

**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

JOINT MOTION FOR
CONTINUANCE
AND RELIEF FROM
SCHEDULING ORDER

HP14-001

The following parties, Dakota Rural Action, Rosebud Sioux Tribe, Yankton Sioux Tribe, Bold Nebraska, the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe, through the undersigned counsel, request the Commission grant equitable relief from the scheduling order and to continue the evidentiary hearing scheduled for May 5-8, 2015 as noticed in the PUC Notice of hearing Order dated April 17, 2015. Counsel for Rosebud Sioux Tribe affidavit in support of this motion is attached hereto and incorporated by reference as if reiterated in full herein.

The Commission issued its initial Scheduling Order on December 17, 2014 over the objections of the interveners, who requested a period of time that would allow the parties to engage in a meaningful discovery process consistent with the South Dakota Rules of Civil Procedure and fundamental notions of due process, justice and fair play. Following the initial Scheduling Order, there have been four requests to amend the procedural schedule, three of which have been granted. With the exception of the Staff's Motion to Amend Procedural Schedule which requested a date to file and serve witness and exhibit lists, all of the requests to amend the procedural schedule alleged procedural scheduling deficiencies related to the application of the South Dakota Rules of Civil Procedure. Although the Commission and the

applicant are taking the position that discovery is complete, the facts on the record show otherwise.

The Commission is authorized to grant continuances pursuant to SDCL 15-11-4. Generally speaking, the decision to grant or refuse a continuance lies with the sound discretion of the trial court. *Olesen v. Snyder*, 277 NW 2d 729 (1979). In this case, that sound discretion rests with the Commission. These types of decisions will not be reversed on appeal in the absence of an abuse of discretion. *Farmers and Merchants State Bank v. Mann*, 203 N.W. 2d 173. Additionally, courts may grant continuances upon terms that the court may impose. We are asking for a continuance because discovery is not yet complete. It is entirely unreasonable for the trial to be scheduled, despite the fact that the Commission and Keystone have taken the position that discovery is complete when it is in fact not complete. The parties submit that it is an abuse of discretion to require a trial to take place when discovery is not complete and when the parties have not had a sufficient time to meaningfully review documents produced as a result of the Order to Compel Production. Other Motions will be filed by the parties that address these issues.

Requiring a trial to take place prior to the completion of discovery is an act that is arbitrary, capricious, violates the South Dakota Rules of Civil Procedure as well as fundamental principles of due process and fairness. This action is in violation of the rights of the parties as those rights are protected and understood under the Constitution and Laws of the State of South Dakota and the United States Constitution.

South Dakota Supreme Court addressed this basic concept many years ago in *Mordhorst v. Egert*, 223 NW 2d 501 (SD 1974) when it held ““It is one of the mainstays of our system of

laws that a state cannot affect a person's personal or property rights except after a hearing before a fair and impartial tribunal. * * * A fair and impartial tribunal requires at least that the trier of fact be disinterested * * * and that he also be free from any form of bias or predisposition regarding the outcome of the case * * *. Not only must the procedures be fair, 'the very appearance of complete fairness' must also be present. * * * These principles apply not only to trials, but equally, if not more so, to administrative proceedings. (citations omitted)" *Wall et al. v. American Optometric Association, Inc. et al.*, 379 F.Supp. 175 (N.D.Ga., filed April 19, 1974).

On March 31, 2015, the Commission issued two Orders amending the procedural schedule and issued one Order that denied Standing Rock Sioux Tribe's motion to amend the procedural schedule. The first Order did several things. The Commission granted Rosebud Sioux Tribe's Motion to Amend Scheduling Order, to change Rosebud's deadline for filing pre-filed testimony. The Second Order granted the Staff's Motion to include a date for filing and serving witness and exhibit lists. Finally, the March 31st Order pertaining to Rosebud's Motion to Amend included a scheduled date to file discovery motions to compel, and scheduled discovery hearings for April 14, 2015. This Order further established April 17, 2015 as the date to provide compelled discovery. The March 31st Order pertaining to the Staff's Motion to Amend Procedural Schedule established April 21, 2015 as the date to file and serve witness and exhibit lists. The Commission, again, on April 8, 2015 amended the Scheduling Order regarding the Rosebud Sioux Tribe's date to file testimony. As you will see, the March 31st Order left the parties 5 business days to review, respond and assess the adequacy of over 6000 files prior to the date to file rebuttal testimony on April 27, 2015.

Following a hearing on April 14, 2015 which lasted over ten hours, the PUC issued three separate orders that compelled Keystone to produce responses to certain interrogatories and

request for production of documents made by Dakota Rural Action, the Standing Rock Sioux Tribe and the Yankton Sioux Tribe. Bold Nebraska and the Rosebud Sioux Tribe are both entitled to the same compelled document production because both Bold Nebraska and the Rosebud Sioux Tribe requested that Keystone provide them all of their discovery responses to all other parties under Keystone's continuing duty to supplement their discovery responses. In total, Keystone was compelled to produce answers to 16 interrogatories in addition to 35 document production requests.

Since the issuing of the Amended order that required witness and exhibit lists to be filed with the Commission on April 21, 2015, the parties have stipulated to April 28, 2015 as the new date to file witness and exhibit lists. Although the parties stipulated to this new date for filing witness and exhibit lists, the undersigned parties in no way feel that the new date satisfies underlying concerns that there is not sufficient time in the schedule to allow the discovery process to be completed prior to the scheduled evidentiary hearing taking place. The instant motion is based on the grounds that there is not sufficient time in the procedural schedule to resolve discovery disputes and complete the discovery process in a meaningful manner prior to starting the trial in this matter.

Additionally, if other witnesses are identified based on a review of the new information, these parties will be permitted to present that testimony at the evidentiary hearing as rebuttal testimony, however the incredibly condensed schedule does not actually permit this to take place. Again, adding to the numerous due process violations that have already taken place. These arguments were presented to the Commission through several motions filed by various parties. Each reasonable request for relief from the schedule to properly amend the schedule to account for these requirements has been summarily rejected by the Commission. There is not

ample time to review the information to make a proper determination as to whether or not Keystone has in fact actually fully complied with the Order to Compel Discovery. This results in an additional due process violation as the Rules of Civil procedure provide for this to take place and contemplates that even though parties are compelled or ordered to do certain things, parties to proceedings may not actually do what they are ordered to do. It is worthy to note that Keystone has objected to providing this discovery since at least March 10, 2015. Some of their objections were overruled with the Commission ordering that Keystone be compelled to produce discovery.

Late in the afternoon of April 17, 2015, Keystone made confidential and non-confidential data available electronically in response to the PUC's Order to Compel Production. The confidential data consists of 2,508 files and is contained in 222 folders and consists of 35.7GB of data. The non-confidential data consists of 3,706 files and is contained in 419 folders and is 6.84GB of data. The total amount of documents produced by Keystone is 42.54 GB of data, consisting of 6,214 total files. Due to the limiting nature of the protective order concerning confidential information the parties have not even been able to share the information with experts for purposes of determining actual confidentiality and for the preparation of testimony and exhibit lists. These concerns are being taken up by separate motion.

Upon receipt of the compelled discovery on Friday, April 17th in the late afternoon the parties immediately set out to access the data and transfer to a secured cloud service. Due to the large quantity of data, the number of files provided by Keystone, the inefficient manner in which the information was provided and security concerns with the site utilized by Keystone, it took a considerable amount of time to even do this. This leaves the parties facing an unreasonable and

impossible deadline to fully prepare for the trial of this matter, to file rebuttal testimony by April 27, 2015 and be prepared for a May 5, 2015 trial.

Despite numerous and repeated reasonable requests to adjust the procedural schedule in a meaningful manner, the PUC continues to cling to an unreasonably condensed schedule which is impossible to comply with and unnecessarily restricts the fact-finding process of discovery. The continued application of the current schedule violates all of the parties' due process rights in that it denies the parties the opportunity to participate meaningfully in the case and imposes unreasonable, unrealistic and arbitrary deadlines, especially given the enormity and complexity of the discoverable information already produced along with the information that Keystone produced on April 17, 2015.

The requirement that the enormous amount of data be reviewed for completeness and substance in time for the trial is unreasonable and impossible. Many of the parties are calling witnesses in the evidentiary hearing scheduled for May 5-8, 2015. These witnesses require the opportunity to review and properly analyze the compelled discovery. In addition to these concerns, the Protective Order concerning the compelled discovery limits the review process to "attorneys of record" and as such, prevents meaningful review of these materials by expert witnesses as well as legal support staff and others. Given the unrealistically condensed schedule for the case, it is also impossible to meaningfully review this data in time for the evidentiary hearing scheduled for May 5-8, 2015.

The Court in *Mordhorst* went on to state "that the absence of fundamental fairness in proceedings followed by the South Dakota State Board of Examiners in Optometry spawned this litigation. The trial court was asked to examine the situation and concluded that due process

requirements had been violated. We affirm and decide no more. However, this and other similarly constituted boards should re-examine their structures and procedures, remembering that the final refuge people have in all governmental procedures is that of due process, the eternal friend of justice and unrelenting foe of undue passion.”

The situation currently before the elected body of the Public Utilities Commission is no different. The guidance from the Court in *Mordhorst* is no less valuable today, than it was when was first uttered nearly a half century ago. Accordingly, the Commission should grant the party’s reasonable request for a continuance until such time as all disputes regarding discovery between the parties can be resolved. Only then can the Commission provide a completely fair environment for these important issues to be decided.

Based on the above and foregoing, the undersigned respectfully request the Commission to grant them equitable relief from the Notice of Scheduling Order and grant a continuance for the evidentiary hearing scheduled on May 5-8, 2015.

Dated this 24th day of April, 2015.

RESPECTIVELY SUBMITTED:

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CERTIFICATE OF SERVICE

I certify that on this 24th day of April, 2015, the original of this Joint Motion for Continuance, Affidavit in Support and Exhibits 1 and 2 on behalf of the Rosebud Sioux Tribe, Dakota Rural Action, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Bold Nebraska and Standing Rock 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 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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Matthew L. Rappold

**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

AFFIDAVIT IN SUPPORT OF
MOTION FOR CONTINUANCE

HP14-001

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

Affidavit of Matthew L. Rappold

I, Matthew L. Rappold, under penalty of perjury hereby state and affirm the following:

1. That I am one of the attorneys of record for the Rosebud Sioux Tribe in the above captioned matter.
2. I am informed and have personal knowledge of the affirmations contained herein, except any affirmations that are stated upon information and belief.
3. That the Rosebud Sioux Tribe submitted a proposed procedural schedule regarding this case upon the request of the Public Utilities Commission requesting a schedule that included a period of time that allowed for a meaningful discovery period to be completed that was prior to the scheduled trial for the application. Rosebud Sioux Tribe's suggested procedural schedule is attached as Exhibit 1 and is incorporated by reference herein.
4. That the Commission rejected the proposed procedural schedule over the objections of the parties and issued a highly compressed procedural schedule that did not provide any time period to complete discovery prior to the hearing being scheduled for trial.
5. That on March 25, 2015 the Rosebud Sioux Tribe filed a Motion to Amend Procedural Schedule requesting that the Commission amend the schedule to allow for a meaningful time period to complete the discovery process prior to the matter being scheduled for trial.
6. That the Commission amended the procedural schedule but did not account for or include into the amended schedule a meaningful time period to resolve discovery prior to the matter being scheduled for trial.
7. That on March 27, 2015 the Standing Rock Sioux Tribe submitted a Motion to Amend Procedural schedule to allow for a meaningful time period to resolve discovery prior to the matter being scheduled for trial.


8. That the Commission rejected the Standing Rock Sioux Tribe's Motion in its entirety.
9. That on March 31, 2015, the Indigenous Environmental Network filed a Motion in Support of the Motions to Amend the Procedural Schedule.
10. That on March 30, 2015 Bold Nebraska submitted its Motion in Support of the Rosebud Sioux Tribe and Standing Rock Sioux Tribe's Motions to Amend Procedural Schedule.
11. That on April 7, 2015 Dakota Rural Action, the Rosebud Sioux Tribe, the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe and the Indigenous Environmental Network filed a joint motion to stay the proceedings.
12. That the Joint Motion to Stay the proceedings was rejected by the Commission in its entirety.
13. That on April 7, 2015 Dakota Rural Action, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe and the Indigenous Environmental Network filed a Motion to Appoint a Special Master to assist the Commission with resolving ongoing discovery disputes.
14. That the Motion to Appoint a Special Master to assist the Commission with the ongoing discovery disputes.
15. That on April 8, 2015 the Rosebud Sioux Tribe filed a Motion to Amend the Procedural Schedule to allow for a meaningful time period in which to resolve discovery disputes prior to the matter being scheduled for trial.
16. That the Commission granted the motion in part and denied the motion in part but did not amend the schedule to permit a meaningful time period in which to complete ongoing discovery disputes prior to the matter being scheduled for trial.
17. That the other parties to this motion participated in a meet and confer call with attorneys for TransCanada on April 20, 2015 for the purposes of attempting to resolve ongoing disputes related to discovery, security matters associated with the manner by which TransCanada made documents electronically available to certain parties, issues associated with the scope of the protective order issued by the Commission, changing the date for filing witness and exhibit lists and TransCanada's designation of confidential materials that were provided by TransCanada pursuant to the Commissions Orders compelling TransCanada to provide discovery to certain parties.
18. That by email dated April 20, 2015, counsel for TransCanada, Bill Taylor informed the parties that TransCanada would agree to extend the date to file witness and exhibit lists to April 28, 2015. The extension of the date to file witness and exhibit lists did nothing to address or resolve the underlying issues of disagreement between the interveners and TransCanada.

19. That by email dated April 21, 2015 counsel for TransCanada, Bill Taylor informed the parties that TransCanada would agree to certain modifications of current orders and conditions but ultimately would not agree to continue the hearing scheduled for May 5-8, 2015. This email correspondence is attached as Exhibit 2.

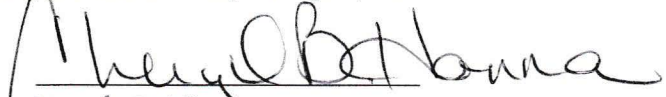
20. That the concessions offered by TransCanada were not acceptable to the parties because they did nothing to address or resolve the underlying concern of the parties, that being that the trial for this matter cannot take place until the discovery process is fully completed.

21. That as of the time of the filing of this motion to continue there are ongoing discovery disputes between the interveners and TransCanada that necessitates continuing the case until after the disputes can be resolved and the parties have been provided a meaningful opportunity to participate in the discovery process.

Dated this 24th day of April, 2015.


Matthew L. Rappold

Subscribed and sworn to before me, a Notary Public, on this 24th day of April, 2014.


Notary Public



My Commission Expires: 12-4-19

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ROSEBUD SIOUX TRIBE
PROPOSED PROCEDURAL
SCHEDULE

HP14-001

COMES NOW, the Rosebud Sioux Tribe, by and through counsel, Matthew L. Rappold
and Eric Antoine and submits their proposed procedural schedule:

EVENT	DATE
Initial discovery requests due from all parties.	8 weeks from date Scheduling Order issued by the Commission.
Responses to initial discovery requests due.	4 weeks after the initial discovery request due date.
Hearing on discovery requests (if needed).	2 weeks after date for responses to discovery requests are due.
Supplemental discovery requests due.	6 weeks after responses to initial discovery request received.
Responses to supplemental discovery requests due.	4 weeks after the supplemental discovery request due date.
Hearing on supplemental discovery requests (if needed).	2 weeks after date for responses to supplement discovery requests are due.
Additional Applicant pre-filed testimony due; Commission staff pre-filed testimony due.	4 weeks after final hearing on discovery requests and compliance with any orders issued as a result of a hearing, or after compliant responses are received.
Intervenor pre-filed testimony due.	4 weeks after additional Applicant and Commission Staff testimony filed.
Applicant rebuttal testimony due.	4 weeks after Intervenor testimony filed.

Prehearing conference with all parties	4 weeks prior to hearing date.
Evidentiary hearing.	4 weeks after Applicant rebuttal testimony filed.

Dated this 1st day of December, 2014.

RESPECTFULLY SUBMITTED:



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Yesterday's conference call

1 message

William Taylor <Bill.Taylor@woodsfuller.com>

Tue, Apr 21, 2015 at 10:54 AM

To: "robin.martinez (robin.martinez@martinezlzaw.net)" <robin.martinez@martinezlzaw.net>, "belli4law@aol.com" <belli4law@aol.com>, "Paul Blackburn (paul@paulblackburn.net)" <paul@paulblackburn.net>, "matthew rappold (matt.rappold01@gmail.com)" <matt.rappold01@gmail.com>, "Thomasina Real Bird (TRealBird@ndnlaw.com)" <TRealBird@ndnlaw.com>, "Peter Capossela (pcapossela@nu-world.com)" <pcapossela@nu-world.com>, "kristen.edwards@state.sd.us" <kristen.edwards@state.sd.us>

We discussed the matters raised in yesterday's conference call with Keystone. Our response to the matters discussed follows.

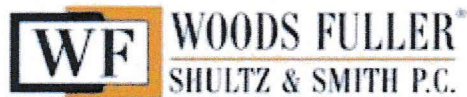
1. The non-protected materials have been posted to a Hightail site, which is up and running. By separate email I'll send connecting information and passwords. The protected materials will be posted to another Hightail site today, which should be available by late afternoon. In the meantime, the FTP sites continue in operation.
2. We look forward to DRA and Standing Rock reviewing their interrogatory/document requests and narrowing the scope of the broader inquiries.
3. As you peruse the documents, please let us know of any specific documents you think should not be denominated confidential and the reasons why, and we will review and consider your requests.
4. Keystone agrees that experts may review the confidential documents, provided that each agrees to be bound by the terms of the extant order(s) to the extent they govern document management, confidentiality, security, use and return of the documents. Keystone requires that you identify the experts to whom the documents will be shown in advance, that experts make their commitment in writing, and Keystone receive a signed copy of the commitment.
5. Keystone believes it is appropriate for lawyers who have permission to see the confidential documents to show them to co-counsel within their firms, provided co-counsel agree to be bound by the terms of the order(s). Presumably they are ethically bound to the terms of the order(s) anyway.

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6. Keystone will extend points four and five above to Ms. Spotted Eagle, with respect to the cultural surveys.
7. Keystone has separately addressed Standing Rock's request with respect to its HPO, through Mr. Caposella.
8. Ms. Edwards suggestion that the Commission enter an order memorializing our agreement to postpone witness/exhibit lists until the 28th is acceptable to Keystone, and I understand, acceptable to all other parties to yesterday's call.
9. Keystone will not agree to extend the date for hearing, or other milestone dates in the run-up to the hearing.

William Taylor



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