

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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IN THE MATTER OF TRANSCANADA  
KEYSTONE PIPELINE, LP  
FOR ORDER ACCEPTING CERTIFICATION  
OF PERMIT ISSUED IN DOCKET HP09-001  
TO CONSTRUCT THE KEYSTONE XL  
PIPELINE

RESPONSE TO KEYSTONES  
MOTION TO DEFINE THE  
SCOPE OF DISCOVERY

HP14-001

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COMES NOW, the Rosebud Sioux Tribe, by and through counsel, Matthew L. Rappold and Eric Antoine and submits their response to Trans-Canada's Keystone Pipeline's Motion to Define the Scope of Discovery.

**PROCERURAL HISTORY**

On September 15, 2014 TransCanada filed their Petition for Order Accepting Certification under SDCL §49-41B-27 regarding the permit to construct the Keystone KXL Pipeline through the State of South Dakota on Docket HP 09-001 with the South Dakota Public Utilities Commission (hereinafter the "Commission"). The Amended Final Decision and Order for Permit for Construction issued from the South Dakota Public Utilities Commission on June 29, 2010. Pursuant to SDCL 49-41B-27 "that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." More than four years has elapsed since the issuance of the permit and TransCanada has not begun construction of the proposed pipeline. Accordingly, Keystone must seek recertification prior to starting construction of the pipeline.

On September 18, 2014 the Commission transmitted notice of this filing and established an intervention deadline of October 15, 2014. The Rosebud Sioux Tribe and numerous other

tribes, organizations and individuals filed for intervention and were granted party status by the Commission.

On October 30, 2014 TransCanada filed its Motion to Define the Scope of Discovery under SDCL §49-41B-27. By order dated November 5, 2014 the Commission issued a Prehearing Scheduling Conference Order whereby the Commission established November 25, 2014 as the date for a hearing on Keystone's Motion to Define the Scope of Discovery. On November 14, 2014, following the filing of numerous motions by the interveners to extend the hearing date and deadline to file responses, the Commission issued an order changing the motion hearing date to December 9, 2014. The November 14, 2014 Order also states that the Commission will hear from the parties regarding an appropriate procedural schedule for this case and that the Commission may render a decision establishing the procedural schedule as well.

In the same order the Commission also ordered that interveners and staff responses to be filed on or before December 1, 2014 and that Keystone file responses on or before December 5, 2014. No party has requested discovery in this matter pursuant to the Rules of Civil Procedure and the Commission has not established a procedural schedule for the case.

## ARGUMENT

### **1. Administrative Rule 20:10:01:01.02 and SDCL 15-6 Control**

The Commission has jurisdiction over this matter pursuant to SDCL 1-26 and 49-41B, 49-41B-27 and ARSD 20:10:22. ARSD **20:10:01:01.02. "Use of Rules of Civil Procedure"** requires the Commission to follow the rules of civil procedure in all cases before the

Commission.<sup>1</sup> The South Dakota Rules of Civil Procedure are located at SDCL 15-6 which includes rules governing discovery. The rules governing discovery are specifically located at SDCL 15-6-26 (a) through 15-6-37(d). The scope of discovery is defined in SDCL 15-6-26(b)(1) and includes “any matter, not privileged, which is relevant to the subject matter involved in the pending action...” and includes information that is “inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *See also In the Matter of the Application of Native American Telecom, LLC*, TC11-087, WL 11078169 (S.D.P.U.C.) (May 4, 2012). Keystone has no right to define the scope of discovery as the scope of discovery is defined by statute.

What Keystone is really asking for is a protective order regarding discovery. SDCL 15-6-26(c) provides procedures to be followed and standards in the event of disputes in the discovery process. SDCL 15-6-26(c) also provides for the issuance of protective orders.<sup>2</sup> Until the Commission issues a scheduling order, which will presumably include a discovery deadline, and the parties have engaged in formal discovery proceedings, Keystone cannot legally seek a protective order. In the present case the record is devoid of any attempt or effort made by Keystone to comply with the confines of SDCL 15-6-26 (c). Keystone has not filed a Motion for a Protective Order regarding discovery. Keystone has made no effort to certify that they have

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<sup>1</sup> ARSD 20:10:01:01.02: “Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter [1-26](#), another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.”

<sup>2</sup> “Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following.....”

“in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” SDCL 15-6-26. At this point in the case Keystone certainly cannot show that good cause exists for the issuance of a protective order.

## **2. Keystone’s Reliance on *Jundt vs. Fuller*, 2007 S.D. 62, 736 N.W. 2d 508 is Erroneous**

Keystone’s reliance on the case of *Jundt vs. Fuller*, 2007 S.D. 62, 736 N.W. 2d 508, to define the scope of discovery in the present case is erroneous. In *Jundt vs. Fuller*, the Court held that “once an agency’s adjudication has become final it is no longer subject to reconsideration.” *Jundt v. Fuller*, 2007 S.D. 62, ¶ 12, 736 N.W.2d 508, 512. No party to this case has formally requested the Commission to either reconsider the permit or to reopen the entire case. This case is legally and factually distinguishable from the present case and should be disregarded as such.

In *Jundt v. Fuller* the South Dakota Water Management Board (“the Board”) issued a water permit on March 15, 2005. *Id.* ¶2, 736 N.W.2d at 510. No appeal to the permit decision was made at the time. *See Id.* On December 6, 2006, less than two years after the permit was issued, the circuit court remanded an additional issue to the Board. *Id.* Essentially, the circuit court ordered the Board to re-litigate the initial water permit proceeding. The South Dakota Supreme Court held that a circuit court cannot order an administrative agency to reconsider whether or not an initial permit should have been granted once the agency’s decision to issue the permit is final. *See Id.* ¶ 12-13, 736 N.W.2d at 513. The issue in *Jundt v. Fuller* did not involve the certification proceeding detailed in SDCL § 49-41B-27. The Commission’s authority to examine all issues related to Keystone’s certification proceedings are not constrained by the holding from *Jundt vs. Fuller*.

### **3. An Order Restricting Discovery Violates the Parties Due Process Rights**

“Due process centrally concerns the fundamental fairness of governmental activity.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The Commission is clearly a governmental agency and therefore must ensure fundamental fairness in these proceedings pursuant to the State and U.S. Constitutions. Both the South Dakota Constitution (S.D. Constitution Article VI, § 2) and the United States Constitution (Amendment XIV, § 1) provide that no person shall be deprived of “life, liberty or property without due process of law.”

Keystone has asked the Commission to severely restrict the rules of civil procedure and The South Dakota Administrative Procedures Act through its motion. It seeks to restrict and circumvent the rules that have been created to ensure that the parties have a fundamentally fair process and to protect due process rights of all involved. “‘A fair trial in a fair trial in a fair tribunal is a basic requirement of due process’... This applies to administrative agencies which adjudicate as well as to courts.” *Strain v. Rapid City Sch. Bd. For Rapid City Area Sch. Dist.*, 447 N.W.2d 332, 336 (S.D. 1981) (citations omitted). Granting Keystone’s motion would necessarily be contrary and repugnant to the Constitution and the laws of the State of South Dakota as well as the United States and must be denied as such.

### **CONCLUSION**

Rather than choose to follow the direction and requirements of ARSD 20:10:01:01.02 and SDCL 15-6 in its desire to limit the scope of discovery, Keystone attempts an end run around the South Dakota Constitution, the United States Constitution, the South Dakota Administrative Procedures Act, the Rules of Civil Procedure and the South Dakota Administrative Rules. Any

attempt to limit the scope of discovery by TransCanada is not permitted by law and a ruling that permits TransCanada to do the same would deny the Parties the opportunity to fully exercise their rights to discovery as provided by the Rules of Civil Procedure and is contrary to the principles of fundamental fairness, fair play and the interests of justice.

In this case the Commission has not issued a final scheduling order. The parties have not engaged in any discovery and cannot do so until the Commission has established a procedural schedule. Quite simply put, Keystone has placed the cart before the horse in its attempt to limit the scope of discovery and the Commission should deny their request. Based on the above and foregoing the Commission should deny Keystone's Motion in its entirety.

Dated this 1<sup>st</sup> day of December, 2014.

RESPECTFULLY SUBMITTED:



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