

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

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**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**

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\*      STAFF'S RESPONSE TO APPLICANT'S  
\*      MOTION CONCERNING PROCEDURAL  
\*      ISSUES AT THE EVIDENTIARY  
\*      HEARING  
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**HP14-001**

COMES NOW, Staff ("Staff") of the Public Utilities Commission ("Commission") and files this Response to Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing (Motion). In its Motion, Keystone makes six requests: 1) limiting parties with a common interest to one lawyer who may ask questions on cross-examination; 2) require opening statements to be submitted in writing, rather than given orally at the hearing; 3) preclusion of friendly cross-examination; 4) if a party is represented by counsel, allow only counsel to conduct cross-examination; 5) limit cross-examination to the scope of direct examination; and 6) prohibit parties from arguing evidentiary objections unless directed by General Counsel for the Commission.

**1. Limiting parties with common interest to one lawyer who may ask questions on cross-examination**

The Commission has the inherent power, as well as duty, to conduct fair and orderly hearing. *State v. Means*, 268 N.W.2d 802, 808 (SD 1978). Therefore, the Commission does have the authority, if it chooses, to grant Keystone's request. However, because of the difficulty in determining which parties have a common interest, and on which issues, it may be more workable to expressly prohibit repetitive or redundant questioning. Should the Commission

decline to grant this Motion, the Commission may revisit the issue should it become necessary during the course of the hearing.

## **2. Opening statements in writing**

ARSD 20:10:01:22.05 allows for parties to give opening statements. However, the rule does not require opening statements to be in writing. In the Commission's Order and Notice of Evidentiary Hearing, issued on July 2, 2105, the Commission ordered that opening statements be limited to ten minutes. It is within the Commission's discretion to require opening statements to be submitted in writing. This would likely be an effective use of time, as well as a tool for the Commission to become familiar with the position of each party prior to the evidentiary hearing. Therefore, Staff supports this portion of Applicant's Motion.

## **3. Preclusion of friendly cross-examination**

The South Dakota Supreme Court has stated that the purpose of cross-examination is to test the truth of direct examination. *State v. Johnson*, 139 N.W.2d 232 (SD 1965). Friendly cross-examination does not serve that purpose. However, using its discretion, the Commission may choose to allow cross-examination that does not merely test the truth of direct examination, provided the cross-examination is relevant. See, *State v. Dale*, 439 N.W.2d 121 (SD 1989) (holding that cross-examination is not unlimited and is subject to the rules concerning relevancy).

Therefore, Staff recommends the Commission rule on this request on a case-by-case basis at the hearing, allowing for any friendly cross-examination the Commission finds will aid in making a decision on the ultimate issue in this proceeding.

## **4. Cross-examination by counsel**

Keystone also requests the Commission issue an order requiring that for parties that are represented by counsel, cross-examination be conducted by counsel. This is again within the

Commission's power to conduct an orderly hearing. While counsel may confer with clients in formulating cross-examination, when a party is represented by counsel, it is typical for counsel to handle the direct and cross-examination. Staff recommends the Commission grant this portion of Keystone's Motion. If a represented party asks for leave for non-counsel to participate in cross-examination, that request can be addressed during the hearing. Clearly, those parties not represented by counsel will be permitted to conduct cross-examination.

#### **5. Scope of cross-examination**

Staff agrees that cross-examination should be limited to the scope of direct examination. SDCL § 19-19-611(b) provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." However, the trier of fact does have the latitude to deviate from this rule if necessary. The South Dakota Supreme Court has held that cross-examination "is limited to the subject matter of the direct examination and matters affecting credibility. [However,] the [trier of fact] may permit, in its discretion, inquiry into additional matters as if on direct examination." *State v. Dale*, 439 N.W.2d 98.

Therefore, Staff recommends the Commission grant the request to limit cross-examination, and entertain requests to go outside the scope of direct on a case-by-case basis as justice requires.

#### **6. Objections**

While Staff questions whether this will ultimately save a great deal of time, the Commission does have the authority to grant this portion of Keystone's Motion. SDCL § 19-19-611(a)(2) provides that the trier of fact shall exercise control over the mode and order of interrogation and presentation so as to avoid needless consumption of time. Keystone's Motion

does serve that purpose. However, Staff recommends withholding ruling until the hearing, at which time the Commission can determine whether the requested restriction is necessary.

**CONCLUSION**

For the foregoing reasons, Staff recommends that the Commission grant in part and deny in part Keystone's Motion. For any portion denied, Staff recommends addressing again during the evidentiary hearing.

Dated this 14<sup>th</sup> day of July, 2015.



Kristen N. Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

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

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

I hereby certify that true and correct copies of Staff's Response to Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing and Certificate of Service were served electronically to the Parties listed below, on the 14<sup>th</sup> day of July, 2015, addressed to:

Ms. Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[patty.vangerpen@state.sd.us](mailto:patty.vangerpen@state.sd.us)

Mr. James E. Moore  
Attorney  
Woods, Fuller, Shultz and Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117  
[james.moore@woodsfuller.com](mailto:james.moore@woodsfuller.com)

Ms. Kristen Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[Kristen.edwards@state.sd.us](mailto:Kristen.edwards@state.sd.us)

Mr. William G. Taylor  
Attorney  
Taylor Law Firm  
2921 E. 57th St. #10  
Sioux Falls, SD 57108  
[bill.taylor@williamgtaylor.com](mailto:bill.taylor@williamgtaylor.com)  
(605) 212-1750 – voice

Mr. Brian Rounds  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[brian.rounds@state.sd.us](mailto:brian.rounds@state.sd.us)

Mr. Paul F. Seamans  
27893 249th St.  
Draper, SD 57531  
[jackknife@goldenwest.net](mailto:jackknife@goldenwest.net)

Mr. Darren Kearney  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[darren.kearney@state.sd.us](mailto:darren.kearney@state.sd.us)

Mr. John H. Harter  
28125 307th Ave.  
Winner, SD 57580  
[johnharter11@yahoo.com](mailto:johnharter11@yahoo.com)

Mr. James P. White  
Attorney  
TransCanada Keystone Pipeline, LP  
Ste. 225  
1250 Eye St., NW  
Washington, DC 20005  
[jim\\_p\\_white@transcanada.com](mailto:jim_p_white@transcanada.com)

Ms. Elizabeth Lone Eagle  
PO Box 160  
Howes, SD 57748  
[bethcbest@gmail.com](mailto:bethcbest@gmail.com)

Mr. Tony Rogers  
Rosebud Sioux Tribe - Tribal Utility  
Commission  
153 S. Main St.  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)

Ms. Viola Waln  
PO Box 937  
Rosebud, SD 57570  
[walnranch@goldenwest.net](mailto:waln ranch@goldenwest.net)

Ms. Jane Kleeb  
Bold Nebraska  
1010 N. Denver Ave.  
Hastings, NE 68901  
[jane@boldnebraska.org](mailto:jane@boldnebraska.org)

Mr. Benjamin D. Gotschall  
Bold Nebraska  
6505 W. Davey Rd.  
Raymond, NE 68428  
[ben@boldnebraska.org](mailto:ben@boldnebraska.org)

Mr. Byron T. & Ms. Diana L. Steskal  
707 E. 2nd St.  
Stuart NE 68780  
[prairierose@nntc.net](mailto:prairierose@nntc.net)

Ms. Cindy Myers, R.N.  
PO Box 104  
Stuart, NE 68780  
[csmyers77@hotmail.com](mailto:csmyers77@hotmail.com)

Mr. Arthur R. Tanderup  
52343 857th Rd.  
Neligh, NE 68756  
[atanderu@gmail.com](mailto:atanderu@gmail.com)

Mr. Lewis GrassRope  
PO Box 61  
Lower Brule, SD 57548  
[wisestar8@msn.com](mailto:wisestar8@msn.com)  
(605) 208-0606 - voice

Ms. Carolyn P. Smith  
305 N. 3rd St.  
Plainview, NE 68769  
[peachie\\_1234@yahoo.com](mailto:peachie_1234@yahoo.com)

Mr. Robert G. Allpress  
46165 Badger Rd.  
Naper, NE 68755  
[bobandnan2008@hotmail.com](mailto:bobandnan2008@hotmail.com)  
(402) 832-5298 - voice

Mr. Louis T. Genung  
902 E. 7th St.  
Hastings, NE 68901  
[tg64152@windstream.net](mailto:tg64152@windstream.net)

Mr. Peter Capossela, P.C.  
Attorney at Law

PO Box 10643  
Eugene, OR 97440  
[pcapossela@nu-world.com](mailto:pcapossela@nu-world.com)

Ms. Nancy Hilding  
6300 W. Elm  
Black Hawk, SD 57718  
[nhilshat@rapidnet.com](mailto:nhilshat@rapidnet.com)

Mr. Gary F. Dorr  
27853 292nd  
Winner, SD 57580  
[gfdorr@gmail.com](mailto:gfdorr@gmail.com)

Mr. Bruce & Ms. RoxAnn Boettcher  
Boettcher Organics  
86061 Edgewater Ave.  
Bassett, NE 68714  
[boettcherann@abbnebraska.com](mailto:boettcherann@abbnebraska.com)

Ms. Wrexie Lainson Bardaglio  
9748 Arden Rd.  
Trumansburg, NY 14886  
[wrexie.bardaglio@gmail.com](mailto:wrexie.bardaglio@gmail.com)  
(607) 229-8819 - voice

Mr. William Kindle  
President  
Rosebud Sioux Tribe  
PO Box 430  
Rosebud, SD 57570  
[William.Kindle@rst-nsn.gov](mailto:William.Kindle@rst-nsn.gov)  
[ejantoine@hotmail.com](mailto:ejantoine@hotmail.com)

Mr. Eric Antoine  
Attorney  
Rosebud Sioux Tribe  
PO Box 430  
Rosebud, SD 57570  
[ejantoine@hotmail.com](mailto:ejantoine@hotmail.com)

Ms. Paula Antoine  
Sicangu Oyate Land Office Coordinator  
Rosebud Sioux Tribe  
PO Box 658  
Rosebud, SD 57570  
[wopila@gwtc.net](mailto:wopila@gwtc.net)  
[paula.antoine@rosebudsiouxtribe-nsn.gov](mailto:paula.antoine@rosebudsiouxtribe-nsn.gov)

Mr. Harold C. Frazier  
Chairman  
Cheyenne River Sioux Tribe  
PO Box 590  
Eagle Butte, SD 57625  
[haroldcfrazier@yahoo.com](mailto:haroldcfrazier@yahoo.com)

Ms. Amy Schaffer  
PO Box 114  
Louisville, NE 68037  
[amyanschaffer@gmail.com](mailto:amyanschaffer@gmail.com)

Ms. Debbie J. Trapp  
24952 US HWY 14  
Midland, SD 57552  
[mtdt@goldenwest.net](mailto:mtdt@goldenwest.net)

Ms. Gena M. Parkhurst  
2825 Minnewasta Place  
Rapid City, SD 57702  
[gmp66@hotmail.com](mailto:gmp66@hotmail.com)

Ms. Joye Braun  
PO Box 484  
Eagle Butte, SD 57625  
[jmbraun57625@gmail.com](mailto:jmbraun57625@gmail.com)

Mr. Robert Flying Hawk  
Chairman  
Yankton Sioux Tribe  
PO Box 1153  
Wagner, SD 57380  
[Robertflyinghawk@gmail.com](mailto:Robertflyinghawk@gmail.com)

Ms. Thomasina Real Bird  
Attorney  
Fredericks Peebles & Morgan LLP  
1900 Plaza Dr.  
Louisville, CO 80027  
[trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)

Ms. Chastity Jewett  
1321 Woodridge Dr.  
Rapid City, SD 57701  
[chasjewett@gmail.com](mailto:chasjewett@gmail.com)

Mr. Duncan Meisel  
350.org  
20 Jay St. #1010  
Brooklyn, NY 11201  
[duncan@350.org](mailto:duncan@350.org)

Ms. Sabrina King  
Dakota Rural Action  
518 Sixth Street, #6  
Rapid City, SD 57701  
[sabrina@dakotarural.org](mailto:sabrina@dakotarural.org)

Mr. Frank James  
Dakota Rural Action  
PO Box 549  
Brookings, SD 57006  
[fejames@dakotarural.org](mailto:fejames@dakotarural.org)

Mr. Bruce Ellison  
Attorney  
Dakota Rural Action  
518 Sixth St. #6  
Rapid City, SD 57701  
[belli4law@aol.com](mailto:belli4law@aol.com)

Mr. Tom BK Goldtooth  
Indigenous Environmental Network (IEN)  
PO Box 485  
Bemidji, MN 56619  
[ien@igc.org](mailto:ien@igc.org)

Mr. Dallas Goldtooth  
38371 Res. HWY 1  
Morton, MN 56270  
[goldtoothdallas@gmail.com](mailto:goldtoothdallas@gmail.com)

Ms. Bonny Kilmurry  
47798 888 Rd.  
Atkinson, NE 68713  
[bikilmurry@gmail.com](mailto:bikilmurry@gmail.com)

Mr. Robert P. Gough  
Secretary  
Intertribal Council on Utility Policy  
PO Box 25  
Rosebud, SD 57570  
[bobgough@intertribalCOUP.org](mailto:bobgough@intertribalCOUP.org)

Mr. Terry & Cheryl Frisch  
47591 875th Rd.  
Atkinson, NE 68713  
[tcfrisch@q.com](mailto:tcfrisch@q.com)

Ms. Tracey Zephier  
Fredericks Peebles & Morgan LLP  
Ste. 104  
910 5th St.  
Rapid City, SD 57701  
[tzephier@ndnlaw.com](mailto:tzephier@ndnlaw.com)

Mr. Travis Clark  
Fredericks Peebles & Morgan LLP  
Ste. 104  
910 5th St.  
Rapid City, SD 57701  
[tclark@ndnlaw.com](mailto:tclark@ndnlaw.com)

Mr. Robin S. Martinez  
Martinez Madrigal & Machicao, LLC  
616 W. 26th St.

Kansas City, MO 64108  
[robin.martinez@martinezlaw.net](mailto:robin.martinez@martinezlaw.net)

Ms. Mary Turgeon Wynne, Esq.  
Rosebud Sioux Tribe - Tribal Utility  
Commission  
153 S. Main St  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)

Mr. Matthew L. Rappold  
Rappold Law Office  
816 Sixth St.  
PO Box 873  
Rapid City, SD 57709  
[Matt.rappold01@gmail.com](mailto:Matt.rappold01@gmail.com)

Ms. April D. McCart  
Certified Paralegal  
Martinez Madrigal & Machicao, LLC  
616 W. 26th St.  
Kansas City, MO 64108  
[april.mccart@martinezlaw.net](mailto:april.mccart@martinezlaw.net)

Mr. Paul C. Blackburn - Representing: Bold  
Nebraska  
Attorney  
4145 20th Ave. South  
Minneapolis, MN 55407  
[paul@paulblackburn.net](mailto:paul@paulblackburn.net)

Ms. Kimberly E. Craven - Representing:  
Indigenous Environmental Network (IEN)  
Attorney  
3560 Catalpa Way  
Boulder, CO 80304  
[kimecraven@gmail.com](mailto:kimecraven@gmail.com)

And on July 14, 2015, a true and accurate copy of the foregoing was mailed via U.S. Mail, first class postage prepaid, to the following:

Mr. Cody Jones  
21648 US HWY 14/63  
Midland, SD 57552

Mr. Jerry Jones  
22584 US HWY 14  
Midland SD 57552

Ms. Elizabeth Lone Eagle  
PO Box 160  
Howes, SD 57748

Mr. Ronald Fees  
17401 Fox Ridge Rd.  
Opal, SD 57758



Kristen N. Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

019799