BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	HP 14-001

STANDING ROCK SIOUX TRIBE
BRIEF IN OPPOSITION TO TRANSCANADA'S MOTION
CONCERNING PROCEDURAL ISSUES AT THE EVIDENTIARY HEARING

TransCanada's ill-conceived motion to revise the procedures for the hearing must be denied, because it requests the Commission to violate numerous evidentiary rules and procedural requirements of South Dakota law. Under the state Administrative Procedures Act, the decision of any state agency is subject to modification or reversal by the circuit court, if "administrative findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions… (or) made upon unlawful procedure." SDCL§1-26-36(1) & (3). TransCanada's motion implicated both prohibitions.

TransCanada's motion requests the Commission to violate SDCL §19-19-611(b), which codifies Rule 611 of the South Dakota Rules of Evidence. The rule states:

> Cross examination shall be limited to the subject matters of the direct and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters as if on direct examination.

Id.

Moreover, the PUC regulations governing the hearing state that "the commission shall give the parties an opportunity for a hearing conducted in accordance with the provision of SDCL Chapter 1-26." ARSD 20:10:01:15. Section 19 of chapter 1-26 provides that "A party may conduct cross examination required for a full and true disclosure of the facts." SDCL§1-26-19(2). "In all cases, vigorous cross examination, presentation of contrary evidence, and careful jury instructions are the traditional and appropriate means of attacking evidence under our adversary system." *Minemyer v R-*

Boc Representatives Inc., 839 F. Supp. 2d 1004, 1014 (N.D. Ill 2012). The statutes and regulations governing the hearing prohibit the granting of TransCanada's motion.

The modern trend is to permit liberal cross examination, as an important tool to assist the finder of fact. Roger Haydock et al, *Trial: Theories, Tactics, Techniques* (1990) §10.2. Nevertheless, granting the request to limit cross examination would violate SDCL §§19-19-611(b) and 1-26-19(2). The motion must be denied.

By statute, South Dakota also confers the right to object to the introduction of evidence. SDCL §19-19-103. In fact, it requires a party to exercise that right in order to preserve an evidentiary matter for appeal: "Error may not be predicated upon a ruling which admits or excludes evidence, unless… a timely objection or motion to strike appears of record, stating the specific ground of objection." SDCL §19-19-103(a). Thus, if a party is prohibited from making evidentiary objections, that party loses their right to judicial review under the South Dakota Administrative Procedures Act. SDCL 1 Chap. 26. TransCanada's request to limit objections at the hearing violates the appeal rights of interveners under South Dakota law.

The motion also asks the Commission to violate its own rules. ARSD 20:10:01:22.05 grants parties the right to make opening statements: "Parties may make opening statements or appropriate motions." The "may" in this context grants discretion to the party whether they want to make a statement – it does not permit the Commission to deny the right to make an opening statement. Also, in the context of "hearing procedure," the term "opening statement" clearly refers to an oral statement. This is not a right that may be abridged, per TransCanada's motion.

The PUC regulations contemplate a much more open process than that sought by TransCanada in its motion. Interveners may fully participate as a party. ARSD 20:10:01:15.02. They have all of the procedural rights granted under SDCL§1-26-17 (notice rights); and §1-26-19 (right to present, rebut evidence).

South Dakota law simply does not authorize the relief requested in TransCanada's motion. If the issues and parties are too numerous or complex, the remedy under South Dakota law is to bifurcate the issues for the evidentiary hearing – i.e. a separate hearing on cultural resources, environmental resources, etc. *St John v. Peterson*, 804 N.W.2d 71, 74-75 (S.D. 2011).

In this proceeding, TransCanada has repeatedly and aggressively sought to limit the fact-finding process by the Commission. It seeks to violate the rights of South Dakotans and South Dakota Tribes, and limit the Commission's ability to do its job under SDCL §41-41B-27. *See Application of Nebraska Public Power District to Construct and Operate Proposed MANDAN Nominal KV Transmission Facility*, 354 N.W.2d 713, 720 (S.D. 1984) ("[T]he statute clearly designates the PUC as the fact finder"). TransCanada's actions appear designed to thwart the truth, not achieve it.

Significantly, prior to filing its motion, TransCanada failed to consult with opposing counsel and attempt to reach agreement on hearing procedures – a routine courtesy designed to minimize the cost and burden of litigation. If TransCanada were genuinely concerned about judicial economy, it would work cooperatively with opposing counsel, and not file frivolous procedural motions at the last minute. The *Motion Concerning Procedural Issues* is arrogant, untimely, unwarranted and unlawful. It should be denied in full.

RESPECTFULLY SUBMITTED this 20th day of July, 2015

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Dated this 20th day of July, 2015

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