BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT,	:	HP 14-001 **AMENDED MOTION TO PRECLUDE CERTAIN INTERVENORS FROM OFFERING EVIDENCE OR WITNESSES AT HEARING AND TO COMPEL DISCOVERY**

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Under ARSD 20:10:01:22.01, Petitioner TransCanada Keystone XL Pipeline, LP ("Keystone"), moves that the Commission enter an order precluding certain Intervenors as identified below from offering evidence or presenting witness testimony at the hearing set for May 5-8, 2015 based on their failure to answer written discovery addressed to them. Except for the title and this paragraph, this motion is identical to the motion previously filed on March 23, 2015.

1. Background

Keystone served written discovery on all 42 Intervenors on December 18, 2014. (Moore Aff. ¶ 2.) Of the 42 Intervenors:

- Seventeen failed to respond to the discovery: Rosebud Sioux Tribe--Tribal Utility Commission; Viola Waln; Cheryl and Terry Frisch; Louis Grass Rope; Robert Allpress; Jeff Jensen; Louis Genung; Jerry Jones; Cindy Jones; Debbie Tripp; Gina Parkhurst; Joyce Braun; 350.org; Chastity Jewett; Dallas Goldtooth; and Ronald Fees. (*Id.*¶ 3.)

- An additional two Intervenors did not respond, but they have since withdrawn by order of the Commission: Sierra Club and South Dakota Wildlife Federation. (*Id.* ¶ 4.)

- Five responded to the discovery, but have failed to disclose any witnesses or exhibits because they are still investigating their case (John Harter; BOLD Nebraska; Carolyn Smith; and Gary Dorr); or they simply objected to all of Keystone's discovery requests and provided no responsive information (Yankton Sioux Tribe). (*Id.* ¶ 7.)

- Nine responded that they do not intend to call any witnesses at the hearing: Paul Seamans; Cindy Myers; Arthur Tanderup; Amy Schaffer; Nancy Hilding; Bruce Boettcher; Roxanne Boettcher; Wrexie Lainson Bardaglio; and Bonny Kilmurry. (*Id.* ¶ 9.) One of the nine, Cindy Myers, later responded that she might call an expert, but she has not provided any specific information about him in response to outstanding discovery. (*Id*. ¶ 13.)

- Nine responded and have disclosed the identity of witnesses they intend to call at the hearing: Elizabeth Lone Eagle; Rosebud Sioux Tribe; Standing Rock Sioux Tribe; Cheyenne River Sioux Tribe; Dakota Rural Action; Indigenous Environmental Network; Intertribal COUP; and Byron and Diana Steskal. (*Id.* ¶ 10.)

On February 11, 2015, as required by SDCL § 15-6-37(a), counsel for Keystone wrote to Intervenors who did not respond to ask that they respond by February 16, 2015. (*Id.* ¶ 5.) Except for the Sierra Club and the South Dakota Wildlife Federation, none of the Intervenors who received that letter responded. (*Id.* ¶ 6.)

On the same date, as required by SDCL § 15-6-37(a), counsel for Keystone also wrote to the six Intervenors who had objected or not fully responded to Keystone's written discovery to request that they identify witnesses they intended to call at the hearing and documents that they intended to rely on at the hearing by March 10, 2015. (*Id.* ¶ 8.) Five of the six did not respond to the letter, but the Rosebud Sioux Tribe later served supplemental answers after discussions between counsel. (*Id*.)

2. The Intervenors who have disclosed nothing should not be allowed to offer witnesses or evidence.

With respect to the 18 Intervenors who failed to answer discovery and the four Intervenors who responded but failed to identify witnesses or documents based on their continuing investigation or objections, Keystone asks that the Commission enter an order precluding them from offering witnesses or evidence at the hearing based on their failure to answer discovery.

First, by administrative rule, the rules of civil procedure applicable in state court apply before the Commission. ARSD 20:10:01:01.02; ARSD 20:10:01:22.01. The Commission has broad discretion to address discovery issues, including to preclude parties who entirely failed to respond to discovery from offering testimony or evidence at the hearing. *See, e.g., Veblen District v. Multi-Community Coop. Dairy*, 2012 S.D. 26, 21, 813 N.W.2d 161, 166 ("'The authority of the trial court concerning sanctions is flexible and allows the court "broad discretion with regard to sanctions imposed thereunder for failure to comply with discovery orders."'" (quoting *Schwartz v. Palachuk*, 1999 S.D. 100, 23, 597 N.W.2d 442, 447)). By statute, if a party fails to answer discovery, a court may "make such orders in regard to the failure as are just," including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." SDCL §§ 15-6-37(d) and 15-6-37(b)(2)(B). The South Dakota Supreme Court has held that it is within a court's discretion to exclude testimony that was not disclosed in response to written interrogatories. *Delzer Const. Co. v. South Dakota State Bd. Of Transp.*, 275 N.W.2d 352, 356 (S.D. 1979).

As to the 18 Intervenors who failed to respond to discovery in any way, an order precluding them from offering testimony or evidence at the hearing would be appropriate. Their refusal to participate in discovery, including their failure to respond to a follow-up letter requesting that they answer the discovery served on them is deliberate conduct inconsistent with the goal of allowing all parties an opportunity to learn what witnesses and evidence the other side will use to present its case.

Second, the Commission's procedural order established deadlines for responding to discovery, including a deadline of March 10, 2015, to respond to a second round of discovery. Because the next deadline identified in the Commission's order is the deadline on April 2, 2015, for disclosing prefiled testimony, the date of March 10, 2015 essentially set a discovery deadline. The four Intervenors who have stated that they are still investigating their case should not be allowed to disclose for the first time documents or witnesses after the discovery deadline. *See Thompson v. Mehlhaff*, 2005 S.D. 69, ¶¶ 25-27, 698 N.W.2d 512, 520-21 (affirming exclusion of expert witness who was not timely disclosed).

This proceeding was started in September, 2014, and Keystone's discovery was served on December 18, 2014. The four Intervenors who responded to discovery but who have failed to identify any witnesses or documents have had ample time to investigate the facts and circumstances and to disclose to Keystone what they intend to present at the hearing, if anything. The Intervenors offer no explanation for their failure to produce discovery. They should not be allowed to subvert the discovery process by providing information for the first time well after the

close of discovery, which would be prejudicial to Keystone. *See Thompson*, ¶¶ 25-26, 698 N.W.2d at 521 (discussing explanation for failure to comply and prejudice as relevant factors).

3. The blanket objections of The Yankton Sioux Tribe are without merit and are an effort to deny Keystone even basic discovery.

The Yankton Sioux Tribe objected to all of Keystone's written discovery and provided no substantive information. Its objections are without merit and are an effort to deny Keystone even basic discovery before the hearing.

With respect to Interrogatory Nos. 3 and 4, asking for the identity of fact and expert witnesses, the Yankton Sioux Tribe objected that "[a]t this early stage in the proceedings before discovery has been completed, it would be frivolous and unduly burdensome to require a party to speculate as to whom it will call to testify" at the hearing. (Moore Aff. ¶ 7, Ex. G.) These answers have not been supplemented. (*Id*. ¶ 11) When the answers were made on February 6, 2015, the case had been pending since September, and Keystone's discovery requests were served on December 18, 2014. The Yankton Sioux Tribe did not respond to Keystone's follow-up letter. (*Id*. ¶ 8.) The time for discovery expired on March 10, 2015. With a hearing set to begin on May 5, it would be prejudicial to Keystone to allow the Yankton Sioux Tribe to provide responsive information shortly before the hearing, especially given that other Intervenors have been able to timely respond, and that Keystone has timely responded to two sets of written discovery from the Yankton Sioux Tribe. (*Id*. ¶ 12.)

With respect to Interrogatory No. 5, in which Keystone asked the Tribe to identify by number each condition in the final permit that the Tribe contends Keystone could not meet, the Tribe objected that the request failed to comply with the Commission's discovery order because

it did not "identify by number and letter the specific Condition or Finding of Fact addressed." (*Id*. Ex. G.) This objection makes no sense given that the request asked the Tribe to identify which conditions it contends Keystone cannot meet. The Tribe also objected that the request called for work product under SDCL § 15-6-26(b)(3). (*Id*.) The cited statute is a codification of the work-product doctrine, which applies to "documents and tangible things." SDCL § 15-6-26(b)(3). It does not apply to a request that a party identify the factual basis for what it must prove to prevail in the litigation. Finally, the Tribe objected that "it would be unduly burdensome for Yankton to compile a list of each and every fact on which each and every contention is based." (*Id*.) This is mere boilerplate. The Tribe offers no facts to support its objection.

The Tribe made essentially the same objections to Interrogatory Nos. 6, 7, and 8, in which Keystone asked the Tribe to identify by number each finding of fact in the final permit that it contends is no longer accurate because of a change in factor or circumstances; to identify any other reasons why it contends Keystone cannot meet its Permit obligations; and to identify any other reasons it contends that the Commission should not accept Keystone's certification. (*Id*.) The objections should be overruled for the same reasons.

The Tribe objected to all of Keystone's document requests. (*Id*.) The Tribe objected to Document Request No. 1 for all documents that would be offered as exhibits because it failed to identify by number each condition to which it was addressed; because it related to work product; and because it was vague and overbroad. As discussed, the first objection is illogical, the second is contrary to a basic understanding of procedure (parties almost always exchange exhibits to be

used at trial), and it is not overlybroad or vague—it seeks only documents that the Tribe intends to offer as exhibits.

The Tribe objected to Document Request Nos. 2-5, which asked for documents supporting the answers to Interrogatory Nos. 5-8, as failing to identify by number each condition or factual finding to which it was addressed, which is an illogical objection given the nature of the request.

The Tribe objected to Document Request Nos. 6-8, which asked for documents relied on or sent to any expert to be called as a witness, as well as a resume for every expert witness the Tribe intends to call. The Tribe objected that these requests failed to identify the condition or finding to which they were addressed, required the production of work product (as to 6 and 7), and were vague and overly broad. To the contrary, South Dakota statute requires identification of trial experts, identification of the substance of the expert's testimony, and facts or data that a party's attorney sent to the expert. SDCL §§ 15-6-26(b)(4)(A)(i), (C)(ii) and (iii). Keystone respectfully requests that all of these objections be overruled.

4. Cindy Myers has not sufficiently disclosed an expert witness.

In her initial discovery responses, Cindy Myers did not identify any expert witnesses, but in a supplemental response sent on March 10, 2015, Myers disclosed that she may call Dr. Cleve Trimble, a retired UNMC staff educator/surgeon as an expert witness. (*Id*. ¶ 13.) Keystone responded with a request that if Myers intended to call Dr. Trimble, that she respond as soon as possible to the specifics in Interrogatory No. 4, asking for expert witness information. *(Id*.) Myers has not provided any additional information. (*Id*.)

Keystone asks that the PUC require Myers to provide, in advance of the hearing, additional responsive discovery related to Dr. Trimble if she intends to call him as a witness at the hearing.

Conclusion

Keystone therefore respectfully requests that the Commission enter an order:

(1) precluding the 17 Intervenors who failed to respond to discovery from offering any testimony or evidence at the hearing;

(2) precluding the four Intervenors who are still investigating their case from making late disclosures for the first time after the close of discovery, and therefore also precluding them from offering witnesses or evidence at the hearing;

(3) overruling the objections of the Yankton Sioux Tribe, thereby limiting its hearing participation; and

(4) requiring Cindy Myers to disclose additional expert information if she intends to present expert testimony.

Dated this 25th day of March, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

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