

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

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

ROSEBUD SIOUX TRIBE'S
RESPONSE TO KEYSTONE'S
MOTION CONCERNING
PROCEDURAL ISSUES

HP14-001

For its response to Keystone's Motion Concerning Procedural Issues, the Rosebud Sioux Tribe states the following:

By filing dated July 10, 2015 Keystone filed its Motion Concerning Procedural Issues with the PUC. The Motion represents yet another opportunity taken by Keystone to limit the rights and the abilities of the parties to meaningfully participate at the evidentiary hearing on this matter. The requested relief would result in a hearing conducted in such a manner that denies the parties due process rights to meaningful participation in the evidentiary hearing as required by the laws and constitution of the State of South Dakota. Furthermore, the motion is not a Motion in Limine, rather it is a motion to address procedural issues. The deadline to file substantive motions has come and gone without Keystone filing this motion. Accordingly, the motion must be denied.

What appears to be the crux supporting Keystone's motion is the duration of the hearing. Keystone first requested a highly accelerated schedule for this case and also for a quick evidentiary hearing, over the objections of the interveners and the PUC granted those requests. Throughout these proceedings, Keystone has never taken the position that this is complex civil litigation, now through the filing of this procedural motion, Keystone reverses course and takes that exact position. Through the present filing Keystone again seeks to restrict the party's rights

to meaningful participation. Keystone raises 6 issues regarding the manner in which the evidentiary hearing will be conducted and requests that the PUC issue an order that does the following:

1. Limit the rights of cross examination of parties that may share a common interest;
2. Require a written opening statement to be filed on July, 24, 2015;
3. Infringes on the rights of the parties to administer cross-examination in a manner that is consistent with the rules of Evidence;
4. Require parties that are represented by counsel to have counsel conduct cross examination;
5. Limit the scope of cross examination to the scope of direct examination; and
6. Denies the parties rights to argue evidentiary objections unless permitted to do so by the PUC General Counsel.

ARGUMENT

1. RESTRICT CROSS EXAMINATION WO PARTIES THAT HAVE A COMMON INTEREST

These proceedings are governed by SDCL 1-26, 15-6; Title 19 and ARSD 20:10:01.

While the PUC may regulate the conduct and manner in which hearings and contested cases proceed before the PUC, they must do so within the bounds of the Rules of Civil Procedure, Rules of Evidence and the due process constraints of the South Dakota and United States Constitution. The PUC lacks the inherent authority to manage its affairs as suggested by Keystone. Rather the authority is derived from statute. The PUC has chosen to regulate the manner in which proceedings take place through the adoption of ARSD 20:10:01:01.02 “Use of the Rules of Civil Procedure.” SDLC 15-6-43(a) “Form and admissibility of evidence” provides that “In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this chapter or by the South Dakota Rules of Evidence.”

Accordingly, SDCL 19-19-611 governs the manner in which testimony is taken before the PUC. SDCL 19-19-611. “Mode and order of interrogation and presentation” provides the following:

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for the ascertainment of the truth;
- (2) Avoid needless consumption of time; and
- (3) Protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-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.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”

SDCL 19-19 provides no authority for the PUC to grant the requested relief. Furthermore, the requested relief would require the PUC to determine what parties share common interests and then require all of the parties to agree on one lawyer that would ask questions for all the parties that share a common interest on cross examination.

The requested relief would also require Keystone and the PUC Staff to formally state whether or not they share a common interest. It is apparent from this proceeding that Keystone and the PUC Staff clearly share common interests, so if the Commission granted this motion the task of formally placing Keystone and Staff on the same side would be a relatively easy one. The ruling would then require PUC Staff and Keystone to determine who would handle cross-examination for the other. The request is not a more efficient manner in which to govern the manner in which testimony is taken before the PUC.

Additionally, the parties could not be reasonably expected to coordinate cross examination with less than two weeks to the trial of this matter. To order otherwise would prejudice the rights of the parties. If the PUC grants the motion, that would at a minimum also require the Commission to reschedule the hearing in order to provide all parties the opportunity to adequately prepare following a hearing whereby the Commission would determine what common interests each party shares. The request must be denied.

2. RESTRICTIONS ON OPENING STATEMENTS

Keystone also requests the commission to require the parties to submit a written opening statement in advance of the Trial. The PUC has no such authority to issue such an order. Furthermore, Keystone has had many months to present their concerns to the PUC regarding the manner in which the evidentiary hearing is conducted. They have chosen to wait until the last minute to ask the PUC to require the parties to submit a written opening statement. While a written opening statement may be helpful to the commission, requiring opening statements to be submitted in advance of the hearing at this late stage infringes the party's rights to prepare for the hearing in the manner in which they choose to do so. Accordingly the motion must be denied.

3. THE COMMISSION SHOULD PRECLUDE FRIENDLY CROSS EXAMINATION

Keystone's next attempt to further restrict the rights of the parties to meaningful participation is by further restricting the manner in which cross examination is conducted. Keystone desires the PUC to issue an order precluding friendly cross examination. This request requested is not permitted by the Rules of Evidence and is again beyond the statutory authority of the Commission. The mode and order of interrogation and presentation of witnesses is governed by SDCL 19-19-611. It provides: SDCL 19-19-611 "Mode and order of interrogation and presentation - Cross-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.”Simply put it does not provide for the relief requested. Under this statute, the Commission has minimal discretion and even so that discretion is limited by statute.

Keystone asserts that this would save time and relieve the PUC of its burden to properly apply the rules. Rosebud asserts that the proper application of the rules of procedure results in a fair process for all parties and allows the commission to receive all relevant evidence on the matter. Despite assertions by Keystone that are supported by Staff, the PUC does not have any inherent authority. All of the PUC’s authority is derived by statute. The Commission does not have the authority to amend the rules of procedure and evidence. Rather its duty is to apply them to the proceedings. Accordingly, the request must be denied.

4. REQUIRE PARTIES THAT ARE REPRESENTED BY COUNSEL TO REQUIRE THAT COUNSEL CONDUCT CROSS EXAMINATION.

This request is incomprehensible and absurd and accordingly should be denied. Counsel for Rosebud can think of no situation where anyone other than counsel would be permitted to conduct cross-examination. The request must be denied.

5. CROSS EXAMINATION SHOULD BE LIMITED TO THE SCOPE OF DIRECT EXAMINATION

As previously stated the mode and manner of interrogation and the presentation of witnesses is governed by SDCL 19-19-611 which provides: “Cross-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.” Because the scope of cross examination is defined by statute, the

commission can take no action that is not in conformance with the law. The request must be denied.

6. DENY THE RIGHT TO ARGUE EVIDENTIARY OBJECTIONS

Keystone's final request is as off base as its other requests and it should be denied as well. Keystone requests that the PUC not permit parties to argue objections made at the evidentiary hearing unless the Commissions General Counsel permits arguments to be made. The request, if granted, necessarily infringes on the parties rights to build an effective record in the event an appeal is necessary and will prohibit a record for any reviewing court to properly review. It also would prohibit all parties, including Keystone and Staff from presenting legal arguments to support objections unless the PUC's General Counsel determines that it is permissible to present argument.

As the Court in *Johnson v. John Deere Co.*, 306 NW 2d 231 (SD 1981) stated "we will not review a matter on appeal unless proper objection was made before the trial court." Quoting *Till vs. Bennett*, 281 N.W. 2d 276, 278 (SD 1979) and *Start vs. Stark*, 70 SD 178, 109 N.W. 2d 904 (1961). Because the request is contrary to the application and the requirements of the law, it must be denied along with all of the other requests for relief.

CONCLUSION

Based on the foregoing Rosebud requests the PUC to deny Keystone's motion Concerning Procedural Issues at the Evidentiary Hearing.

Dated this 17th day of July, 2015.

RESPECTFULLY SUBMITTED:

/s/ Matthew L. Rappold

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