

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

IN THE MATTER OF:)	
)	Docket HP 14-001
)	
PETITION OF TRANSCANADA)	INTERTRIBAL COUP'S RESPONSE
KEYSTONE PIPELINE, LP FOR ORDER)	TO KEYSTONE'S OBJECTION TO
ACCEPTING CERTIFICATION OF)	COUP'S REQUEST FOR A TIME
PERMIT ISSUED IN DOCKET HP09-001)	CERTAIN AND MOTION TO
TO CONSTRUCT THE KEYSTONE XL)	PRECLUDE WITNESSES
PIPELINE)	

Comes now the Intertribal Council On Utility Policy (COUP), by and through counsel, Robert Gough, and hereby submits the following response to KEYSTONE'S OBJECTION TO COUP'S REQUEST FOR A TIME CERTAIN AND MOTION TO PRECLUDE WITNESSES.

Rebuttal Witnesses for Intertribal COUP

This statement is applicable to the following rebuttal witnesses Intertribal COUP has previously disclosed to TransCanada Keystone Pipeline, LP ("TransCanada"), namely: Dr. George Seiestad, Dr. Robert Oglesby and Dr. James Hansen.

TransCanada has moved the Commission to "preclude Dr. Hansen, Dr. Seielstad, and Dr. Oglesby from testifying [as Rebuttal Witnesses] based on their failure to timely submit prefiled testimony [for Direct Testimony]. This position is untimely and absurd as it relies upon imagined rebuttal testimony.

Intertribal COUP disclosed our witnesses and the scope of their testimony, but in reliance on citing SDCL §15-6-43(a), we did not pre-file our direct witness

testimony by the date set by the SD PUC based upon our reading of the law in this matter. COUP was overruled by the SD PUC, which imposed the harsh penalty of precluding our witnesses from offering direct testimony during the Re-Certification Hearing. During that preliminary hearing, Intertribal COUP reserved the right to have its witnesses appear as rebuttal witnesses, which was agreed to by the SD PUC. Based upon the PUC ruling, COUP will not file any "Direct Testimony" but will file, by leave of the PUC, Rebuttal Testimony from our three witnesses, as deemed necessary.

According to the transcript of the April 14, 2015 hearing at pages 191-192:

CHAIRMAN NELSON: Yes, Mr. Gough. I thought Mr. Gough who wanted to speak.

MR. GOUGH: Yes, Chairman. Point of clarification on the Motion regarding Dakota Rural Action and InterTribal COUP. Given what was resolved today, do I understand that we are precluded from bringing a written on direct? And that's the only preclusion, that we still have all of our rights for cross-examination and all other rights as parties, including providing rebuttal witnesses?

CHAIRMAN NELSON: That is my understanding. And I'm going to turn to Mr. Smith to make sure that I'm right on that.

MR. SMITH: That's my understanding of what you -- when I asked you the questions. And, again, it's a little unusual because of the weird way we're set up here this year in terms of -- but my understanding is that people have responsive testimony, and they're not -- and they wish to -- they're not -- and they do prefile, that that will not be precluded.

The agreed upon condition for Rebuttal Testimony is "that prefiled rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline." (Order, Apr. 23, 2015, at 2.) That deadline has since been extended until as per the April 30, 2015 hearing.

TransCanada's objections to our characterization of testimony as "direct" is moot, as that option has been precluded by the PUC already. TransCanada's objections are also untimely on additional two counts. First, TransCanada has no more information at the time of their filing their motion to preclude as to the testimony of COUP's proposed and disclosed witnesses and the likely scope of their testimony than they did at the hearing. They waited until COUP filed our motion for a "Time Certain" as directed by the PUC staff, and only then did they note their objection and desire to preclude our witnesses. If they had objections to the SD PUC advising COUP that it could provide 'Rebuttal Witnesses" they should have objected then and there at the April. Secondly, COUP has yet to pre-file our rebuttal testimony, so TransCanada appears to be pre-supposing too much.

Finally, TransCanada contends that COUP's proposed testimony is "direct testimony" and, not "rebuttal testimony".

First, TransCanada's motion appears to claim to divine the nature and content of our rebuttal testimony, without benefit of either our original 'direct testimony' which was not filed, as per the PUC ruling against COUP, or our soon to be pre-filed rebuttal testimony, which isn't due until . TransCanada has apparently imagined what elements of their own direct testimony may be subject to rebuttal and then have further imagined what our rebuttal testimony is going to be, and then have taken it upon themselves to deem it not rebuttal testimony and have moved to preclude it sight unseen.

Second, we agree with TransCanada that “rebuttal testimony is testimony responding directly to the testimony of another witness.” See, e.g., *State v. Phillips*, 489 N.W.2d 613, 618 (S.D. 1992) (stating that witness testimony was “improper rebuttal testimony as it did not rebut the evidence presented by” other witnesses who had offered direct testimony). The relevancy of COUP’s rebuttal testimony remains to be seen. Having finally waded through some of TransCanada’s document delivery available to Intertribal COUP, we find that TransCanada has opened the door to rebuttal testimony on the issues of “carbon emissions” and in the direct testimony of Mr. David Diakow with regard to Finding #27 and greenhouse gas intensity. In TransCanada’s update to Finding #27 it boldly states:

The DOS Final SEIS indicates that transportation of crude oil by pipeline is safer and less greenhouse gas intensive than crude oil transportation by rail.

Lastly, EPA’s comments on the FSEIS also compel an examination of greenhouse gas emissions intensity and climate change issues and the changes in our understanding and consequences of these emissions over the state of understanding in 2010.

CONCLUSION

TransCanada's motion to preclude COUP's rebuttal witnesses must be dismissed for the reasons cited above.

Submitted this 15th day of May 2015

Respectfully submitted,



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CERTIFICATION OF SERVICE

I, Robert Gough, hereby certify that on the 15 day of May, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the **INTERTRIBAL COUP'S RESPONSE TO KEYSTONE'S OBJECTION TO COUP'S REQUEST FOR A TIME CERTAIN AND MOTION TO PRECLUDE WITNESSES**, to the following:

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Dated this 15th Day of May, 2015.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'R. P. Gough', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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