BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**YANKTON SIOUX TRIBE'S RESPONSE TO KEYSTONE'S MOTION TO DEFINE THE SCOPE OF DISCOVERY UNDER SDCL § 49-41B-27** **HP14-001**

COMES NOW, Yankton Sioux Tribe, by and through Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and for its *Response to Keystone's Motion to Define the Scope of Discovery under SDCL § 49-41B-27* asserts the following.

I. BACKGROUND

TransCanada Keystone Pipeline, LP ("Keystone") initiated this action by filing a *Petition* on September 15, 2014. Following the *Petition*, several individuals and entities submitted applications for party status. At its regularly scheduled meeting on October 28, 2014, the Public Utilities Commission ("Commission") granted intervention to all such applicants. On October 30, 2014, before a prehearing scheduling conference had even been ordered, Keystone filed a *Motion to Define the Scope of Discovery Under SDCL 49-41B-27.* Upon information and belief, to date no party to this matter has sought discovery.

II. APPLICABLE LAW

The issuance of an order limiting the scope of discovery in this matter is unnecessary under the law and inappropriate as proposed by Keystone. Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. Such rules are found in SDCL Chapter 15-6, and include rules

governing discovery. *See* SDCL 15-6(V). The scope of discovery is already defined in SDCL 15-6-26(b)(1) to include "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). "This phraseology implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 20 (S.D.1989) (citing 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2008 (1970)).

In addition, SDCL 15-6-26(c) governs the issuance of protective orders. Pursuant to that statute, a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including "[t]hat certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." SDCL 15-6-26(c) requires a party to show good cause for the issuance of a protective order, and the motion requesting the order must be "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." Based on the aforementioned governing laws, Keystone's *Motion* must be denied.

III. ARGUMENT

A. KEYSTONE HAS FAILED TO MEET THE STATUTORY REQUIREMENTS FOR ISSUANCE OF A PROTECTIVE ORDER.

Keystone's *Motion* must be denied because it has failed to meet its burdens pursuant to SDCL 15-6-25(c) to support the issuance of a protective order. Keystone's *Motion* asks the

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Commission to issue an order "[t]hat the scope of the discovery be limited to certain matters" under SDCL 15-6-26(c)(4). However, as stated above, SDCL 15-6-26(c) imposes clear requirements on a party seeking a protective order that the party must fulfill before a protective order can be issued.

1. KEYSTONE FAILED TO CERTIFY THAT IT IN GOOD FAITH CONFERRED OR ATTEMPTED TO CONFER WITH OTHER AFFECTED PARTIES IN AN EFFORT TO RESOLVE THE DISPUTE.

Keystone's *Motion* was not accompanied by the certification that it has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. In fact, at this stage there is no dispute to be resolved as none of the parties have sought discovery yet – so there is not yet any basis for a dispute. Furthermore, upon information and belief, Keystone did not make any attempt to reach out to any Party at all regarding discovery prior to the filing of its *Motion*. The absence of good faith from Keystone's actions is thus apparent. Because Keystone failed to comply with this statutory requirement for issuance of a protective order, the *Motion* must be denied.

2. KEYSTONE FAILED TO SHOW GOOD CAUSE FOR THE ISSUANCE OF A PROTECTIVE ORDER.

Likewise, Keystone's *Motion* is wholly void of good cause for the issuance of a protective order. "SDCL 15–6–26(c) authorizes a court to grant a protective order upon a showing of good cause. Good cause is established on a showing that disclosure will work a clearly defined and serious injury." *Bertelsen v. Allstate Insurance Co.*, 796 N.W.2d 685, 704 (S.D. 2011), *citing Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "The injury must be shown with specificity." *Id.* Keystone not only failed to show that discovery beyond its requested scope would cause a specific, clearly defined, serious injury, but it failed to show that any injury would result at all. Keystone has not met its burden to show

good cause for the issuance of a protective order and therefore failed to meet the statutory requirements for issuance of a protective order.

3. KEYSTONE'S REQUEST FOR A PROTECTIVE ORDER IS PREMATURE AND MUST THEREFORE BE DENIED.

It is improper for Keystone to seek a protective order before any party has sought discovery because no dispute exists to necessitate such an order. "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders, quash subpoenas, and grant terms when appropriate." *Public Entity Pool for Liability v. Score*, 658 N.W.2d 64, 72 (S.D. 2003), *citing* SDCL 15–6–26(c), 37(a)(4), 45(b) and 45(d)(1). Thus, a court's – and the Commission's – authority to issue a protective order is not triggered until after a party has sought discovery. The rationale for this is based in simple logic: there is no need for an order restricting discovery unless and until a party attempts to effect discovery beyond what is proper. Because the Commission cannot know until discovery is actually sought whether or not there is a need for a protective order, the issue of whether or not such an order should be issued is not ripe at this stage in the proceedings and Keystone's *Motion* must be dismissed.

B. KEYSTONE'S REQUESTED DEFEATS THE PURPOSES OF DISCOVERY.

The South Dakota Rules of Civil Procedure intentionally provide for a broad scope of discovery, and like the Rules themselves, that intention for broad discovery applies here. "The scope of pretrial discovery is, for the most part, broadly construed." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), *citing Bean v. Best*, 80 N.W.2d 565 (S.D. 1957). The Supreme Court has explained that "broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial."

Id., *citing* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970). While Keystone's *Motion* claims it is seeking to limit the scope of discovery, Keystone's *Motion*, if granted, would effectively narrow the issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court. Keystone's *Motion* should therefore be denied.

C. AN ORDER RESTRICTING DISCOVERY AS KEYSTONE HAS REQUESTED WOULD VIOLATE THE PARTIES' RIGHTS TO DUE PROCESS.

Both the U.S. Constitution and the South Dakota Constitution provide that no person shall be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; S.D. Const. art. VI, § 2. Procedural due process prevents the government from procedural irregularities, i.e., "a guarantee of fair procedure," when life, liberty or property is being taken. *Zinermon v. Burch*, 494 U.S. 113, 125 (1999). "Due process centrally concerns the fundamental fairness of governmental activity." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The Commission, as a governmental agency, must ensure fundamental fairness in these proceedings pursuant to the State and U.S. Constitutions. One way in which fairness is assured is compliance with the rules of procedure, whose very purpose is to ensure due process. "The South Dakota Administrative Procedures Act (SDAPA) guarantees individuals many of the procedural protections" that exist to safeguard due process, including SDCL 1-26-19(1) which subjects contested administrative cases to the rules of evidence as applied in South Dakota circuit court civil cases, codified at SDCL 15-1-1, et seq. *See Daily v. City of Sioux Falls*, 802 N.W. 2d 905, 915 n.10 (S.D. 2011). "'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). Through its *Motion*, Keystone has asked the Commission to severely diminish the rules established for the very purpose of ensuring a fair trial. Because the relief requested by Keystone would erode the constitutional protections provided by the rules of evidence through SDCL 1-26-19(1), Keystone's *Motion* must be denied and the Commission should adhere to the process provided by South Dakota law.

D. KEYSTONE'S DEMAND THAT DISCOVERY REQUESTS EXPRESSLY IDENTIFY CORRESPONDING CONDITIONS OR FINDINGS WOULD PLACE AN IMPRACTICAL AND UNNECESSARY BURDEN ON THE COMMISSION, CONTRARY TO THE INTEREST OF JUSTICE.

Furthermore, Keystone's request that the Parties be required to narrow each discovery request to a specific condition or finding and to identify that condition or finding in the request must be denied. As discussed above, the parameters of discovery under South Dakota law are intentionally broad because at this early stage in a proceeding a party cannot necessarily know what specific question or document will lead to admissible evidence – let alone the particular element of a claim or defense to which such evidence is relevant. If the Commission were to adopt this overly restrictive requirement, Keystone may very likely disagree with whether or not a particular discovery request pertained to whatever condition or finding the discovering party identified in its request. There is no procedural rule or legal standard to apply to determine whether or not a discovery request pertains a particular condition or finding because South Dakota law does not allow for this additional burden to be imposed on parties during discovery. Moreover, while Keystone failed to identify how it believes its requested relief would expedite these proceedings, the likelihood of numerous challenges to discovery requests based on whether or not the proper condition or finding was identified in the request shows that Keystone's requested relief would in fact prolong these proceedings due to the need for additional hearings on this issue. It is thus wholly impractical for the Commission to impose this unnecessary

restriction, and Keystone's request that it do so will cause undue delay in the proceedings, contrary to the very purpose alleged in Keystone's *Motion*.

IV. CONCLUSION

Rather than prematurely restrict the Parties' opportunities to identify evidence to develop and support their claims, the Commission should abide by South Dakota law, SDCL § 15-6-26(b), and permit discovery pursuant to the Rules of Civil Procedure as well as the Parties' rights to challenge a particular discovery request as provided by law. In the event that a party objects to one or more discovery requests based on scope as defined by SDCL § 15-6-26(b)(1) or any other grounds, that party may challenge the requests as permitted under SDCL § 15-6-26(b) and the Commission should consider and rule on such challenges on a case-by-case basis. This process protects the rights of parties to acquire the information that constitutes or will likely lead to admissible evidence, which is necessary to ensure due process, while also protecting parties from being subjected to improper discovery requests. Furthermore, Keystone has failed to meet the statutory requirements for the issuance of a protective order. The *Motion* contained neither a certification that it in good faith conferred or attempted to confer with the Parties regarding this matter, nor a showing of good cause for issuance of a protective order. In fact, such a showing is impossible at this premature stage because the Parties have not yet made requests for discovery.

Information sought through discovery need only appear "reasonably calculated to lead to the discovery of admissible evidence." SDCL § 15-6-26(b)(1). This is a far broader standard than the one Keystone seeks to impose, and to deny the Parties the opportunity to fully exercise their rights to discovery as provided by law would defeat the purpose of discovery by unjustly restricting the Parties' abilities to develop legal arguments and frustrating the interests of justice.

To ensure fundamental fairness and compliance with the law, the Commission must deny Keystone's *Motion*.

Dated this 1st day of December, 2014.

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**CERTIFICATE OF SERVICE** **HP14-001**

I hereby certify that true and correct copies of Yankton Sioux Tribe's Motion to Dismiss, Yankton Sioux Tribe's Suggested Procedural Schedule, Yankton Sioux Tribe's Response to Keystone's Motion to Define the Scope of Discovery Under SDCL § 49-41B-27, and Certificate of Service were served electronically to the Parties listed below, on the 1st day of December, 2014, addressed to:

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