of the Intervenor who either failed entirely to respond to discovery or who failed to disclose their witnesses and exhibits.

The sequence and substance of Keystone's motion and the Commission's order is as follows. On December 18, 2014, Keystone served written discovery on all Intervenor. (Record at 1831-1941 (Moore Aff. ¶ 2).) Seventeen of the Intervenor did not respond to the discovery in any way. (*Id.*) Others responded to varying degrees. (*Id.*) As required by SDCL § 15-6-37(a), counsel for Keystone therefore wrote a letter to each of these Intervenor asking for a response or a complete response. (*Id.*) When Keystone did not receive a response, it filed a motion dated March 25, 2015, asking the Commission to preclude certain of the Intervenor from offering evidence or witnesses at the hearing. The Commission granted Keystone's motion in part by an order dated April 17, 2015. (Record at 4714-4715.)

The Individual Appellants argue that due to error in the Commission's order, the Court should remand for the Commission to hear testimony from Cheryl and Terry Frisch, Joye Braun, Chastity Jewett, Dallas Goldtooth, and John Harter. (Ind. Intervenor's Br. at 23.) Except for John Harter, all of these Intervenor failed entirely to respond to discovery (Moore Aff. ¶ 3), and

also failed to respond to Keystone's follow-up letter. (*Id.* ¶ 6.) John Harter responded to the discovery, but failed to disclose any witnesses or exhibits for the hearing. (*Id.* ¶ 7.) With respect to all of these Intervenor, the Commission's order directed that they could not present evidence or witnesses at the evidentiary hearing. (Record at 4714-4715.) At the evidentiary hearing, John Harter testified at length (over Keystone's objection) as a witness on behalf of Dakota Rural Action. (Tr. at 2183-2237.) He also made an opening statement and cross-examined witnesses. (Tr. at, *e.g.*, 100-05, 248-69, 391-97, 626-32, 653, 903-23.) Braun, Jewett, and Goldtooth all attended the hearing at various times and either made opening statements and conducted cross-examination or were given the opportunity and declined. (Tr. at 87-92, 2140-42, 2045-47, 2115, 2233, 70-75, 2226.) Cheryl and Terry Frisch did not attend the hearing, but Intervenor Diana Steskal offered an affidavit from them as Exhibit 5005, which was admitted into evidence. (Tr. at 985.)

The Individual Appellants argue that the Commission's order dated April 17, 2015, constitutes error because Keystone did not first file a motion to compel discovery under SDCL § 15-6-37(a), meaning that the sanctions under SDCL § 15-6-37(b)(2)(B) were premature. (Ind. Intervenor's Br. at 20-21.) This argument is contradicted by SDCL § 15-6-37(d), which provides that if a party "fails to serve answers or objections to interrogatories submitted under § 15-6-33, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions 15-6-37(b)(2)(A), (2)(B), and (2)(C)." In other words, the motion (as it states) was based on SDCL §§ 15-6-37(d) and 15-6-37 (b)(2)(B). The Individual Intervenor ignore § 15-6-37(d), which expressly authorized the relief that Keystone sought and the relief that the Commission granted.

The Individual Appellants argue that Keystone “failed to properly consult with the non-moving parties and attempt to informally resolve the dispute.” (Ind. Intervenor’s Br. at 21.) This argument is factually incorrect. Keystone consulted with all of the Intervenor’s who failed to provide discovery, as stated in counsel’s affidavit dated March 23, 2015. (Moore Aff. ¶¶ 8, 14, Record at 1831-1941.) This argument has no support in the evidentiary record.

The Individual Appellants also argue that the sanctions were too severe and not warranted absent a showing of willfulness, bad faith, or some fault on their part. (Ind. Intervenor’s Br. at 22.) The statute does not require such a showing, and the South Dakota Supreme Court has held that a court may exclude testimony that was not disclosed in response to written interrogatories. *Delzer Constr. Co. v. South Dakota State Bd. Of Transp.*, 275 N.W.2d 352, 356 (S.D. 1979). The Supreme Court did say in *Haberer v. Radio Shack* that the severest sanctions should not be awarded when the failure to comply is the result “of inability rather than willfulness or bad faith.” 1996 S.D. 130, ¶ 20, 555 N.W.2d 606, 610. The Individuals do not even argue that Harter, Jewett, Goldtooth, Braun, and Terry and Cheryl Frisch were unable to comply with Keystone’s written discovery. Rather, they simply chose not to. That is willfulness or bad faith. Their pro se status before the appeal is not an excuse, as they argue (Ind. Intervenor’s Br. at 22), for not complying with basic rules of evidence and procedure. “[P]arties who appear pro se may not capitalize on their unfamiliarity with the law; they are bound by the same rules of evidence and procedure that bind attorneys and a trial judge is not required to act as counsel for a litigant.” *Oesterling v. Oesterling*, 354 N.W.2d 735, 737 (S.D. 1984).

Finally, the Individuals ignore the issue of prejudice. John Harter testified as a witness for DRA, a fact not mentioned by the Individuals. (Tr. at 2184-2237.) Given that Harter testified, they must show that he would have said something different had he been allowed to

testify on his own behalf. They make no such showing. The Commission received into evidence an affidavit from Terry and Cheryl Frisch. (Tr. at 985; Ex. 5005.) There is no showing what more they would tell the Commission. Similarly, there is no showing what Jewett, Goldtooth, and Braun would have testified to, and what difference it would have made to the Commission. The standard of review for administrative appeals requires a showing that “substantial rights of the appellants have been prejudiced” before reversal is appropriate. SDCL § 1-26-36. The Individual Appellants do not meet this standard.

**2. The discovery sanctions do not violate due process.**

The Individual Appellants argue that, because they were not allowed to call witnesses or testify, they were denied due process. (Ind. Intervenor’s Br. at 23-25.) This argument fails for the simple reason that they cite no case in which the South Dakota Supreme Court, or any other court, has held that a party who has failed to comply with discovery is denied due process when a court imposes statutorily-authorized sanctions that are within the court’s discretion. The decision on which they rely, *In re South Dakota Water Management Board Approving Water Permit No. 179-2*, 351 N.W.2d 119 (S.D. 1984), is not analogous. It involved a question whether a published notice gave citizens a fair opportunity to participate in a public hearing, not whether individuals who were granted intervention and who participated in an evidentiary hearing despite their refusal to comply with basic discovery requests were denied due process because they were not allowed to testify or call witnesses. *Id.* at 123-24.

The premise of the Individuals’ argument is that the Commission failed to comply with SDCL § 15-6-37, which created a liberty interest. As indicated, however, the statute authorized the discovery sanctions imposed by the Commission. There was no due process violation.

## Conclusion

The Individual Appellants include Paul Seamans, Cindy Myers, Elizabeth Lone Eagle, Bruce Boettcher, Gary Dorr, Arthur Tanderup, and Wrexie Lainson Bardaglio. The discovery-related argument in their brief contains no discussion of them, but the Court should be aware of their participation in the hearing. Cindy Myers<sup>2</sup> testified at the hearing and was not precluded from offering witnesses and exhibits. (Tr. at 1654-1681.) Gary Dorr presented testimony at the hearing, offered exhibits, made motions, cross-examined witnesses, and otherwise participated. (Tr. at 2082-2123, 2481-82.) Paul Seamans, Wrexie Lainson Bardaglio, Art Tanderup, and Bruce Boettcher were not subject to the discovery order that the Individuals complain about because they stated that they did not intend to call any witnesses at the hearing. All of them participated in the hearing or were given the opportunity to participate and declined except for Boettcher, who did not attend. (Tr. at, *e.g.*, 145, 283-300, 952-958, 2388-89, 2482-2487, 1988-1990, 2009-2010.) Elizabeth Lone Eagle was not subject to any sanctions because she disclosed the identity of her witnesses, and she was not denied the ability to fully participate in the evidentiary hearing.

As to Harter, Goldtooth, Braun, Jewett, and Terry and Cheryl Frisch, the Commission limited their participation because they acted differently in discovery. The Commission acted well within its discretionary authority in limiting their participation based on their failure to comply with basic discovery requests. Keystone respectfully requests that the Commission's order on this point be affirmed.

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<sup>2</sup> Myers filed a motion to withdraw on May 23, 2016.

## Request for Oral Argument

Keystone respectfully requests oral argument to address the issues briefed by the parties.

Dated this 20th day of July, 2016.

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## Certificate of Service

I hereby certify that on the 20<sup>th</sup> day of July, 2016, I served electronically and by United States first-class mail, postage prepaid, a true and correct copy of Appeal Brief of TransCanada Keystone Pipeline, LP in Response to Individual Appellants, to the following:

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