BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	STAFF'S RESPONSE TO KEYSTONE'S PROTECTIVE MOTION *IN LIMINE* REGARDING DAKOTA RURAL ACTION'S EXHIBIT LIST DATED JULY 7, 2015 **HP14-001**

COMES NOW, Staff ("Staff") of the Public Utilities Commission ("Commission") and files this Response. On July 10, 2015, the Commission received Keystone's Protective Motion *in Limine* Regarding Dakota Rural Actions Exhibit List Dated July 7, 2015 ("Motion"), to which Staff now replies. Staff provides the following legal analysis, but takes no position on the Motion.

Legal Analysis

Parties are under a duty to supplement responses to discovery requests throughout the proceeding. SDCL § 15-6-26(e)(2) provides that

> [a] party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

The purpose of the statute is to ensure a fair hearing to all parties. See, *Papke v. Harbert*, 738 N.W.2d 510 (holding that the nature of the statute requiring supplementation of discovery responses is not dependent upon bad faith; rather, the statute ensures a fair trial for all parties).

The South Dakota Supreme Court addressed the issue of late disclosure in *Kaiser v. University Physicians Clinic*, 724 N.W.2d 186 (SD 2006). In that case, the Court held that the

plaintiffs were denied a fair trial when the court permitted use of previously undisclosed exhibits. *Kaiser* involved the use by an expert witness of three exhibits that were not disclosed to the plaintiffs in discovery. The Court held that the use of the three undisclosed exhibits prevented the plaintiffs' counsel from effectively cross-examining the defendant's witness. *Id.* at 199.

The *Kaiser* Court arrived at its opinion based on a three-part test: 1) existence of bad faith; 2) whether the evidence concerned a crucial issue in the case; and 3) whether the substance was substantially different from that disclosed during the discovery process. *Id.* at 195 (internal citations omitted). The Court based its holding in *Kaiser* on the fact that the late-disclosed exhibits were a crucial issue to the case. *Id.* at 199. The Court noted that

> [i]n cases...(involving expert testimony), a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.

Id. at 197 (citing *Smith v. Ford Motor Company*, 626 F.2d 784, 793 (10th Cir. 1980)).

The Court has also noted that because SDCL § 15-6-26(e) is modeled after the federal rule, decisions by federal courts can help to interpret the rule. *Id.* at 196. In *Smith v, Ford Motor Company*, 626 F.2d 784, a federal court held that evidence should have been excluded because of the party's failure to seasonably supplement responses provided during discovery. *Smith* dealt with the failure of a party to disclose the substance of an expert's testimony prior to trial. *Id.* The federal court stated that the rules were designed to "prevent trial by ambush". *Id.* at 797. In that case, the court felt that the opposing party was prejudiced and that the prejudice was not cured. *Id.* at 799.

Other courts have found that where the opponent suffers no prejudice, substantive legal rights should not be forfeited, as it would result in the loss of a party's opportunity to have the case tried on the merits. See, *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254, 257 (1995). The Court in *Allstate* held that "[d]elay, standing alone, does not necessarily establish prejudice. ...[T]he relevant question must be whether it is harmful to the opposing party or to the justice system." *Id.* at 258. The Arizona court further stated that "[w]henever possible, procedural rules should be interpreted to maximize the likelihood of a decision on the merits." *Id.* at 257.

Staff recommends applying the above-discussed legal analysis to the sixteen groups of exhibits categorized by Dakota Rural Action. When going through the groups of exhibits, the first question is whether or not the information was late-disclosed, or was it information that the parties knew or should have known would be presented in this case. If the answer to that question is that the parties were aware that the document would be presented, as in the case of the Final Supplemental Environmental Impact Statement, then the Motion should be denied with respect to that exhibit or group of exhibits and the parties allowed to make relevancy objections in the course of the evidentiary hearing. If, however, the Commission determines that exhibit was late-disclosed, it is necessary to ask the three questions from the *Kaiser* case.

CONCLUSION

Staff recommends the Commission apply the facts of the matter to the above-discussed legal standard. Staff does not take a position at this time as to each individual exhibit or group of exhibits but is willing to offer input as requested by the Commission.

Dated this 16th day of July, 2015.

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OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	))))))	**CERTIFICATE OF SERVICE** **HP14-001**

I hereby certify that true and correct copies of Staff's Response To Keystone's Protective Motion *in Limine* Regarding Dakota Rural Actions Exhibit List Dated July 7, 2015. and Certificate of Service were served electronically to the Parties listed below, on the 16th day of July, 2015, addressed to:

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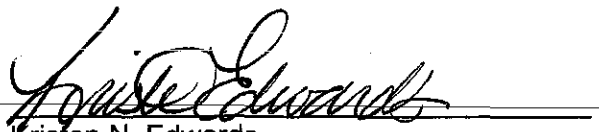

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