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

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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  
SUPPLEMENTAL RESPONSE TO  
MOTION TO EXCLUDE TESTIMONY  
OF RICHARD KUPREWICZ**

**HP14-001**

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The Rosebud Sioux Tribe, by and through counsel of record, files its supplemental response in response to Keystone's Motion to Exclude Portions of Richard Kuprewicz's testimony. In support herein the following is stated.

By filing this supplemental response Rosebud in no way alters or amends its previous response, but rather submits information relevant to the determination of the matter presently before the PUC. In addition, to the following information, Rosebud again asserts that the motion to exclude expert testimony is not properly before the PUC because it is not presented in a manner that conforms with the Rules of Civil Procedure and the South Dakota Rules of Evidence as they apply to the determination of the admissibility of expert testimony. Rosebud asserts that the motion is not properly before the PUC and accordingly must be denied.

Both Keystone and the PUC Staff find difficulties in assessing the relevancy of the testimony sought to be excluded. The Report states that it addresses Keystone's ability to comply with Special Condition No. 32 of the PHMSA Special Permit Conditions as those requirements are made applicable to the proceedings by virtue of Amended Permit Conditions 1 and 3. Amended Permit Condition 3 requires compliance with the Final Environmental Impact Statement when completed by the U.S. Department of State. Appendix Z to the Final Supplemental Environmental Impact Statement imposes 59 Special Conditions for this project

and specifically replaces Keystone's request for a Special Permit. Satisfying the requirements of Appendix Z is referenced numerous times within the testimony submitted by Keystone. It should be noted that although the permit conditions make compliance with these requirements mandatory, this proceeding is the first time that Keystone must demonstrate the actual ability to comply with some of the conditions.

Kuprewicz's testimony and report analyzes Keystone's ability to comply with Special Condition 32 and draws expert conclusions and opinions based on that analysis. Special Condition 32 addresses Mainline and Check Valve Controls and requires Keystone to design and install mainline block valves and check valves on the Keystone XL system based on the worst case discharge as calculated by 49 C.F.R. 194.105. It also requires Keystone to locate valves in accordance with 49 C.F.R. 195.260 by taking into consideration elevation, population and environmentally sensitive locations to minimize the consequences of a release from the pipeline, amongst other requirements.

49 C.F.R. 194.105 requires each operator to determine the worst case discharge for each of its response zones and provide the methodology, including calculations, used to arrive at the volume. The same part also provides a formula requirement for use in making this determination. 49 C.F.R. 194.105 is attached as Exhibit 1 and incorporated by reference.

C.F.R. 194.105 (b) provides several methods to determine the worst case scenario discharge, which are based on either historical data or in the absence of historical data, the operators best estimate. Keystone chose to perform its requirements under this part based on historical data, rather than on its best estimate. Kuprewicz's testimony attacks the methodology used by Keystone to make a worst case-scenario discharge determination under the requirements

of C.F.R. 194.105(b). It calls into question Keystone's ability to comply with Special Condition 32 and the associated requirements of the PUC permit – Conditions 1 and 3. The information and opinions offered are relevant to a determination regarding Keystone's certification petition and the requirements of the law.

49 C.F.R. 195.260 one of the conditions within Special Condition 32, addresses the location of valves and where they must be installed. It is attached as Exhibit 2 and incorporated by reference. It provides in part that a valve must be installed at each of the following locations (c) "on each mainline at locations along the pipeline system that will minimize damage or pollution from accidental hazardous liquid discharge, *as appropriate for the terrain in open country*, for offshore areas or for populated areas." The area designated as High Landslide Risk Areas are considered terrain in open country, consistent with and Keystone's valve placement should be appropriate for that area. (emphasis added) The report opines at page 6 that:

Assuming that the pump stations have bypass arrangements with check valves and remotely operated valving, the pump stations are situated approximately every 50 miles, and mainline valving appears to have been placed to meet Special Condition PHMSA Recommendation No. 32, placing mainline valves at less than (although not much less than) 20 miles to isolate segments of the pipeline. While there is no exact science to valve placement on a pipeline, the elevation profile plays a major role in such valving decisions. When LSHR High Risk areas associated with possible landslide are incorporated as shown in figure 1, and worst case rupture scenarios calculated, it becomes clear that the proposed TC valving is seriously inadequate for a high throughput large diameter pipeline in a location of considerable elevation changes.

This is evidence that is relevant to the issue before the PUC regarding certification and the ability to comply with permit requirements. It is helpful to the finder of fact in reaching a decision on this ultimate issue. This evidence happens to conflict with statements made by and the miniscule evidence offered by Keystone regarding compliance with the same permit

condition. Keystone has put forth no specific evidence or testimony that is demonstrative of their ability to comply with the requirements of Special Condition 32.

The report opines that a worst case discharge scenario would produce a release of slightly over 60,000 barrels of oil, subject to a variety of factors detailed in the report. This represents a vastly different worst case discharge scenario than that is presented by Keystone.

While many of Keystone's witnesses put forward direct testimony that Keystone will comply with the 59 Special Permit Conditions required by PHMSA, the same witnesses rarely put forward any evidence to support the assertion that they intend to comply with those conditions. Furthermore, no witness has stated with any degree of particularity how Keystone intends on complying with Special Permit Condition 32 and each of its requirements.

Amended permit conditions 1 and 3 specifically require that Keystone comply with all of the requirements as contained in the PHMSA Special Conditions, which also includes continued compliance with SDCL 49-41B-22. It necessarily follows that Keystone is required to put on evidence to establish compliance with all of the permit conditions as a matter of law in order to satisfy its burden of proof under the certification proceeding. The existing permit creates a presumption that Keystone can comply with its requirements, including requirements of the Pipeline Safety Act. At the evidentiary hearing, Keystone must carry its burden of proof by demonstrating that this condition has not changed. As an intervening party, the Rosebud Sioux Tribe has the right and the opportunity to present relevant evidence to this end. The testimony and evidence offered by Richard Kuprewicz satisfies this standard and should be considered by the PUC in this case.

The testimony and evidence provided by Kuprewicz is directly relevant to Keystone's ability to comply with the requirements of Special Condition No.32 as it relates to the pipeline route. The report mentions rerouting the pipeline. We acknowledge that the PUC does not have the authority to do that and are not suggesting that it do so. However, Keystone chose this route and the PUC approved it subject to conditions. Keystone cannot now be permitted to divorce their chosen route from the dangers associated with the route along with the requirements of the law. Kuprewicz's report reaches the conclusion that no level of mitigation efforts or requirements could adequately account for the inherent dangers associated with the placement of a pipeline of this size and magnitude in areas designated as High Risk for Landslide Potential. This opinion provides relevant information to inform the fact finder in reaching their conclusion regarding the applicant's ability to meet their burden of proof. It is relevant to the matter before the condition and it is helpful to the finder of fact in reaching a decision.

The PUC considered each and every requirement of the Pipeline Safety Act in assessing the ability of Keystone to comply with the requirements of the law, when it issued the amended permit and condition to construct the project. In order to reach the conclusion that Keystone can comply, the PUC must have considered evidence and testimony on the same subjects that Keystone now desires to exclude. It is a logical conclusion that in the certification proceeding the PUC will hear evidence presented by Keystone regarding satisfying the condition that they maintain the ability to comply with the requirements of the permit and the law, regardless of the source or origin of that law.

Based on the above and foregoing, the motion to exclude testimony of Richard Kuprewicz should be denied.

Dated this 9<sup>th</sup> day of June, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I certify that on the 10<sup>th</sup> day of June, 2015, on behalf of the Rosebud Sioux Tribe, the original Supplemental Response to Motion to Exclude Testimony of Richard Kuperewicz, RST Exhibits 1, 2 and 3 in Case Number HP-14-001 was filed with 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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**Pipeline and Hazardous Materials Safety Admin., DOT**

**§ 194.107**

than 50 percent of the specified minimum yield strength of the pipe,

(4) Is located within a 5 mile (8 kilometer) radius of potentially affected public drinking water intakes and could reasonably be expected to reach public drinking water intakes, or

(5) Is located within a 1 mile (1.6 kilometer) radius of potentially affected environmentally sensitive areas, and could reasonably be expected to reach these areas.

[58 FR 253, Jan. 5, 1993, as amended by Amdt. 194-3, 63 FR 37505, July 13, 1998]

**§ 194.105 Worst case discharge.**

(a) Each operator shall determine the worst case discharge for each of its response zones and provide the methodology, including calculations, used to arrive at the volume.

(b) The worst case discharge is the largest volume, in barrels (cubic meters), of the following:

(1) The pipeline's maximum release time in hours, plus the maximum shutdown response time in hours (based on historic discharge data or in the ab-

sence of such historic data, the operator's best estimate), multiplied by the maximum flow rate expressed in barrels per hour (based on the maximum daily capacity of the pipeline), plus the largest line drainage volume after shutdown of the line section(s) in the response zone expressed in barrels (cubic meters); or

(2) The largest foreseeable discharge for the line section(s) within a response zone, expressed in barrels (cubic meters), based on the maximum historic discharge, if one exists, adjusted for any subsequent corrective or preventive action taken; or

(3) If the response zone contains one or more breakout tanks, the capacity of the single largest tank or battery of tanks within a single secondary containment system, adjusted for the capacity or size of the secondary containment system, expressed in barrels (cubic meters).

(4) Operators may claim prevention credits for breakout tank secondary containment and other specific spill prevention measures as follows:

Prevention measure	Standard	Credit (percent)
Secondary containment > 100% .....	NFPA 30 .....	50
Built/repaired to API standards .....	API STD 620/650/653 .....	10
Overfill protection standards .....	API RP 2350 .....	5
Testing/cathodic protection .....	API STD 650/651/653 .....	5
Tertiary containment/drainage/treatment .....	NFPA 30 .....	5
Maximum allowable credit .....	.....	75

[58 FR 253, Jan. 5, 1993, as amended by Amdt. 194-3, 63 FR 37505, July 13, 1998; Amdt. 194-4, 70 FR 8747, Feb. 23, 2005; Amdt. 194-5, 70 FR 35042, June 16, 2005]

**§ 194.107 General response plan requirements.**

(a) Each response plan must include procedures and a list of resources for responding, to the maximum extent practicable, to a worst case discharge and to a substantial threat of such a discharge. The "substantial threat" term is equivalent to abnormal operations outlined in 49 CFR 195.402(d). To comply with this requirement, an operator can incorporate by reference into the response plan the appropriate procedures from its manual for operations,

maintenance, and emergencies, which is prepared in compliance with 49 CFR 195.402.

(b) An operator must certify in the response plan that it reviewed the NCP and each applicable ACP and that its response plan is consistent with the NCP and each applicable ACP as follows:

(1) As a minimum to be consistent with the NCP a facility response plan must:

(i) Demonstrate an operator's clear understanding of the function of the Federal response structure, including procedures to notify the National Response Center reflecting the relationship between the operator's response organization's role and the Federal On



§ 195.254

49 CFR Ch. I (10–1–11 Edition)

§ 195.254 Above ground components.

(a) Any component may be installed above ground in the following situations, if the other applicable requirements of this part are complied with:

- (1) Overhead crossings of highways, railroads, or a body of water.
- (2) Spans over ditches and gullies.
- (3) Scraper traps or block valves.
- (4) Areas under the direct control of the operator.
- (5) In any area inaccessible to the public.

(b) Each component covered by this section must be protected from the forces exerted by the anticipated loads.

§ 195.256 Crossing of railroads and highways.

The pipe at each railroad or highway crossing must be installed so as to adequately withstand the dynamic forces exerted by anticipated traffic loads.

§ 195.258 Valves: General.

(a) Each valve must be installed in a location that is accessible to authorized employees and that is protected from damage or tampering.

(b) Each submerged valve located offshore or in inland navigable waters must be marked, or located by conventional survey techniques, to facilitate quick location when operation of the valve is required.

§ 195.260 Valves: Location.

A valve must be installed at each of the following locations:

(a) On the suction end and the discharge end of a pump station in a manner that permits isolation of the pump station equipment in the event of an emergency.

(b) On each line entering or leaving a breakout storage tank area in a manner that permits isolation of the tank area from other facilities.

(c) On each mainline at locations along the pipeline system that will minimize damage or pollution from accidental hazardous liquid discharge, as appropriate for the terrain in open country, for offshore areas, or for populated areas.

(d) On each lateral takeoff from a trunk line in a manner that permits shutting off the lateral without interrupting the flow in the trunk line.

(e) On each side of a water crossing that is more than 100 feet (30 meters) wide from high-water mark to high-water mark unless the Administrator finds in a particular case that valves are not justified.

(f) On each side of a reservoir holding water for human consumption.

[Amdt. 195–22, 46 FR 38360, July 27, 1981; 47 FR 32721, July 29, 1982; Amdt. 195–50, 59 FR 17281, Apr. 12, 1994; Amdt. 195–63, 63 FR 37506, July 13, 1998]

§ 195.262 Pumping equipment.

(a) Adequate ventilation must be provided in pump station buildings to prevent the accumulation of hazardous vapors. Warning devices must be installed to warn of the presence of hazardous vapors in the pumping station building.

(b) The following must be provided in each pump station:

(1) Safety devices that prevent overpressuring of pumping equipment, including the auxiliary pumping equipment within the pumping station.

(2) A device for the emergency shutdown of each pumping station.

(3) If power is necessary to actuate the safety devices, an auxiliary power supply.

(c) Each safety device must be tested under conditions approximating actual operations and found to function properly before the pumping station may be used.

(d) Except for offshore pipelines, pumping equipment must be installed on property that is under the control of the operator and at least 15.2 m (50 ft) from the boundary of the pump station.

(e) Adequate fire protection must be installed at each pump station. If the fire protection system installed requires the use of pumps, motive power must be provided for those pumps that is separate from the power that operates the station.

[Amdt. 195–22, 46 FR 38360, July 27, 1981, as amended by Amdt. 195–52, 59 FR 33397, June 28, 1994]

§ 195.264 Impoundment, protection against entry, normal/emergency venting or pressure/vacuum relief for aboveground breakout tanks.

(a) A means must be provided for containing hazardous liquids in the

Condition	Keystone XL <sup>a</sup> facilities).	49 CFR 195	Benefits
31	<b>SCADA – Leak Detection Manual:</b> The Leak Detection Manual must be prepared using guidance provided in Canadian Standards Association (CSA), Oil and Gas Pipeline Systems, CSA Z662-03, Annex E, Section E.5.2, Leak Detection Manual.	General, less prescriptive. Many elements inferred through Code Sections 195.134 and 195.444 for leak detection, but code references API 1130 specifically.	Helps provide state-of-the-art monitoring and control of the pipeline reflecting exacting standards.
32	<b>Mainline and Check Valve Control:</b> Keystone must design and install mainline block valves and check valves on the Keystone XL system based on the worst-case discharge as calculated by 49 CFR 194.105. Keystone must locate valves in accordance with 49 CFR 195.260 and by taking into consideration elevation, population, and environmentally sensitive locations to minimize the consequences of a release from the pipeline. Mainline valves must be placed based on the analysis above or no more than 20 miles apart, whichever is less. Mainline valves must contain transit inhibit switches that prevent the valves from shutting at a rate (and in conjunction with pumps being shutdown) so that no pressure surges can occur, or other damage caused by unintended valve closures or by closures that are too rapid.  Valves must be remotely controlled and actuated, and the SCADA system must be capable of closing the valve and monitoring the valve position, upstream pressure, and downstream pressure so as to minimize the response time in the case of a failure. Remote power backup is required to ensure communications are maintained during inclement weather. Mainline valves must be capable of closure at all times. If it is impracticable to install a remote-controlled valve, Keystone must submit a valve design and installation plan to the appropriate PHMSA Region Director(s), Central, Western, and Southwest Region to confirm the alternative approach provides an equivalent safety level. For valves that cannot be remotely actuated, Keystone must document on a yearly basis not to exceed 15 months that personnel response time to these valves will not take more than an hour.	General Valve Requirements in Code Section 195.260.	Helps provide more instrumentation feeding back data to reduce leak detection times, helps reduce potential spill volumes though prescriptive valve spacing, and helps ensure that valves can close when loss of primary power is experienced. Also helps ensure prompt response time to non-automated valve locations.
33	<b>Pipeline Inspection:</b> The entire Keystone XL pipeline (not including pump stations and tank farms) must be capable of passing ILI tools. Keystone must prepare and implement a corrosion mitigation and integrity management plan for segments that do not allow the passage of an ILI device.	ILI required in Code Section 195.120, but no requirements for station piping inspection.	Provides pipeline capable of internal inspection and requires direct assessment plan for pump stations and other facilities.