

Prefiled testimony is not contrary to statute because it is not a substitute for oral testimony--it is merely a precursor to it. Prefiled testimony is not even sworn. A witness who offers prefiled testimony takes the stand at the hearing, is sworn at that time, adopts his or her prefiled testimony with any changes that may be appropriate, and then is subject to cross-examination. Neither DRA nor COUP explains how that procedure is contrary to SDCL § 15-6-43(a). Because each witness testifies live at the hearing, which is the equivalent of “orally in open court,” the statute is not violated. Moreover, prefiled testimony is fully consistent with SDCL § 1-26-19(2), which provides that a party may conduct cross-examination. The position of DRA and COUP is self-evidently wrong.

2. DRA and COUP’s challenge to the Commission’s authority should be rejected as procedurally improper.

Although neither DRA nor COUP has filed a motion or requested any relief, their objections are a frontal assault on the Commission’s authority to conduct not only this administrative proceeding, but all contested-case proceedings in which prefiled testimony is ordered. The objections are procedurally improper. The Scheduling Order containing the deadline for prefiled testimony is dated December 17, 2014. If DRA and COUP wanted to challenge the Commission’s authority to require prefiled testimony under ARSD 20:10:01:22.06, their remedy was to seek declaratory relief either in circuit court, as provided in SDCL § 1-26-14, or before the Commission, as provided in SDCL § 1-26-15. SDCL § 1-26-14 provides:

The validity or applicability of a rule may be determined in an action for declaratory judgment in the circuit court for the county of the plaintiff’s residence, if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment maybe rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

SDCL § 1-26-15 provides that “[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or any rule or order of the agency.” Under SDCL § 49-1-11(5), the Commission has the authority to adopt procedures for obtaining a declaratory ruling, which the Commission has done under ARSD 20:10:01:34 and 20:10:01:35. Thus, there are two statutory procedures for a challenge to an administrative rule.

DRA and COUP cannot reasonably file an "objection" with the Commission challenging its administrative authority under a certain rule and state that they will not abide by the rule because the rule is unlawful. Rather, they must follow the statutory procedures in place to challenge the rule. Not having done that, their objection should be rejected as procedurally improper.

3. Keystone would be prejudiced if parties are allowed to ignore the Scheduling Order.

DRA and COUP intend to circumvent the Scheduling Order, which requires prefiled testimony. Whether prefiled testimony would be required was discussed by the Commission in an open meeting on December 9, 2014. The Commission discussed whether prefiled testimony should be ordered, and concluded that it would enable a timely and fair proceeding. The Scheduling Order was filed on December 17, 2014, and the parties have been on notice since that they would have to comply with the deadline for prefiled testimony on April 2, 2015. Had DRA, COUP, or any other party wanted to challenge the legality of the administrative rule on which the order for prefiled testimony was based, they could--and must--have done so before the deadline. Instead, DRA and COUP have given notice that they intend to call witnesses at the hearing who have not submitted prefiled testimony. Allowing them to do so

{01882019.1}

would prejudice not only Keystone, but all of the other Intervenors and Staff who have complied with the Scheduling Order by filing their prefiled testimony on April 2. Keystone, Staff, and other Intervenors would be denied an opportunity to see the testimony of these witnesses in advance, to prepare rebuttal testimony if necessary, and to prepare effective cross-examination in advance of the hearing.

DRA disclosed nine witnesses it intends to call without prefiled testimony: Lillian Anderson, Delwin Hofer, Kent Moeckly, John Harter, Taylor and Claudia Vroman, Bret Clanton, Bob Beck, and Dr. W. Carter Johnson. COUP disclosed three witness: Dr. George A. Seielstad, Dr. Robert J. Oglesby, and Dr. James Hansen.¹ There is no reason why these 12 witnesses should be subject to different rules than all of the witnesses who have disclosed prefiled testimony. Moreover, if DRA and COUP are allowed to call these witnesses at the hearing, there is no reason why other parties could not do the same. The Commission's Scheduling Order would then be subverted, with resulting prejudice to any party not only who is adverse to the testimony, but who has complied with the Scheduling Order. The same rules need to apply to everyone.

Conclusion

The Scheduling Order is legal, proper, and should not be disregarded to the prejudice of Keystone and others. Keystone respectfully requests that its motion be granted.

¹ All of COUP's witnesses would testify about climate change, an issue that is not relevant to the certification under SDCL § 49-41B-27. It was an issue addressed by the Department of State in the Final Supplemental Environmental Impact Statement as part of the national interest determination, but it is not an issue for the Commission. If COUP is allowed to call their witnesses, Keystone will move to exclude their testimony as not relevant.
{01882019.1}

Dated this 6th day of April, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

William Taylor
James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email James.Moore@woodsfuller.com
Attorneys for Applicant TransCanada

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony, to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
patty.vangerpen@state.sd.us

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
kristen.edwards@state.sd.us

Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
brian.rounds@state.sd.us

Darren Kearney
Staff Analyst South Dakota Public Utilities
Commission
500 E. Capitol Avenue
Pierre, SD 57501
darren.kearney@state.sd.us

Tony Rogers, Director
Rosebud Sioux Tribe - Tribal Utility
Commission
153 South Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Jane Kleeb
1010 North Denver Avenue
Hastings, NE 68901
jane@boldnebraska.org

Terry Frisch
Cheryl Frisch
47591 875th Road
Atkinson, NE 68713
tcfrisch@q.com

Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com

Robert G. Allpress
46165 Badger Road
Naper, NE 68755
bobandnan2008@hotmail.com

Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschafter@gmail.com

Benjamin D. Gotschall
6505 W. Davey Road
Raymond, NE 68428
ben@boldnebraska.org

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

John H. Harter
28125 307th Avenue
Winner, SD 57580
johnharter11@yahoo.com

Peter Capossela
Peter Capossela, P.C.
Representing Standing Rock Sioux Tribe
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com

Byron T. Steskal
Diana L. Steskal
707 E. 2nd Street
Stuart, NE 68780
prairierose@nntc.net

Arthur R. Tanderup
52343 857th Road
Neligh, NE 68756
atanderu@gmail.com

Carolyn P. Smith
305 N. 3rd Street
Plainview, NE 68769
peachie_1234@yahoo.com

Jeff Jensen
14376 Laflin Road
Newell, SD 57760
jensen@sdplains.com

Louis T. (Tom) Genung
902 E. 7th Street
Hastings, NE 68901
tg64152@windstream.net

Nancy Hilding
6300 West Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Paul F. Seamans
27893 249th Street
Draper, SD 57531
jackknife@goldenwest.net

Viola Waln
PO Box 937
Rosebud, SD 57570
walnranh@goldenwest.net

Wrexie Lainson Bardaglio
9748 Arden Road
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com

Jerry P. Jones
22584 US Hwy 14
Midland, SD 57552

Debbie J. Trapp
24952 US Hwy 14
Midland, SD 57552
mtdt@goldenwest.net

Duncan Meisel
350.org
20 Jay St., #1010
Brooklyn, NY 11201
duncan@350.org

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.com

RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bonny Kilmurry
47798 888 Road
Atkinson, NE 68713
bjkilmurry@gmail.com

Harold C. Frazier
Chairman, Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldcfrazier@yahoo.com
<mailto:kevinckeckler@yahoo.com>

Cody Jones
21648 US Hwy 14/63
Midland, SD 57552

Gena M. Parkhurst
2825 Minnewsta Place
Rapid City, SD 57702
GMP66@hotmail.com

Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

The Yankton Sioux Tribe
Robert Flying Hawk, Chairman
PO Box 1153
Wagner, SD 57380
robertflyinghawk@gmail.com
Thomasina Real Bird
Attorney for Yankton Sioux Tribe
trealbird@ndnlaw.com

Chastity Jewett
1321 Woodridge Drive
Rapid City, SD 57701
chasjewett@gmail.com

Bruce Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Ronald Fees
17401 Fox Ridge Road
Opal, SD 57758

Robert P. Gough, Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Dallas Goldtooth
38731 Res Hwy 1
Morton, MN 56270
goldtoothdallas@gmail.com

Cyril Scott, President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
cscott@gwtc.net
ejantoine@hotmail.com

Thomasina Real Bird
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com

Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Tracey A. Zephier
Attorney for Cheyenne River Sioux Tribe
Fredericks Peebles & Morgan LLP
910 5th Street, Suite 104
Rapid City, SD 57701
tzephier@ndnlaw.com

Matthew Rappold
Rappold Law Office
on behalf of Rosebud Sioux Tribe
PO Box 873
Rapid City, SD 57709
matt.rappold01@gmail.com

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

Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabinra@dakotarural.org

Robin S. Martinez
Dakota Rural Action
Martinez Madrigal & Machicao, LLC
616 West 26th Street
Kansas City, MO 64108
robin.martinez@martinezlaw.net

Paul C. Blackburn
4145 20th Avenue South
Minneapolis, MN 55407
paul@paulblackburn.net

April D. McCart
Representing Dakota Rural Action
Certified Paralegal
Martinez Madrigal & Machicao, LLC
616 W. 26th Street
Kansas City, MO 64108
april.mccart@martinezlaw.net

Kimberly E. Craven
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

Mary Turgeon Wynne
Rosebud Sioux Tribe - Tribal Utility
Commission
153 S. Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Joy Lashley
Administrative Assistant
SD Public Utilities Commission
joy.lashley@state.sd.us

Eric Antoine
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

/s/ James E. Moore
One of the attorneys for TransCanada