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	**DOCKET HP 14-001** **CHEYENNE RIVER SIOUX TRIBE'S RESPONSE TO KEYSTONE'S MOTION CONCERNING PROCEDURAL ISSUES AT THE EVIDENTIARY HEARING**

COMES NOW, the Cheyenne River Sioux Tribe ("CRST"), by and through undersigned counsel, and responds to *Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing* ("*Motion*") as follows:

ARGUMENT

1. Common Interest Restriction on Cross Examination

The Commission must reject TransCanada Keystone Pipeline, LP ("Keystone") Motion to limit parties with a "common interest" to a single cross examination made by a single attorney. Keystone correctly states that quasi-judicial agencies such as the PUC have an "inherent authority to 'manage their own affairs so as to achieve the orderly and expeditious disposition of cases,'" *Annett v. American Honda Motor Co*., 548 N.W.2d 798, 805 (S.D. 1996). However, such inherent authority is not limitless. *See Chicago & N.W. Ry. Co. v. Bradbury*, 129 N.W.2d 540, 542 (S.D. 1964) ; *see also Link v. Wabash R. Co*., 370 U.S. 626, 630-31 (1962) (acknowledging that there is a constitutional due process limit to a court's inherent authority to manage its affairs).

"…[T]he fundamental requirement of due process is **an opportunity to be heard**." *Link*, 370 U.S. at 631 *citing Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944) (emphasis added). The Commission's inherent authority to manage its affairs cannot be construed in such a

way that would violate the constitutionally protected due process rights of intervenors to defend their own unique interests and have their particular cases heard by the Commission. Yet this is precisely what Keystone asks the Commission to do. The cases cited by Keystone, *Annett v. American Honda Motor Co*., 548 N.W.2d 798 (S.D. 1996), and *Duncan v. Pennington Cty. Housing Authority*, 382 N.W. 2d 425 (S.D. 1996), both deal with dilatorious parties who failed to prosecute their cases. Failure to prosecute a case is a materially different issue than the one presented in the instant matter. In both *Annett* and *Duncan*, the parties were given the opportunity to present their cases and failed to do so. Here, intervenors have not dilatoriously failed to present their particular cases to the Commission; indeed, Keystone's Motion has forced them into the awkward position of having to argue that they have a right to have their cross-examinations heard. Whereas the parties in *Annet* and *Duncan* had their opportunity to "be heard" and unreasonably delayed, granting Keystone's Motion would unduly hinder intervenors ability to have their unique interests considered by the Commission.

There is of course some amount of overlap with regard to the interests of each respective intervenor. However, Keystone has misconstrued certain overlapping intervenor interests as being identical and indistinguishable interests. Intervenors are distinct entities situated in unique factual circumstances. As such, each intervenor has its own unique case to present to the Commission. For instance, the Cheyenne River Sioux Tribe will be affected by certain proposed water crossings and may choose to ask questions on cross-examination related its particular water resources. Other tribal intervenors may also have concerns regarding water issues, but they are not identical to the Cheyenne River Sioux Tribe's issues/concerns. Keystone merely makes a general assertion that intervenors share interests and that they should be limited to one attorney asking questions on behalf of all similarly situated intervenors. Such a limitation on intervenors with overlapping but

not identical interests to a single opportunity to cross-examine a witness would deprive intervenors of the right to due process. Such a result would be incredibly prejudicial to each intervenor denied an opportunity to conduct their own cross-examination of witnesses.

Simply stated, each intervening party is situated uniquely and has formulated their own theories in this case. Each intervening party has the right to present their distinct arguments to the Commission. Intervenors have a right to represent their own unique interests. As such, each intervenor must necessarily have the ability to conduct their own cross-examinations of the witnesses they choose. Disallowing unique intervenor parties to cross-exam witnesses merely because they share similarities with other parties would amount to an unconstitutional burden on their due process rights.

2. Written Opening Statements

Keystone's Motion to require written opening statements should also be denied. Specifically, Keystone is concerned that too many parties will make opening statements and that such statements will consume too much time during the hearing. However, all parties have a right make oral opening statements. ARSD 20:10:01:22.05 asserts that "[a] hearing shall be opened with a concise statement of its nature and purpose. Appearances shall be entered on the record. **Parties may make opening statements** or appropriate motions. Further oral arguments may be given at the discretion of the commission." (Emphasis added). Moreover, Keystone's Motion is especially peculiar given the fact that the Commission has already addressed this particular concern in the July 2, 2015 Order For and Notice of Evidentiary Hearing, which expressly limits opening statements to being no longer than fifteen minutes. Keystone's request to require submission of written opening statements should be denied.

3. Preclusion of Friendly Cross-Examination

Keystone's request to prohibit "friendly" cross-examination must also be denied. Such a blanket prohibition by the Commission would amount to an undue burden on the due process rights of intervenors. The Commission may exercise some control with regard to duplicative and/or irrelevant testimony; however, it cannot unconditionally prohibit parties from asking non-duplicative, relevant cross-exam questions of witnesses. Essentially Keystone is arguing that because duplicative and/or irrelevant questions **might** be asked by an intervenor, the Commission should prohibit intervenors from asking **any** cross-exam questions of other intervenors' witnesses. Such a prohibition would not only frustrate the purpose of the Evidentiary Hearing, it would also unlawfully restrict the due process rights of the intervenors.

4. Keystone's Request to Limit Scope of Cross-Examination

Keystone's motion to limit the scope of cross-examination must also be denied. SDCL § 19-19-611(b) asserts 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**" (emphasis added).

The Commission cannot limit the scope of cross-examination as Keystone has requested. The minimum requirements under South Dakota law require the Commission to allow questions concerning (1) subject matter of the direct examination, and (2) matters affecting the credibility of witnesses. However, these are only **minimum** requirements. The Commission may **choose** to broaden the scope of cross-examination as it sees fit. Indeed in the instant matter such a broadening of scope may be helpful to the Commission. The Commission is a quasi-judicial administrative agency tasked with protecting the interests of South Dakota and its citizens. As such, the

Commission must be empowered to seek out as much factual and opinion information as possible in order to make an informed decision. In other words, the Commission should not limit itself by narrowing the scope of cross-examination. The purpose of the Evidentiary Hearing is to find out whether Keystone can continue to meet the conditions upon which its permit was granted, and as long as cross-exam questions are relevant to that question the Commission need not exclude them.

5. Prohibiting Argument of Evidentiary Objections

Finally, Keystone's request to prohibit argument of evidentiary objections should also be denied. SDCL § 19-19-102 asserts that "to secure fairness in administration, elimination of **unjustifiable** expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (Emphasis added). Keystone request the Commission to make yet another premature blanket prohibition. Moreover, Keystone grossly over exaggerates the delay that such evidentiary objections may cause. By hearing evidentiary objection arguments the Commission helps to ensure the fundamental fairness of the proceeding. Such arguments may cause some very brief delays during the course of the hearing; however, the cumulative effect of such short delays for argument would be negligible. The Commission must balance the interests of fundamental fairness and due process with its legitimate desire for a timely process. Given the importance of ensuring that the process is fair and that the concerns of each party are heard, considered, and addressed, along with the minimal delays that might occur, the weight of interests tilts strongly in favor of allowing such evidentiary objection arguments.

Moreover, due process necessitates a mechanism upon which issues may be preserved for appeal. SDCL § 19-19-103(a) asserts that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and … [i]n case the

ruling is one admitting evidence, a timely objection or motion to strike appears of record, **stating the specific ground of objection**, if the specific ground was not apparent from the context…" The mechanism for preserving such appealable issues is to allow parties to state their grounds for objection on the record. Should the Commission prohibit such a mechanism the due process rights of all parties involved in this matter will be unduly burdened.

CONCLUSION

For the foregoing reasons the Cheyenne River Sioux Tribe asks that the Commission deny all requests made in the *Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing*.

Dated this 17th day of July, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 17th day of July, 2015, the original of this **RESPONSE TO KEYSTONE'S MOTION CONCERNING PROCEDURAL ISSUES AT THE EVIDENTIARY HEARING** on behalf of the Cheyenne River Sioux Tribe in Case Number HP 14-001, was filed on the Public Utilities Commission of the State of South Dakota e-filing website. Also on this day, a true and accurate copy of the above was sent to the following:

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