

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

IN THE MATTER OF THE PETITION OF)	Docket 14-001
TRANSCANADA KEYSTONE PIPELINE, LP)	
FOR ORDER ACCEPTING CERTIFICATION OF)	DAKOTA RURAL ACTION’S MOTION
PERMIT ISSUED IN DOCKET HP09-001 TO)	AND MEMORANDUM FOR
CONSTRUCT THE KEYSTONE XL PIPELINE)	RECONSIDERATION OF PARTIAL
)	GRANTING OF MOTION IN LIMINE
)	TO EXCLUDE EXHIBITS
)	
)	

Dakota Rural Action (“**DRA**”) hereby moves the South Dakota Public Utilities Commission (the “**Commission**”) to reconsider its Order Granting in Part and Denying in Part TransCanada’s Motion in Limine regarding DRA’s exhibits. Without citing any authority in its Order, the Commission excluded numerous documentary exhibits solely on the finding that TransCanada would be “unduly prejudiced” by DRA providing notice and a copy of the currently excluded exhibits, some three weeks prior to the start of the evidentiary hearing in this matter.¹ No other finding was made to purportedly justify this extreme action by the Commission.

This Motion for Reconsideration is made to provide the Commission with an opportunity to correct its decision which is far afield from and contrary to the opinions of the South Dakota Supreme Court in interpreting when the extreme sanction of preclusion of evidence is warranted by a purported failure to seasonably comply with a discovery request for such evidence by TransCanada.

TransCanada’s Motion in Limine cited SDCL 15-6-26(e) for DRA’s responsibility to supplement its discovery answers in a timely manner, or as the statute states, in a “seasonable” manner. It further cited, and the Commission based its partial granting of TransCanada’s Limine Motion on SDCL 15-6-37(c), for

¹ DRA respectfully submits that due to the extreme volume of documents disclosed by TransCanada, together with the documents and photographs more recently obtained by other means, and DRA’s very limited resources, it was not until on or about July 7, 2015, that DRA was able to determine and provide notice of a dramatically reduced number of documents relevant and material to these proceedings.

authority of the PUC to exclude evidence when not disclosed “seasonably,” without citation to our Supreme Court’s interpretation and determination of when such an extreme sanction is warranted.

DRA respectfully submits that the South Dakota Supreme Court has never affirmed, as unduly prejudicial, the exclusion of a party’s documentary evidence disclosed to the opposing party three weeks prior to the trial or final hearing. The Supreme Court has similarly never found such disclosure as unduly prejudicial when the overwhelming majority of the documents the Commission has currently excluded, were documents already in the possession of, if not created by TransCanada, the opposing party, and including communications between a regulatory agency and the opposing party about the very issues involved in the proceedings. These would include DRA Exhibits 29-37, 39-65, 67-128, incorporated herein by this reference.

Similarly, the South Dakota Supreme Court has never found disclosure of limited photographs,² scientific studies,³ and a previously issued FSEIS,⁴ noticed and disclosed three weeks prior to trial or final hearing, as being unduly prejudicial to an opposing party. However, as the materiality and relevance of the contents of the documents reveal, together with testimonial and other evidence likely presented at trial, the exclusion of these documents will be unduly prejudicial to DRA, denying this Intervenor due process and a fair proceeding.

What our Supreme Court has held, is that where a party fails to disclose proposed evidence requested by an opposing party until the start of or well into trial, it is unduly prejudicial. For example, in *Kaiser v. University Physicians Clinic*, 724 N.W.2d 186 (S.D. 2006), the Court reversed a Circuit Court’s admission of several slides used by a party’s expert, where the documents, requested in discovery, were not provided to opposing counsel until the expert testified on the sixth day trial. *Id.*, ¶¶20-24, 49. See, also, *Papke v. Harbert*, 738 N.W.2d 510, 529-530 (S.D. 2007). Unlike the instant case, neither the notice nor a copy of exhibits were disclosed to the opposing party until after the start of the respective trials.

² DRA Exhibits 397-409, incorporated herein.

³ DRA Exhibits 1058-1061, incorporated herein.

⁴ DRA Exhibit 1062, incorporated herein.

The Supreme Court has similarly upheld a Circuit Court's refusal to admit previously undisclosed evidence when the offending party knew the name of its expert witnesses and of the existence of the evidence at least twenty-four (24) days prior to trial, yet failed to disclose the information until three (3) days before trial. *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 762 (S.D. 1994). However, the Supreme Court reversed a Circuit Court's exclusion of testimony from a plaintiff's rebuttal expert witnesses, disclosed ten (10) days before the start of trial, but eighteen (18) days after plaintiffs deposed one expert witness for the defense and eleven days after plaintiffs deposed two additional expert witnesses that challenged the heart of plaintiff's case. *Schrader v. Tjarks*, 522 N.W.2d 205, 208-212, (S.D. 1994).

DRA respectfully submits that in granting a significant part of TransCanada's Motion in Limine, the Commission completely ignored or considered the pronouncement of the South Dakota Supreme Court in *Schrader*: "The severity of the sanction must be tempered with consideration of the equities. *Id.* at 316-17. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts." *Id.* citing, *Chittenden v. Eastman Co. v. Smith*, 286 N.W.2d 314, 316-317 (S.D. 1979).

DRA further respectfully submits that due to the materiality of the currently excluded exhibits, the seasonable supplementation of discovery of mainly TransCanada documents, together with a limited number of photographs, scientific theses, and involved agency correspondence, that the Commission may well be ultimately inviting judicial reversal if this Motion for Reconsideration is not granted and the exclusion of the referenced exhibits is not remedied.

Dated: July 20, 2015

Respectfully submitted,

/s/ Bruce Ellison

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
Telephone: (605) 348-1117
Email: belli4law@aol.com

and

MARTINEZ MADRIGAL & MACHICAO, LLC

By: /s/ Robin S. Martinez

Robin S. Martinez, MO #36557/KS #23816
616 West 26th Street
Kansas City, Missouri 64108
816.979.1620 phone
888.398.7665 fax
Email: robin.martinez@martinezlaw.net

Attorneys for Dakota Rural Action