BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 14-001

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,	:	KEYSTONE'S MOTION TO PRECLUDE WITNESSES FROM TESTIFYING AT HEARING WHO DID NOT FILE PREFILED TESTIMONY

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Dakota Rural Action ("DRA") and Intertribal COUP ("COUP") both challenge the Commission's authority to order prefiled testimony. Because the administrative rule that they challenge is not contrary to statute, their challenge should be rejected. Because their challenge would prejudice Petitioner TransCanada Keystone Pipeline, LP ("Keystone"), Keystone respectfully requests that the Commission enter an order precluding DRA, COUP, and any other party from offering any testimony at the hearing, other than rebuttal testimony that meets the deadline for prefiled rebuttal testimony, that was not prefiled with the Commission on April 2, 2015, as required by the Scheduling Order.

1. Prefiled testimony is not contrary to statute.

DRA and COUP contend that ARSD 20:10:01:22.06, which authorized prefiled testimony, exceeds the Commission's authority because written testimony is not allowed under, or is contrary to, SDCL § 15-6-43(a), which states that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this chapter or by the South Dakota Rules of Evidence." This argument is baseless.

Prefiled testimony is not contrary to statute because it is not a substitute for oral testimony--it is merely a precursor to it. Prefiled testimony is not even sworn. A witness who offers prefiled testimony takes the stand at the hearing, is sworn at that time, adopts his or her prefiled testimony with any changes that may be appropriate, and then is subject to cross-examination. Neither DRA nor COUP explains how that procedure is contrary to SDCL § 15-6-43(a). Because each witness testifies live at the hearing, which is the equivalent of "orally in open court," the statute is not violated. Moreover, prefiled testimony is fully consistent with SDCL § 1-26-19(2), which provides that a party may conduct cross-examination. The position of DRA and COUP is self-evidently wrong.

2. DRA and COUP's challenge to the Commission's authority should be rejected as procedurally improper.

Although neither DRA nor COUP has filed a motion or requested any relief, their objections are a frontal assault on the Commission's authority to conduct not only this administrative proceeding, but all contested-case proceedings in which prefiled testimony is ordered. The objections are procedurally improper. The Scheduling Order containing the deadline for prefiled testimony is dated December 17, 2014. If DRA and COUP wanted to challenge the Commission's authority to require prefiled testimony under ARSD 20:10:01:22.06, their remedy was to seek declaratory relief either in circuit court, as provided in SDCL § 1-26-14, or before the Commission, as provided in SDCL § 1-26-15. SDCL § 1-26-14 provides:

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the circuit court for the county of the plaintiff's residence, if it is alleged that the rule, or its threated application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment maybe rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

SDCL § 1-26-15 provides that "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or any rule or order of the agency." Under SDCL § 49-1-11(5), the Commission has the authority to adopt procedures for obtaining a declaratory ruling, which the Commission has done under ARSD 20:10:01:34 and 20:10:01:35. Thus, there are two statutory procedures for a challenge to an administrative rule.

DRA and COUP cannot reasonably file an "objection" with the Commission challenging its administrative authority under a certain rule and state that they will not abide by the rule because the rule is unlawful. Rather, they must follow the statutory procedures in place to challenge the rule. Not having done that, their objection should be rejected as procedurally improper.

3. Keystone would be prejudiced if parties are allowed to ignore the Scheduling Order.

DRA and COUP intend to circumvent the Scheduling Order, which requires prefiled testimony. Whether prefiled testimony would be required was discussed by the Commission in an open meeting on December 9, 2014. The Commission discussed whether prefiled testimony should be ordered, and concluded that it would enable a timely and fair proceeding. The Scheduling Order was filed on December 17, 2014, and the parties have been on notice since that they would have to comply with the deadline for prefiled testimony on April 2, 2015. Had DRA, COUP, or any other party wanted to challenge the legality of the administrative rule on which the order for prefiled testimony was based, they could--and must--have done so before the deadline. Instead, DRA and COUP have given notice that they intend to call witnesses at the hearing who have not submitted prefiled testimony. Allowing them to do so

would prejudice not only Keystone, but all of the other Intervenors and Staff who have complied with the Scheduling Order by filing their prefiled testimony on April 2. Keystone, Staff, and other Intervenors would be denied an opportunity to see the testimony of these witnesses in advance, to prepare rebuttal testimony if necessary, and to prepare effective cross-examination in advance of the hearing.

DRA disclosed nine witnesses it intends to call without prefiled testimony: Lillian Anderson, Delwin Hofer, Kent Moeckly, John Harter, Taylor and Claudia Vroman, Bret Clanton, Bob Beck, and Dr. W. Carter Johnson. COUP disclosed three witness: Dr. George A. Seielstad, Dr. Robert J. Oglesby, and Dr. James Hansen.[1] There is no reason why these 12 witnesses should be subject to different rules than all of the witnesses who have disclosed prefiled testimony. Moreover, if DRA and COUP are allowed to call these witnesses at the hearing, there is no reason why other parties could not do the same. The Commission's Scheduling Order would then be subverted, with resulting prejudice to any party not only who is adverse to the testimony, but who has complied with the Scheduling Order. The same rules need to apply to everyone.

Conclusion

The Scheduling Order is legal, proper, and should not be disregarded to the prejudice of Keystone and others. Keystone respectfully requests that its motion be granted.

[1] All of COUP's witnesses would testify about climate change, an issue that is not relevant to the certification under SDCL § 49-41B-27. It was an issue addressed by the Department of State in the Final Supplemental Environmental Impact Statement as part of the national interest determination, but it is not an issue for the Commission. If COUP is allowed to call their witnesses, Keystone will move to exclude their testimony as not relevant.

Dated this 6th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony, to the following:

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