

**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
MOTION TO COMPEL
DISCOVERY

HP14-001

The Rosebud Sioux Tribe (RST), pursuant to SDCL 15-6-37(a), by and through counsel, moves the Public Utilities Commission to compel applicant, TransCanada Keystone Pipeline, LP (Keystone) to comply with their discovery obligations and fully produce responses and documents that are substantive and non-evasive, to the RST's First set of Interrogatories numbered 10, 11 and 78 and to the documents requested in the RST's First Set of Request for Production of Documents numbered 18 and 19 as well as interrogatories numbered 1 a-h, 2a-e, 4d and e, 8 a-d, 9b, c, and e, 10 a-i, 11 and 12 a-d from the RST's Second Set of Interrogatories.

Counsel for the RST certifies that pursuant to SDCL 15-6-37(a)(2), that he has in good faith conferred or attempted to confer with Keystone's counsel in a good faith effort to secure the information or material without the Public Utilities Commission action.

Curiously, in RST's First Set of Interrogatories and Request for Production of Documents, Interrogatory No. 2 the RST posed the following question "Prior to answering these interrogatories, have you made due and diligent search of all books, records, and papers of the Applicant with the view of eliciting all information available in this action?" Keystone responded by stating: "Yes, to the extent reasonably practicable in attempting to respond to over 800 discovery requests within the time allowed."

Based on this answer, it appears that Keystone has acknowledged that they have only responded to the RST's discovery requests to the "extent reasonably practicable" within the given time frame. Counsel for RST asserts that Keystone has not fully complied with South Dakota Rules of Civil Procedure by only responding to requests to the extent that it was "reasonably practicable" to do so. The South Dakota Rules of Civil Procedure do not permit parties to respond to discovery requests, to the "extent reasonably practicable." In addition to requesting for an order to compelling compliance with discovery, RST asks that the PUC order Keystone to pay attorneys fees and expenses pursuant to SDCL 15-6-37(a)(A).

FACTUAL AND PROCEDURAL BACKGROUND

The Rosebud Sioux Tribe served its First Set of Interrogatories and Request for Production of Documents on Keystone on January 6, 2015. Keystone responded to the First set of Interrogatories and Request for Production of Documents with objections on January 23, 2015 and then again responded to the First Set of Interrogatories and Request for Production of Documents with answers and objections on February 6, 2015.

The Rosebud Sioux Tribe served its second Set of Interrogatories and Request for Production of Documents on Keystone on February 20, 2015. Keystone responded with answers and objections to the same on March 10, 2015. It should be noted additionally that Keystone has supplemented some of its responses to the First and Second Set of Interrogatories and Request for Production of Documents as of this date of this filing.

Keystone supplemented its answers to Rosebud Sioux Tribes First Set of Interrogatories and Request for Production of Documents on March 10, 2015. Keystone provided additional responses to Rosebud Sioux Tribe's First Set Interrogatories and Request for Production of

Documents by sending documents related to Interrogatory No. 55 from the First Set of Interrogatories and Request for Production of Documents and Request for Production No.: 1 from the Second Set of Interrogatories and Request for Production of Documents by email dated March 30, 2015, which included electronic access to all of Keystone's responses to all other parties discovery requests.

LEGAL STANDARD

SDCL 15-6-26(b) provides for liberal discovery. *Bean v. Best*, 76 SD 462, 80 N.W.2d 565, 566. It provides in part that “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

The party that is resisting production of documents and responding to interrogatories bears the burden of establishing lack of relevance or undue burden. *St. Paul Reins. Co., Ltd. vs. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000). The objecting party should be required to demonstrate to the PUC that the requested information or documents (i) do not come within the broad scope of the definition of relevance as defined by the South Dakota Rules of Evidence; or (ii) are an undue burden to produce; or (iii) are of such marginal relevance that the potential harm of production through discovery would outweigh the ordinary presumption favoring broad disclosure. Relevant evidence means “evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1 (Rule 401).

Keystone's responses are filled with numerous boilerplate objections to reasonable requests for information, including the following: "not relevant to the subject matter," "the requests are not likely to lead to admissible evidence," "the information requested is confidential or protected information," "the requests are overly broad or unduly burdensome." These types of boilerplate objections are objections that are routinely rejected by courts. The resisting party bears the burden to show specifically how each objection is irrelevant, overly broad or unduly burdensome, or protected by confidentiality laws. Boilerplate objections are not helpful to the finder of fact in ruling on discovery and boilerplate objections do not satisfy a party's burden to explain and support its objections. *St. Paul* at 512.

Keystone's Specific Objections

The discovery process in this case was bifurcated, meaning that discovery was broken down into two separate sets of Interrogatories and Request for Production of Documents. Keystone's responses and objections to RST's First Set of Interrogatories and Request for Production of Documents will be addressed first followed by Keystone's responses and objections to the Second Set of Interrogatories and Request for Production of Documents followed by arguments in support of the motion to compel compliance with discovery obligations.

The majority of objections presented by Keystone are boilerplate objections using such language as "not relevant" "not likely to lead to admissible evidence," "confidential and protected information," "overly broad and unduly burdensome." Keystone fails to provide any specific explanation as to why the objections are overly broad, irrelevant, confidential, unduly

burdensome, not likely to lead to admissible evidence or are confidential or proprietary. SDCL 15-6-26(b) (5) provides that “When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Keystone has failed to describe the nature of the documents, communications, or things not produced in a manner that enables the RST to assess the applicability of the claimed privilege or protection. Each of Keystone's objections on the grounds of privilege or confidentiality should be overruled based on Keystone’s failure to comport its objections to the requirements of the Rules of Civil Procedure.

Each of the requests is directly relevant to the matter before the Public Utilities Commission, namely certification that the conditions upon which the permit was issued in 2010 continue to exist today.

Keystone’s Responses and Objections to First Set of Interrogatories and Request for Production of Documents

The following section includes the Interrogatory No. along with Keystone’s answer and or objection to the Interrogatory followed by argument in support of the Motion to Compel.

Original Interrogatory Nos.10 and 11:

Interrogatory No. 10: Has TransCanada received any communications from any regulatory body or agency that may have jurisdiction over the construction, maintenance or operation of any pipeline located in the United States alleging that TransCanada has failed to comply with any applicable permits for the construction, operation or maintenance of any pipeline located in the United States? Amended Permit Conditions 1 and 2.

Interrogatory No. 11: Has TransCanada received any communications from any regulatory body or agency that may have jurisdiction over the construction, maintenance or operation of any pipeline located in Canada alleging that TransCanada has failed to comply with any applicable permits for construction operation or maintenance of any pipeline located in Canada? Amended Permit Condition 2.

Keystone's Response:

Through its answers and objections dated February 6, 2015, Keystone objected to Interrogatory Nos. 10 and 11 on the grounds that the request is not relevant, not likely to lead to the discovery of admissible evidence and is overly broad.

Following the first meet and confer that took place between the parties RST agreed to narrow Interrogatories Nos. 10 and 11 to the following which were submitted to Keystone by letter dated March 16, 2015.

(Amended) Interrogatory No. 10: From 2005 through the present, has TransCanada received any communications from any regulatory body or agency that may have jurisdiction over the operation of any crude oil pipeline located in the United States alleging that TransCanada has failed to comply with any applicable permits regarding the operation of any crude oil pipeline located in the United States? Amended Permit Conditions 1 and 2.

(Amended) Interrogatory No. 11: Has TransCanada received any communications from any regulatory body or agency that may have jurisdiction over the operation of any crude oil pipeline located in Canada alleging that TransCanada has failed to comply with any applicable permits regarding the operation of any crude oil pipeline located in Canada? Amended Permit Condition 2.

Argument:

To date, Keystone has not responded to the amended Interrogatories which were submitted to Keystone in good faith following our meet and confer dated March 13, 2015 at which time Keystone attorneys informed counsel for RST that they would revisit the Interrogatories as amended and consider supplementing or changing their responses based on the amended interrogatory Nos. 10 and 11.

Keystone's objections are boilerplate and "several courts across the country have taken a negative view of what have been deemed "boilerplate objections." See PUC Staff Response to Keystone's Motion for Sanctions dated April 6, 2015, citing *McCleod, Alexander, Powel and Apffel, P.C. vs. Quarles*, 894, F2d 1482 (5th Cir. 1990) and *St. Paul Reinsurance Co. vs. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (sanctioning lawyer for using boilerplate objections in response to requests for production of documents) . Boilerplate objections are those objections that fail to state with specificity how the discovery request is deficient and that also fails to detail how the objecting party would be harmed if required to respond.

Accordingly, the Rosebud Sioux Tribe requests that the PUC overrule the objections and require Keystone to answer the original, non-amended Interrogatory's No. 10 and 11 in their entirety. Should the PUC sustain Keystone's original objections to Interrogatories No. 10 and 11 the Rosebud Sioux Tribe requests that the PUC require Keystone to fully answer amended Interrogatories No. 10 and 11. The interrogatories are relevant because they seek information related to Keystone's compliance with any permit conditions from any other regulatory agency from any other jurisdiction related to the construction, operation or maintenance of any type of pipeline located in the United States or Canada. Certainly, Keystone's history of compliance or

non-compliance with other permit requirements concerning construction, operation or maintenance of other pipelines is relevant to the conditions of the amended permit conditions in docket HP09-001.

The Rosebud Sioux Tribe's understanding is that U.S. federal pipeline safety standards are not implemented through a permit process, but rather pipeline companies are required to comply with them subject to enforcement by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). As such, the best evidence of TransCanada's capacity and willingness to comply with federal pipeline safety standards, as required by Final Permit Conditions 1 and 2, are PHMSA's enforcement communications with TransCanada. Since the Final Permit requires compliance with federal pipeline safety standards, evidence of TransCanada's compliance or failure to comply with these standards, since issuance of the Final Permit in 2010, is relevant to the Commission's proceeding. Therefore, this information is subject to discovery and the Commission must require that TransCanada disclose it to the Rosebud Sioux Tribe.

It should be noted that at the time of the filing of this Motion to Compel, Keystone, submitted supplemental responses to amended Interrogatory 10 and 11. This information was sent by email transmission on April 7, 2015, several hours before the deadline to file Motions to Compel discovery. Counsel for RST and his witnesses have not had ample time to review said information for substance to determine if the information sent is sufficient under the Rules of Civil Procedure. Additionally, this information was sent 3 days prior to the due date for the filing of pre-filed testimony, in a late and delayed manner consistent with Keystones responses

that were sent to RST on March 30, 2015, which was 3 days before the original due date for Pre-filed testimony.

Interrogatory No.78: According to Keystone's original application, Keystone began cultural and historic surveys in May 2008 and at that time it had found several pre-historic stone circles were uncovered. Please provide a detailed description of these sites, including location.

Answer: These sites are addressed during the course of government to government consultation with the DOS. Site locations are confidential and cannot be disclosed outside of the consultation process.

Argument:

Keystone's answer while not captioned as an objection is in effect an objection and the PUC should consider the objection to be a boilerplate and overrule the objections for the reasons previously stated and because the objections are not made properly consistent with SDCL 15-6-26(b) (5). Keystone has not referenced any statutory authority to support its assertion that the information sought is confidential and cannot be disclosed to the Rosebud Sioux Tribe outside of the consultation process.

The purpose of making cultural resource information confidential is to protect the cultural property and rights of Native Americans, including the Rosebud Sioux Tribe and the other tribes that are parties to this proceeding. The purpose of such confidentiality is not to protect TransCanada's interests. Further, there is no law or regulation stating that a tribe may protect its cultural resources only through the consultation process. Instead, Native Americans may seek to protect their cultural properties and rights through any means provided in law, including through state permitting processes. Therefore, disclosure of information about the location and nature of cultural sites and property to the Rosebud Sioux Tribe is proper. Moreover, such disclosure is

also necessary for the Tribe to evaluate and comment on protections required to protect our property. A failure to disclose such information to the Rosebud Tribe would violate its express right to meaningfully participate in the protection of cultural resources.

Although Keystone states that the sites are addressed in government to government consultation with the DOS, clearly Keystone has access to such information as they state in their original application that Keystone performed cultural and historic surveys in May 2008 and discovered several pre-historic stone circles. Keystone has the information requested and should be required to provide the same to determine if any of the sites are potentially located on land subject to the jurisdiction of the Rosebud Sioux Tribe.

Request for Production of Documents No. 18: Provide documentation regarding TransCanada's compliance with reclamation and clean –up efforts from all other construction activities related to any other pipeline that TransCanada owns or operates in the United States and Canada.

Amended Permit Condition 26.

Request for Production of Documents No. 19: Provide copies of TransCanada's pipeline safety records for all other pipelines that TransCanada owns or operated in the United States and Canada.

Keystone Response:

Keystone objected to the information requested in Request for Production of Documents No. 18 and 19 on the grounds that the request is overly broad and unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence under SDCL 15-6-26(b). It is unlimited in time and extends to all of TransCanada's operations in the United States and Canada.

Following the first meet and confer that took place between the parties on March 13, 2015, the RST agreed to narrow Request for Production No. 18 and 19 to the following which were submitted to Keystone by letter dated March 16, 2015.

Amended RFP No.18: Provide documentation regarding TransCanada's compliance with reclamation and clean up-efforts from all other construction activities related to any other crude oil pipeline that TransCanada operates in the United States and Canada since 2005. Amended Permit Condition 26.

Amended RFP No.19: Provide documentation regarding TransCanada's compliance with pipeline safety requirements for any other crude oil pipeline that TransCanada has operated in the United States and Canada since 2005. Amended Permit Condition 26.

To date, Keystone has not responded to the amended Request for Production of Documents No. 18 and 19 which were submitted to Keystone in good faith following our meet and confer dated March 13, 2015 at which time Keystone attorneys informed counsel for RST that they would revisit the RFP's as amended and consider supplementing or changing their responses based on the amended RFP's.

Since the U.S. Pipeline Safety Act, 49 U.S.C. § 60101 et seq., and its implementing regulations at 49 C.F.R Part 195 do not require that TransCanada acquire a permit before construction, the best evidence of its compliance with U.S. law includes the record of its actual compliance, or its failure to comply with reclamation and cleanup standards. Similarly, the record of TransCanada's actual compliance with its Canadian permits is relevant, because the existence of a Canadian permit for the Keystone XL Pipeline does not guaranty that TransCanada has a record of complying with its Canadian permits. Instead, the best evidence of

its capacity and willingness to comply with law includes records showing any actual non-compliance by TransCanada.

Based on the authority cited in the section addressing Interrogatories 10 and 11 the PUC should overrule the objections and require Keystone to fully respond to the information requested in RFP 18 and 19. If the PUC should sustain the objections RST requests that the PUC require Keystone to fully respond to the amended RFP Nos. 18 and 19.

Keystone's Responses and Objections to Second Set of Interrogatories and Request for Production of Documents

Interrogatory No. 1:

References:

- (i) Findings 1, 19, 20, 33 in Appendix C - Tracking Table of Changes ("Appendix C")
- (ii) Amended Permit Condition 6 and 35
- (iii) Response 17 to Rosebud Sioux Tribe - Tribal Utility Commission ("RST") Information Request No. 1 ("IR No. 1"); RST Documents, Keystone 0470-0583.
- (iv) Response 39 to Bold Nebraska IR No. 1
- (v) Response 35 (g) to Cindy Myers IR No. 1.

Requests:

- a) For the most recent and accurate Project route (as described in ref (iii)) and facility locations, provide an approximate elevation profile of the proposed pipeline (elevation vs. pipeline milepost), capturing the segments from the nearest upstream pump station north of the state border to the nearest pump station just south of the state border.
- b) On the elevation profile provided above, indicate (1) the location of the pump stations, (2) the location of all mainline valves, including check valves, by milepost; (3) the type of mainline valve actuation (i.e. manual, automatic, or remotely operated); and (4) the location of all valves in reference to water crossings.
- c) According to Finding 20 and ref (iv), Keystone is proposing a number of changes to both the type of valves and their location since the PUC decision of June 29, 2010. Please list these changes and indicate them on the elevation profile requested above.
- d) For the maximum design flow rate (i.e. the updated maximum design flow rate of 830,000 bpd as per Finding 20), indicate the suction and discharge pressures at each pump station identified on the above elevation profile.

- e) On the provided elevation profile, indicate the maximum operating pressure ("MOP") for the pipeline segments.
- f) Superimpose a hydraulic profile on the provided elevation profile for the stated design capacity/operation.
- g) On the above pipeline elevation profile, indicate the approximate location of HCAs by milepost.
- h) If the information in (g) is confidential as indicated on IR no. 1 responses to other parties, please indicate (on the above pipeline elevation profile) the approximate location by milepost of (i) water crossings; (ii) the High Plains aquifer (Ogallala Formation) in Tripp County; (iii) other areas of unconfined aquifers including alluvial aquifers associated with streams, and occasional unconfined stretches in the Hell Creek, Fox Hills, and Pierre Shale aquifers (as per ref (v)); and (iv) any Karst Aquifers, which are crossed by the Project.

Keystone Response:

1a. This request seeks information that is confidential for security reasons. It is also not relevant or likely to lead to the discovery of admissible evidence.

1b. This request seeks information that is confidential for security reasons. The milepost locations for each pump station and mainline valve are not relevant or likely to lead to the discovery of admissible evidence. Without waiving the objection, each mainline valve located in South Dakota will be remotely operated. Mainline valves and pump stations are discussed in Section 2.1.4.4 of the FSEIS.

1c. This request for an elevation profile seeks information that is confidential for security reasons. Without waiving the objection, all valve locations are in compliance with 49 CFR 195.260 and PHMSA Special Condition 32. Changes include remote control and actuation of any valves which were manually operated; the addition of backup power; and the addition/adjustment of intermediate mainline valve locations to ensure no more than a 20 mile spacing.

1d. The request for an elevation profile seeks information that is confidential for security reasons. Without waiving the objection, the minimum suction pressure at the pump station is 50 psig and a maximum discharge pressure of 1,307 psig.

1e. The request for an elevation profile seeks information that is confidential for security reasons. Without waiving the objection, in accordance with 49 CFR 195.106 Design Pressure the mainline MOP will be 1,307 psig and at select locations downstream of pump stations, the MOP is 1,600 psig.

1f. This request seeks information that is confidential for security reasons. It is also not relevant or likely to lead to the discovery of admissible evidence.

1g. The location of High Consequence Areas is confidential and Keystone is required by PHMSA to keep this information confidential.

1h. The Department of State FSEIS discusses the High Plains Aquifer and other aquifers in Chapter 3, Water Resources, Section 3.3.2. The mile posts of the aquifers beneath the right of way are listed in Table 3.3-2.

Argument:

Interrogatory 1 in its entirety focuses on the elevation profile of the Project in South Dakota and highly relevant information associated with the elevation profile that is central to our ability to (i) evaluate the safety of the pipeline; (ii) assess the risks to the pipeline; (iii) determine worst-case spill scenarios; (iv) evaluate the oil spill response plan. None of the information requested is unusual and such information has been provided by other pipeline companies before other regulatory bodies relating to similar projects. Presumably an elevation profile exists

because it is necessary to prepare an elevation profile in order to design the pipeline. The following argument applies to Keystone's answers and objections relating to 1a-h, in that Keystone's objections are boilerplate objections, without merit and are not supported by law. Keystone has also not properly objected to the Interrogatory pursuant to SDCL 15-6-26(b)(5).

Keystone continues to assert that they will comply with all applicable regulations, but when questioned as to how they will actually comply with requirements they fail to state how they will actually comply and what specific actions they will take to ensure compliance. Furthermore, the Interrogatory requests information relevant to analyzing, quantifying and describing worst case spill scenarios and is central to the ability to evaluate the risk of spills from the pipeline, its overall design and operation, the potential harm that would be caused to the Rosebud Sioux Tribe and the people of South Dakota by a spill from the pipeline, TransCanada's planned on-the-ground capacity to respond to a spill from the pipeline, and TransCanada's compliance with spill cleanup standards. All of these matters relate to Final Permit Conditions 1 and 2, such that these requests are reasonably calculated to lead to the discovery of admissible evidence. The blanket assertion made by Keystone that the information is confidential without stating any law or regulation that supports the assertion is baseless and without merit and in violation of SDCL 15-6-26(b)(5). PUC administrative rules and SDCL 15-6 address when information may be considered confidential. The burden to establish that the information sought is confidential rests with Keystone. The PUC has made no determination that the information that Keystone claims is confidential is in fact confidential information worthy of protection from public disclosure and not discoverable. Even if the PUC determines that the information is protected by confidentiality, PUC's administrative rules address the extent to which the information may be obtained and used in the current proceedings.

While Keystone has failed to provide complete answers to IR 1a.-h., further explanation is provided for the missing information in IRs 1e., 1g., and 1h. The answer to IR 1e is incomplete in that it provides only general MOPs for the Project whereas the request calls for MOP by pipeline segment. Keystone's blanket objection that the information sought is protected information is a boilerplate objection because Keystone has made no reference to any statute that supports the assertion and has failed to make any connection to the provision of the answers and harm to Keystone in disclosing the information. The objection should be overruled. Keystone next alleges that the PHMSA requires them to keep High Consequence Areas confidential without stating with particularity the statute or rule that supports their objection also in violation of SDCL 15-6-26)b)(5). This assertion is not supported by any law that requires Keystone to treat High Consequence Areas as confidential.

The answer to IR 1g is incomplete. The location of High Consequence Areas on the elevation profile is key to integrity management and central to the ability to evaluate the overall safety of the pipeline. PUC administrative rules and SDCL 15-6 address when information may actually be considered confidential and the burden to establish that the information sought is confidential rests with Keystone. The PUC has made no determination that the information that Keystone claims is confidential is in fact confidential information worthy of protection from public disclosure. Even if the PUC determines that the information is protected by confidentiality, PUC's administrative rules address the extent to which the information may be obtained and used in the current proceedings.

The answer to IR 1h is incomplete. While the FSEIS does discuss water crossings, as well as the High Plains Aquifer and other aquifers in the reference provided in response to this question, it is impossible to know if the information in the FSEIS is still up-to-date given the

changes in the routing (particularly around HCAs) in South Dakota, which may post-date the FSEIS. Furthermore, Table 3.3-2 (FSEIS) does not categorize the aquifers as "unconfined" and therefore does not answer the question. Nor does Table 3.3-2 provide the information requested about the location of occasional unconfined stretches in Hell Creek, Fox Hills and Pierre Shale aquifers. Finally, the question asks for the location of any Karst Aquifers crossed by the Project. (We are seeking confirmation of our understanding that no Karst aquifers are crossed by the project.) For the above reasons, the response is incomplete, potentially out of date, and ambiguous. RST requests that the PUC issue an order compelling Keystone to fully answer the interrogatory in a manner consistent with their obligations under the Rules of Civil Procedure.

By email communication dated April 7, 2015 Keystone committed to providing at least partial supplemental answers to Interrogatory 1. They informed counsel for RST that they are preparing a response to Interrogatory 1 regarding pump station locations, an elevation profile and a hydraulic profile. Keystone indicated that these documents will be available on Wednesday April 8, 2015 and that they will email them to RST counsel upon completion. It is anticipated that a full and complete response to Interrogatory 1 will satisfy the inquiries presented in Interrogatory 2a. However, because the information has not actually been provided yet and because of its close proximity to the deadline for filing pre-filed testimony it is impossible to determine if the response will be considered full and complete. Moreover, in the April 7 email, Keystone has not committed to answering IR 1 in its entirety. Beyond the pump station locations, an elevation profile and hydraulic profile, in order to evaluate the safety of the Project, RST's experts require (a) updated valve types and locations superimposed on the elevation profile; and (b) MOPs per pipeline segment on the elevation profile. Without this key information, the experts cannot adequately evaluate the safety of the Project. And unless IR 1 is

answered completely, then IR 2 is not answered. Also, it is worthy to note that the email pertaining to these responses were sent at the approach of the discovery motions deadline and 3 days prior to the deadline for Rosebud Sioux Tribe to pre-file its direct testimony.

Interrogatory No. 2:

References:

- (i) Finding 20 in Appendix C
- (ii) Response 39 to Bold Nebraska IR No. 1
- (iii) Draft Supplemental EIS, pp. 2.1-19-2.1-23
- (iv) Final Supplemental EIS, pp. 2.1-24-2.1-27.

Preamble:

In Finding 20, Keystone has confirmed that there will now be 20 mainline valves located in SD and that all of these valves will be remotely controlled. Valve placement for critical safety involves the placement of remotely controlled shut-off valves on either side of a critical water crossing, as well as a check valve for additional safety depending on downstream elevation profile.

Requests:

- a) Please list each of the 20 remotely controlled valves (and any additional check valves) and their location by milepost. Please indicate which of these locations are proximate to water crossings and identify the water crossing.
- b) For each critical water crossing, please confirm the placement of remotely controlled shut-off valves on either side of critical water crossings. If not, please explain why not.
- c) For each critical water crossing, please confirm the placement of a check valve. If not, explain why not.
- d) Given that all 20 mainline valves will be remotely controlled, does this imply that there are no more check valves planned? If yes, please explain the absence of check valves for additional safety on critical water crossings. If not, please confirm if there are check valves located at critical water crossings; and provide the location of the check valves.
- e) According to refs (i)-(iv), Keystone is proposing a number of changes to both the type of valves and their location since the PUC decision of June 29, 2010. Please list these

changes.

Keystone Responses:

2a. This request seeks information that is confidential for security reasons. The mile post locations of valve sites is not relevant and not likely to lead to the discovery of admissible evidence. Without waiving the objection, please refer to FSEIS 2.1 Overview of the Proposed Project, Section 2.1.4.4 Mainline Valves. All valve locations are in compliance with PHMSA Special Condition 32 and 49 CFR 195.260. Per 49 CFR 195.260 (e) valves are placed on each side of a water crossing that is more than 100 feet from high water mark to high water mark.

2b. All valve locations are in compliance with PHMSA Special Conditions 32 and 49 CFR 195.260. Per 49 CFR 195.260 (e) valves are placed on each side of a water crossing that is more than 100 feet from high water mark to high water mark.

2c. All valve locations are in compliance with PHMSA Special Conditions 32 and 49 CFR 195.260. Per 49 CFR 195.260 (e) valves are placed on each side of a water crossing that is more than 100 feet from high water mark to high water mark.

2d. No. Select valve site locations contain remotely operable mainline isolation valve and a check valve. These valve assemblies are placed in proximity downstream to major water bodies.

2e. All valve locations are in compliance with 49 CFR 195.260 and PHMSA Special Condition 32. Changes include remote control and actuation of any valves which were manually operated; the addition of back-up power; and the addition/adjustment of intermediate mainline valve locations to ensure no more than a 20 mile spacing.

Argument:

Again, in its response to Interrogatory 2, Keystone makes boilerplate objections and fails to assert any statutory authority to support its assertion that the requested information is confidential for security reasons in violation of SDCL 15-6-26(b)(5). The information sought is relevant to analyzing, quantifying and describing worst case spill scenarios and is central to the ability to evaluate the safety of the pipeline as well as its overall design and operation and is necessary to understand the pressure safety factors on specific segments of the pipeline. Additionally, the information sought is reasonably calculated to lead to the discovery of admissible evidence. The information provided is non-responsive to the questions posed in that the information provided by Keystone is outdated as the FSEIS gives milepost locations for 15 valves in South Dakota and now there are 20 valves as well as check valves located in South Dakota. While the information may be considered confidential by the PUC under applicable administrative rules and statutes, no such determination has been made. The Rosebud Sioux Tribe requests that the PUC overrule Keystone's objections and to compel Keystone to fully answer the interrogatory.

Interrogatory 4d and 4e:

Preamble:

According to Finding 22, "The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, and the special conditions developed by PHMSA and set forth in Appendix Z to the Department of State ("DOS") January 2014 Final Supplemental Environmental Impact Statement ("FSEIS"). These federal regulations and additional conditions are intended to ensure

adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.”

According to Finding 60, "Keystone will implement 59 additional safety measures as set forth in the DOS Final SEIS, Appendix Z. These measures provide an enhanced level of safety equivalent to or greater than those that would have applied under the previously requested Special Permit."

According to Finding 90, “The Keystone pipeline will be designed, constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, and the 59 PHMSA Special Conditions as set forth in DOS Final SEIS, Appendix Z. These federal regulations and additional conditions are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.”

- d) Findings 22, 60, 90 refer to Keystone implementation of 59 PHMSA Special Conditions as set forth in ref (ii). According to ref (ii), pp. 95-107, Keystone has also committed to implement mitigation recommendations from the Battelle and Exponent risk assessment reports, including specifically addressing several issues in its Emergency Response Plan and Oil Spill Response Plan (and its risk analysis that is used in the development of those plans). Please explain what (if anything) Keystone has committed to in regard to implementation of mitigation recommendations from the Battelle and Exponent risk assessment reports, and how this affects Findings 22, 60, 90, and any other Findings.

- e) Findings 22, 60, 90 refer to Keystone implementation of 59 PHMSA Special Conditions as set forth in ref (ii). According to ref (ii), pp. 107-108, Keystone has also committed to

a number of measures beyond the spill cleanup measures described above in ref (ii), including specifically addressing several issues in its Emergency Response Plan and Oil Spill Response Plan (and the detailed risk analysis used in developing those plans).

Please explain what (if anything) Keystone has committed to in regard to additional spill cleanup measures, and how this affects Findings 22, 60, 90, and any other Findings.

Keystone Responses:

4d. Keystone will implement additional mitigation measures included in Appendix Z.

4e. Keystone will implement additional mitigation measures included in Appendix Z.

Argument:

The answer provided is deficient and improper and not made in good faith as Keystone only answered part of the interrogatory by referring to Appendix Z, without attempting to specify how Keystone will actually implement the 59 special conditions or the mitigation recommendations in the Battelle and Exponent reports which are contained in Appendix Z. The response does not address how the implementation of the mitigation measures in Appendix Z will affect Findings 22, 60, 90 and any other relevant findings. A more complete answer would involve Keystone describing with specificity how it is going to apply the 59 special conditions and the mitigation recommendations in Battelle and Exponent to the Project in South Dakota and how the application of these new conditions is going to result in changes that are "either neutral or positive to the Commission's concerns" (rather than stating that Keystone will implement additional mitigation measures as included in Appendix Z).

For example, the answer provided does not address how Keystone plans to implement Special Condition 6 "Monitoring for Seam Fatigue from Transportation." A complete answer would address how Keystone plans to avoid Double Submerged Arc Weld (DSAW) cracking

introduced during transportation and installation along the pipeline. Furthermore, an answer that describes Keystone's plans to implement other measures to avoid DSAW cracking introduced during transportation and installation along the pipeline would be a more complete response. The answer provided does not specifically address the implementation of Special Condition 22 "Pressure Test Level," and an answer that confirms that Keystone will conduct a pre-in-service hydrotest on the Project in SD at a minimum of 100% SYMS for 8 hours would be fully responsive to the question presented. Special Condition 16 sets out conditions for the inspection of welds. A complete answer would specify how weld inspections will actually be carried out on the Project and if Keystone will in fact radiologically inspect every girth weld (even if not required by regulation), and maintain the weld inspection records for the life of the pipeline.

Keystone makes no attempt to explain how they will implement the additional conditions from Appendix Z. Keystone merely purports to answer a question about Appendix Z by referring to Appendix Z as their answer. Clearly this type of answer is not a full or proper answer as contemplated by the Rules of Civil Procedure and the PUC should compel Keystone to fully respond and properly answer the question.

Interrogatory No. 8:

References:

- (i) Amended Permit Conditions 35 and 36
- (ii) Response 34 (c) to Cindy Myers IR No. 1 (p. 42 regarding the lessons learned from Marshall)
- (iii) Response 35 (d) to Cindy Myers IR No. 1
- (iv) Response 35 (g) to Cindy Myers IR No. 1.

Preamble:

According to ref (ii), in order to improve the remediation of a crude spill, Keystone has committed to strategically store equipment and employ personnel and contractors along length of the pipeline to ensure a maximum 6-hour response time.

According to ref (iii), HCAs and HSAs (Hydrologically Sensitive Areas) are subject to high levels of inspection and repair criteria.

Requests:

- a) Does the maximum response time of 6 hours apply to HCAs and HSAs? If not, please provide the maximum response time for HCAs and HSAs.
- b) Does the maximum response time of 6 hours apply to (i) critical water crossings; (ii) the High Plains aquifer (Ogallala Formation) in Tripp County; (iii) other areas of unconfined aquifers including alluvial aquifers associated with streams, and occasional unconfined stretches in the Hell Creek, Fox Hills, and Pierre Shale aquifers (as per ref (iv)); and (iv) any Karst Aquifers, which are crossed by the Project. If not, please provide the maximum response time for these locations.
- c) Does the maximum response time of 6 hours take into account various worst-case conditions (road/traffic/weather/other)?
- d) Given a scenario involving poor (road/traffic/weather/other) conditions, has Keystone developed contingency plans to speed the emergency response (i.e. police escort, alternate routing or other). Please explain.

Keystone Responses:

8a. Maximum response times are identified in the FSEIS Appendix I Spill Prevention Control and Countermeasure Plan and Emergency Response Plan; Emergency Response Plan Section 3.1 Initial Response Actions.

8b. Maximum response times are identified in the FSEIS Appendix I Spill Prevention Control and Countermeasure Plan and Emergency Response Plan; Emergency Response Plan Section 3.1 Initial Response Actions.

8c. TransCanada locates equipment and people that are transported by air, land and water to ensure that regulatory guidelines are met.

8d. TransCanada locates equipment and people that are transported by air, land and water to ensure that regulatory guidelines are met.

Supplemental answers to Interrogatory 8 were provided by email communication dated April 7, 2015 several hours before the due date for filing motions to compel discovery. Counsel and his experts have not had sufficient time to determine if the responses are full and complete and otherwise consistent with Keystone's obligations under the Rules of Civil Procedure.

8a) No. The maximum response time is 12 hours.

8b) No. The maximum response time is 12 hours.

8c) The answer is yes.

8d) Keystone will develop contingency plans to speed emergency response during adverse conditions as part of the ERP. Keystone has emergency ingress plans for its existing pipelines and will formulate the same type of plan for the KXL pipeline.

Argument:

The answers to Interrogatory 8a-d are incomplete and non responsive and not made in a good faith effort to comply with Keystone's requirements under the Rules of Civil Procedure. The questions specifically pertain to the maximum response time required by federal law in an effort to determine that it has learned lessons from the Enbridge pipeline rupture in Marshall, MI. Keystone's answers ignore this specific response time commitment and references regulatory guidelines. Keystone's answers fail to state how much equipment and personnel it plans to provide in order to comply with response standards. Instead Keystone merely references the existence of regulations without stating how it intends to comply with these regulations. Accordingly, the Rosebud Sioux Tribe requests that the PUC issue an order compelling Keystone to provide a responsive and full answer consistent with the requirements of the Rules of Civil Procedure.

Again, due to the late filing of these supplemental responses, counsel for RST and his experts have not had ample opportunity or time to review the answers provided to determine if they are full and complete responses which are consistent with the requirements of the Rules of Civil Procedure. Also, this information has been provided several hours prior to the deadline for filing motions to compel and just a few days prior to the deadline established by the Commission for Rosebud to pre-file its written testimony.

Interrogatory No. 9:

b) a description summarizing each entity's ownership and the operating relationships with each other. This description and the chart in (a) must show, but not be restricted to:

- a. the ownership of each entity and the jurisdiction in which each entity is registered;
- b. the general and limited partners in TransCanada Keystone Pipeline LP; and
- c. the respective roles and responsibilities of TransCanada Keystone Pipeline LP and TransCanada in managing the limited partnership (TransCanada Keystone Pipeline LP) and operating the pipeline;

c) confirmation as to whether the limited partners of TransCanada Keystone Pipeline LP and/or its parent or other affiliates would or would not provide financial backstopping to the limited partnership should it be unable to pay its creditors. If confirmation is not possible at this time, please indicate whether this backstopping would be an option these parties would consider when the Project is placed in service;

e) a summary of TransCanada Keystone Pipeline LP's distribution policy that would determine how cash in the limited partnership would be distributed to the limited partners.

Keystone's Responses:

9b. This request seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. The request also seeks information that is confidential and proprietary.

9c. This request seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. The request also seeks information that is confidential and proprietary. In addition, this request calls for speculation about hypothetical events that Keystone cannot answer.

9e. This request seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. The request also seeks information that is confidential and proprietary.

Supplemented Answers:

9a) TransCanada Pipelines Limited wholly owns TransCanada Oil Pipelines, Inc. (TC Oil pipelines). TC oil Pipelines holds 100% of TransCanada Keystone Pipeline GP, LLC respectively, which are general partner and limited partner, respectively, of TransCanada Keystone Pipeline, LP.

Argument:

Again, due to the late filing of these supplemental responses, counsel for RST and his experts have not had ample opportunity or time to review the answers provided to determine if they are full and complete responses which are consistent with the requirements of the Rules of Civil Procedure. Also, this information has been provided several hours prior to the deadline for filing motions to compel and just a few days prior to the deadline established by the Commission for Rosebud to pre-file its written testimony.

TransCanada's capacity to fully clean up a spill in accordance with law depends to a substantial degree to ability to access the funds necessary to such effort. The spill cleanup from Enbridge Line 6b to date has cost approximately \$1.2 billion, which is a substantial sum even for a large company such as TransCanada. Therefore, TransCanada's financial capacity and its ability to acquire funds from affiliated entities for the purpose of responding to a spill in South Dakota is directly related to its ability to comply with Final Permit Conditions 1 and 2.

Furthermore, Keystone asserts boilerplate objections which should be rejected and overruled by the PUC. The boilerplate objections are asserted without any effort to provide a

nexus between the information sought and the objection raised. The objection is made in violation of SDCL 15-6-26(b)(5). The questions seek information that is relevant to the evaluation of Keystone's financial coverage in the event of a spill. As such, the information sought is likely to lead to admissible evidence. Furthermore, as in other objections, Keystone makes no reference to any law conferring protected status over the answers to the questions. The Rosebud Sioux Tribe asks the PUC to overrule the objection and to compel Keystone to fully and properly answer the question consistent with the Rules of Civil Procedure.

Interrogatory No. 10:

References:

- (i) Amended Permit Conditions 45 - 49.

Requests:

- a) Please describe the type and amount of insurance that would be held by and/or for TransCanada Keystone Pipeline LP¹ during the Project's construction phase. Please include details of the risk analysis performed, assumptions made, and supporting data considered in evaluating the coverage limits proposed.
- b) Please describe the type and amount of spill liability insurance that would be held by and/or for TransCanada Keystone Pipeline LP² during the Project's operation phase. Please include details of the risk analysis performed, assumptions made, and supporting data considered in evaluating the coverage limits proposed.
- c) Please confirm that the spill liability insurance applies exclusively to TransCanada Keystone Pipeline LP's pipeline system and cannot be used for any other pipeline or any other TransCanada business unit. If this cannot be confirmed, please identify the TransCanada corporate entities covered by this insurance.
- d) Please provide an overview of the key elements in the spill liability insurance including the facilities and business functions and related activity risks that are covered by the spill liability insurance program, the name of the insurance provider and the provider's credit

¹ Insurance held for TransCanada Keystone Pipeline LP could include insurance held directly by TransCanada Keystone Pipeline LP, as well as insurance held by TransCanada (the parent corporation) and affiliated entities if that insurance provides coverage for TransCanada Keystone Pipeline LP.

² Insurance held for TransCanada Keystone Pipeline LP could include insurance held directly by TransCanada Keystone Pipeline LP, as well as insurance held by TransCanada (the parent corporation) and affiliated entities if that insurance provides coverage for TransCanada Keystone Pipeline LP.

rating.

- e) Please describe the conditions, circumstances, or exclusions, if any, under which the spill liability insurance would not cover the losses of TransCanada Keystone Pipeline LP and/or third parties in the event of a large oil spill. For clarity include a list of the standard risks and non-standard risks that are excluded from this insurance program.
- f) If the response to d) confirms that the spill liability insurance may not cover all losses and liabilities, please:
 - a. describe how TransCanada Keystone Pipeline LP would financially cover any losses and claims for spills, malfunctions, or other potential liabilities in excess of its insurance coverage during the life of the pipeline system; and
 - b. describe and quantify, to the extent possible, the role of cash from operations, tariff provisions, indemnities, bonds, letters of credit, parental guarantees, cash reserves, or other instruments that would be available to cover these potential liabilities. Regarding cash from operations and cash reserves, illustrate the financial capacity that these cash items could provide.
- g) Please explain whether TransCanada Keystone Pipeline LP's spill liability coverage amount has changed (or will change) as a result of the increased capacity proposed for the pipeline system if the Project is approved and would operate in addition to Base Keystone. Include any risk analysis performed and assumptions made to determine this level of coverage for the period after the Project goes into service.
- h) Regarding the spill liability insurance, please describe:
 - a. the priority of payments for the components of insurance claims for spill events, such as clean-up costs, remediation costs, and third party liability claims;
 - b. how first party (TransCanada Keystone Pipeline LP) and third party claims are managed, including the priorities and the allocation of coverage for each of these parties; and
 - c. whether the coverage is per event or for more than one event in an insurance year.
- i) Please provide the total insurance coverage amount for spill liability for TransCanada Keystone Pipeline LP, and confirm that any cash recovery for spill claims would be in addition to and separate from any recovery from the General Liability insurance program for claims not involving spills. If this cannot be confirmed, please explain the methodology for allocating the total insurance coverage among competing claims if the total claims exceed the spill liability coverage limit.

Keystone Responses:

- a) During construction TransCanada Keystone Pipeline would look to secure a dedicated general liability insurance policy including sudden and accidental pollution coverage with a limit not less than US\$200 million.

b) During operations TransCanada Keystone Pipeline would look to secure a dedicated general liability insurance policy including sudden and accidental pollution coverage with a limit not less than US\$100million. In addition to the dedicated policy, TransCanada's corporate general liability policy would provide excess coverage. This policy covers all of TransCanada's controlled companies and subsidiaries and would include TransCanada Keystone Pipeline operations. Should a specific claim or claims within a policy year result in significant decrease of these limits, TransCanada would seek to reinstate the limits.

d) The policy would respond to the legal liability for third party liability claims, clean-up costs and remediation costs. There are a variety of insurance companies that participate in TransCanada insurance policies, but each must have a minimum Standard & Poor's rating of A-.

e) General liability insurance policies have standard exclusions typical for a company in the liquid pipeline industry including but not limited to i) liabilities arising from gradual seepage, ii) fines and penalties, iii) and other exclusions not relevant to spills. TransCanada Keystone Pipeline is unable to confirm that the exclusions in place today will remain in effect for the life of the project or if new exclusions will be added at a later date.

f)(a) we can't confirm how the insurance policy will or will not respond to losses and claims in the future, as every spill incident is unique. (b) Keystone is still preparing an answer to this interrogatory, and will provide a supplement as soon as possible. Supplement provided for (a) we can't confirm how the insurance policy will or will not respond to losses and claims in the future as every spill incident is unique, In the event of a spill, Keystone will identify the costs associated with spill response and recovery activities, remediation, and potential third party damages. Based on such an analysis, Keystone will identify the levels and types of financial resources required to meet its

obligations. Supplement provided for (b) In the event of a spill, Keystone will identify the costs associated with spill response and recovery activities, remediation and potential third-party damages. Based on such an analysis, Keystone will identify the levels and types of financial resources required to meet its obligations.

g) Our approach has not changed.

h) (a) there is no priority of payments for the components of an insurance claim for spill events. (c) The policy is per occurrence, with an aggregate for the policy year.

i) This can't be confirmed. Insurance claims are made to the policy on a first occurring basis.

Argument:

Consistent with the spirit and intent of broad discovery as previously stated the answers provided, including the supplements, are non responsive to the questions and incomplete and were not provided in good faith effort to comply with the Rules of Civil Procedure. The answer does not include details of the risk analysis performed, assumptions made and supporting data that was considered in evaluating the coverage limits proposed. A proper answer would include these details.

10a) The answer provided is incomplete and nonresponsive as it does not include details of the risk analysis performed, assumptions made and the supporting data that was considered in evaluating the coverage limits proposed. The request seeks information relevant to the evaluation of TransCanada's financial coverage in the event of a spill. In Keystone's answer to 10 b), Keystone states that "[i]n addition to the dedicated policy, TransCanada's corporate general liability policy would provide excess coverage." A complete, responsive answer would indicate if this excess coverage also applies

in the construction phase and would describe the type and the amount of insurance held in TransCanada's corporate general liability policy. A complete, responsive answer would confirm that this \$200 million dedicated general liability insurance policy for the construction period is specific to Keystone XL in South Dakota, Nebraska and Montana. If not, the answer would explain what the \$200 million dedicated general liability insurance policy for the construction period covers (in terms of states and project).

10b) The answer provided is incomplete as it does not include details of the risk analysis performed, assumptions made and supporting data that was considered in evaluating the coverage limits proposed. In answer to 10 b), Keystone states that "[i]n addition to the dedicated policy, TransCanada's corporate general liability policy would provide excess coverage." A complete answer would describe the type and the amount of insurance held in TransCanada's corporate general liability policy and would confirm that this \$100 million dedicated general liability insurance policy for operations is specific to Keystone XL in South Dakota, Nebraska and Montana. If not, Keystone should be required to explain what the \$100 million dedicated general liability insurance policy for operations would cover (in terms of states and project). In the supplemental answer to IR 12, Keystone confirms that Keystone XL will have \$200 million in aggregate third party liability insurance to cover spills in SD and all other states (including MT and NE). A complete answer would identify if this \$200 million in aggregate third party liability insurance is a separate policy from the "dedicated general liability insurance policy including sudden and accidental pollution coverage with a limit not less than US\$100 million" for operations? It would also state if the \$100 million in dedicated general liability insurance is a subset of the \$200 million in aggregate third party liability insurance? We asked for Keystone to explain in detail how the \$200 million in aggregate third party liability insurance (described in response to IR 12) relates to the \$100 million in dedicated

general liability insurance for operations referred to in response to IR 10 b), which Keystone has refused to do. Given the supplemental answer to IR 12, we requested Keystone to modify the answer to 10 b) to integrate the new information from IR 12 if applicable, including the details of the risk analysis performed, assumptions made, and supporting data considered in evaluating the coverage limits proposed. Keystone has failed to correct these responses and requests for information.

10d) The answer is incomplete. We have asked Keystone for an overview of the key elements in the spill liability insurance coverage including the facilities and business functions and related activity risks that are covered by the spill liability insurance program, the name of the insurance provider and the provider's credit rating. Keystone has not provided this information. Keystone did tell us that the policy would respond to the legal liability for third party liability claims, clean-up costs and remediation costs; but Keystone has not told us how the \$200 million in aggregate third party liability insurance (described in response to IR 12) relates to the \$100 million in dedicated general liability insurance for operations referred to in response to IR 10 b). Nor has Keystone told us the names of the insurance providers and amounts and types of coverage for the "variety of insurance companies that participate in TransCanada insurance policies."

10e) The answer provided is incomplete as it does not describe the conditions, circumstances or exclusions, if any, under which the spill liability insurance would not cover the losses of TransCanada Keystone Pipeline LP and or third parties in the event of a large oil spill. The answer did also not provide the requested standard risks and non-standard risks that are excluded from the insurance program. The answer is non responsive to the question and incomplete.

10f) (a) The answer provided is incomplete and non responsive to the interrogatory. The question asked about how Keystone would potentially cover losses in excess of its insurance, not for a confirmation of how the insurance policy will or will not respond to a loss or claim. The answer tells us nothing about how Keystone would cover losses in excess of its insurance. This non-responsive answer impacts our ability to evaluate the adequacy of financial coverage in the event of a spill. (b) The answer, although supplemented, is incomplete and non responsive to the interrogatory. The question asked Keystone to describe and quantify the role of cash (from various sources, including operations, and cash reserves) that would be available to cover liabilities (such as spills and malfunctions) and then to illustrate the financial capacity that cash from operations and cash from reserves could provide. Simply telling us that Keystone will identify the costs associated with a spill after the fact does not answer the interrogatory. This non-responsive answer also impacts our ability to evaluate the adequacy of financial coverage in the event of a spill.

10g) The answer is incomplete. The Interrogatory asks Keystone to confirm if the spill liability coverage will change and by how much it will change, as result of the increased capacity proposed for the Project (from Base Keystone to Base Keystone + Keystone XL)including any risk analysis performed and assumptions made to determine the change in the level of coverage.

The answer is non-responsive to the Interrogatory and incomplete.

10h) (a) This answer seems unlikely. We asked Keystone to confirm the answer that "[t]here is no priority of payments for the components of an insurance claim for spill events." In other words, we are asking for confirmation that TransCanada's spill liability insurance would have no plan to prioritize clean-up costs, remediation costs and third party liability claims? We also asked that if there is a priority of payments between these costs, to describe it. (c) TransCanada has not provided

the aggregate amount of the insurance policy. We requested Keystone to provide a complete answer with details on the aggregate amount for the insurance year and ask the PUC to compel the same.

10i) The answer is incomplete. We asked Keystone to confirm that the answer is complete at this time, which they have failed to do.

Interrogatory No.: 11

a) Please provide the following for TransCanada Keystone Pipeline LP for the first full year and the fifth full year following Project commissioning:

- a. operating cash flow projections that identify net income and other components of cash flow; and
- b. the estimated total asset and liability values and their main components.

b) Please describe the following aspects of TransCanada Keystone Pipeline LP's cash management as anticipated at this time:

- a. the estimated per cent of total cash flow from TransCanada Keystone Pipeline LP's operations that would be distributed to the partners of the limited partnership over the first five years of operation following Project commissioning; and
- b. the estimated cash or near cash that TransCanada Keystone Pipeline LP plans to retain on its balance sheet by the end of the fifth full year of operation after Project commissioning.
- c) With respect to the potential for self-insurance (should the spill liability coverage be exceeded), please explain how TransCanada Keystone Pipeline LP would ensure that it has unfettered access to these funds at all times, and indicate if TransCanada Keystone Pipeline LP will segregate the self-insurance funds from its general funds.

d) In the case of a spill incident, please explain the amount of cash that TransCanada Keystone Pipeline LP could access within 10 business days to pay some or all of the clean-up and remediation costs and to compensate third parties for some losses and damages while any insurance claims are being processed. Please describe the financial instruments that TransCanada Keystone Pipeline LP will use to ensure this unfettered access to funds.

Keystone Responses:

a) This request seeks information that is confidential and proprietary and the disclosure of which would be damaging to Keystone. This request also seeks information that is not relevant and not likely to lead to the discovery of admissible evidence.

b) This request seeks information that is confidential and proprietary and the disclosure of which would be damaging to Keystone. This request also seeks information that is not relevant and not likely to lead to the discovery of admissible evidence.

c) This request seeks information that is confidential and proprietary and the disclosure of which would be damaging to Keystone. This request also seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. (Supplemented Answer) Notwithstanding the objection, in the event of a spill, Keystone will identify the costs associated with spill response and recovery activities, remediation and potential third party damages. Based on such an analysis, Keystone will identify the levels and types of financial resources required to meet its obligations.

d) This request seeks information that is confidential and proprietary and the disclosure of which would be damaging to Keystone. This request also seeks information that is not relevant and not likely to lead to the discovery of admissible evidence. (Supplemented Answer) Notwithstanding the objection, in the event of a spill, Keystone will identify the costs associated with spill response and recovery activities, remediation and potential third party damages. Based on such an analysis, Keystone will identify the levels and types of financial resources required to meet its obligations.

Argument:

Keystone fails to properly raise its objections consistent with the requirements of 15-6-26(b)(5) in that they asserted a blanket objection based on confidentiality. Contrary to Keystone's position, its annual and quarterly filings with the U.S. Security and Exchange Commission ("SEC") likely show its lines of credit and available cash. Similarly, the costs of any major spill cleanup would be reported on its Form 6 filings to the Federal Energy Regulatory Commission ("FERC") as a "casualty or loss." Thus, information showing Keystone's general ability to finance the costs of response to a major spill is not confidential information.

This interrogatory seeks information that is relevant to analyzing and determining financial coverage in case of a spill scenario and is central to the ability to evaluate the adequacy of financial coverage in the event of a spill scenario. The information sought is reasonably calculated to lead to the discovery of admissible evidence. RST requests the commission to overrule the objections and compel Keystone to produce an answer that is responsive to their obligations under the Rules of Civil Procedure.

Interrogatory No.:12

- a) Please confirm that Keystone has committed to \$200 million in third-party liability insurance in both Nebraska and Montana. If not, please explain.
- b) Does this imply that there is \$200 million in third-party liability insurance available specifically to cover a spill in Nebraska; and another \$200 million in third-party liability insurance available specifically to cover a spill in Montana? If not, please explain.
- c) Does Keystone plan to offer third-party liability insurance available specifically to cover a spill in South Dakota? If not, please explain.
- d) Has Keystone considered what level of third-party liability insurance should be available specifically to cover a spill in South Dakota? Please explain.

Keystone Responses:

First response to IR 12(a-d): Keystone is still preparing an answer to this interrogatory, and will provide a supplemental answer as soon as possible.

Supplemented Responses:

- a) Keystone XL undertakes to commit to \$200 million in third party liability insurance in both Nebraska and Montana when required.
- b) No, there will be a \$200 million third party liability policy covering Keystone XL on an aggregate basis.
- c) No, Keystone XL would have an aggregate third party liability insurance to cover spills in South Dakota and all other states.
- d) Yes, a minimum of \$200 million.

Argument:

The answers provided are confusing and raise ambiguity with responses to other IRs. Rosebud's understanding from Keystone's supplemental response to IR 12 is that Keystone XL will have \$200 million in aggregate third party liability insurance to cover spills in SD and all other states (MT and NE). In evaluating the adequacy of the supplemental response to IR 12, we have found a seeming ambiguity with the **response in 10b**, in which Keystone confirmed that "[d]uring operations, TC would look to secure a dedicated general liability insurance including sudden and accidental pollution coverage with a limit of no less than US\$100M." The response leads to confusion as to whether the \$200 million in aggregate third party liability insurance (referred to in response to IR 12) is a separate policy from the "dedicated general liability insurance policy including sudden and accidental pollution coverage with a limit not less than US\$100 million" for operations (referred to in response to IR 10b). Or is the \$100 million in dedicated general liability insurance (as per the response to IR 10b) a subset of the \$200 million in aggregate third party liability insurance (as per the response to IR 12)? Keystone failed to adequately and responsively explain in detail how the \$200 million in aggregate third party liability insurance (described in response to IR 12) relates to the \$100 million in dedicated general liability insurance for operations referred to in response to IR 10b.. The supplemental answer in IR 12 may also require Keystone to modify answers to 10b, d, and h to be consistent with the new information provided in response IR 12. Rosebud requests that the Commission compel Keystone to fully and responsively answer the Interrogatory.

Conclusion

Keystone has indicated that they will stand on the remaining answers/and or objections as contained in their responses. Based on the foregoing reasons the Rosebud Sioux Tribe requests the Public Utilities Commission to grant the Rosebud Sioux Tribe's Motion to Compel and to order Keystone to produce answers to the Rosebud Sioux Tribe's First and Second Set of

Interrogatories and Requests for Production of Documents as enumerated in the foregoing Motion and to issue an order requiring the payment of costs and expenses consistent with statute.

Dated this 7th day of April, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I certify that on this 7th day of April, 2015, the original of this Motion to Compel Discovery on behalf of the Rosebud Sioux Tribe in Case Number HP-14-001 was filed on the Public Utilities Commission of the State of South Dakota e-filing website and also that on this day and a true and correct copy was sent via email and/or U.S. Mail first class postage prepaid to the following persons, as designated:

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