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 OPPOSITION TO STANDING ROCK SIOUX TRIBE'S MOTION FOR DISCOVERY SANCTIONS

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The Standing Rock Sioux Tribe has moved for discovery sanctions under SDCL § 15-6-37. Because its responses were appropriate, compliant with the rules of civil procedure, and made in good faith, Petitioner TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that the motion be denied.

1. Document requests 3-9.

Although its motion is somewhat unclear, the Tribe has broadly objected to Keystone's compliance with seven of its document requests, namely the Tribe's first set of document requests, numbers 3-9. (Moore Aff. ¶ 2, Ex. A.) Keystone will address each of these requests.

a. Request no. 3.

In its third document request, the Tribe sought "all documents prepared for the purposes of demonstrating compliance by TransCanada with the Oil Pollution Act of 1990, codified at 33 U.S.C. 1321, and the PHMSA Facility Response Plan regulations, 49 CFR Part 194, in the construction and operation of the Keystone XL Pipeline." (*Id.* Ex. A.) Keystone responded that the request was beyond the Commission's jurisdiction because it sought information governed by

federal law and, with respect to the Oil Pollution Act, was within the province of the Environmental Protection Agency, and otherwise was in the province of PHMSA. (*Id.*) To the extent that the Tribe sought Keystone's emergency response plan, Keystone also objected that the request was preempted by federal law under 49 CFR Part 194 and 49 U.S.C. § 60104(c), and that it sought information that was confidential and proprietary. (*Id*.)

First, the Tribe does not dispute in its motion that documents related to compliance with the Oil Pollution Act are within the province of the Environmental Protection Agency. Nor does it dispute that PHMSA has exclusive jurisdiction over its regulations found at 49 CFR Part 194. Instead, the Tribe states that Keystone wrongly relies on 49 U.S.C. § 60104(c) because that statute, which is part of the Pipeline Safety Act, does not govern Keystone's emergency response plan. The document request, however, included "all documents prepared for the purpose of demonstrating compliance . . . with the PHMSA Facility Response Plan regulations, 49 CFR Part 194." The cited regulation is titled "Response Plans for Onshore Oil Pipelines." The cited statute contains a preemption provision: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). Thus, the objection is proper based on the terms of the request.

Moreover, the Tribe is incorrect that the Emergency Response Plan is governed by the Clean Water Act. (Tribe's Br. at 4.) The Tribe cites to 33 U.S.C. § 1321(j)(5). This section relates to a response plan that must be submitted to the President for "tank vessels and facilities," which are statutorily defined as: "(i) A tank vessel, as defined under section 2101 of Title 46. (ii) An offshore facility. (iii) An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone." 33 U.S.C. § 1321(j)(5)(B). The

Keystone XL Pipeline is not a "tank vessel" or an offshore or onshore facility as defined in Title 46, which deals with shipping. The definition of a tank vessel is found in 46 U.S.C. § 2101(39). The Tribe's citation is therefore incorrect. The only Emergency Response Plan that Keystone will prepare is one to be submitted to PHMSA. It is not governed by the Clean Water Act.

Second, the Tribe's suggestion that the Emergency Response Plan is not confidential is incorrect. The Commission recognized confidentiality in the Final Decision and Order in Condition 36, which provides that when Keystone files its ERP and Integrity Management Plan with PHMSA, it shall file the documents with the Commission, but can file the documents as confidential filings under ARSD 20:10:01:41. (Amended Final Decision and Order, Condition 36.) This is the same way that Keystone's ERP for the Keystone Pipeline in Docket HP 07-001 was handled. It was filed as a confidential document on February 12, 2009. The ERP is also treated as a confidential document by PHMSA, and this confidentiality was recognized by the Department of State in the Final Supplemental Environmental Impact Statement. The ERP is addressed in Appendix I, and a redacted version of the ERP is attached. Appendix I includes this statement: "Note: The Emergency Response Plan has been made available for review by the general public. Accordingly, security sensitive, business confidential, person, and otherwise confidential information has been removed. A summary of the redacted information is included." (Moore Aff. ¶ 3, Ex. B.)

Third, the Tribe's argument that Keystone was obligated to seek a protective order under SDCL § 15-6-26(c)(7) is not well taken. Keystone was not legally obligated to seek a protective order from the Commission because: (1) the request seeks information that is not only confidential, but is within the exclusive jurisdiction of PHMSA; (2) non-confidential information related to the proposed emergency response plan is publicly available as part of

Appendix I to the FSEIS (Moore Aff. ¶ 3); and (3) the Commission has previously recognized, in this docket, the confidential nature of the Emergency Response Plan.

b. Request No. 4.

In its fourth document request, the Tribe sought all documents related to Keystone's Integrity Management Plan. The Commission has previously recognized in Condition 36 that the Integrity Management Plan is to be treated the same as the Emergency Response Plan. For all of the reasons stated in response to Request No. 3, the Tribe is not entitled to production of the Integrity Management Plan or "all documents" related to it.

c. Request Nos. 5-9.

In its fifth through ninth document requests, the Tribe sought all documents prepared or obtained for the purpose of demonstrating compliance by TransCanada with the Clean Water Act, the Endangered Species Act, "the environmental review of the Keystone XL Pipeline by the Department of State under the National Environmental Policy Act," the National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act. Keystone stated different objections and answers to these requests, but the Tribe lumps them together in its motion, and contends that its reasonable follow-up to Keystone's initial responses was to narrow its requests through Interrogatory No. 51 in its second round of discovery. (Tribe's Br. at 5.) In Interrogatory No. 51, the Tribe asked Keystone to "[i]dentify every document, data compilation or tangible thing in your possession, custody or control relating to the Keystone XL Pipeline." (Tribe's Motion, Ex. D.) Keystone objected to Interrogatory No. 51 as overbroad and unduly burdensome and not likely to lead to the discovery of admissible evidence. (*Id.*) The Tribe challenges this response as well. The Tribe's arguments are without merit.

First, the Tribe ignores the answers that Keystone made and fails to explain why they were insufficient.

- With respect to compliance with the Clean Water Act (Request No 5), Keystone referred the Tribe to Section 4.3 of the FSEIS and provided a link. (Moore Aff. ¶ 2, Ex. A.) Keystone further stated that it has not "initiated any activity that requires compliance with the federal Clean Water Act and SDCL Chapter 34A-02," and that therefore it has no responsive documents. Keystone further answered that it "received a General Permit for Temporary Discharge Activities on April 11, 2013 from the SD Department of Environment and Natural Resources," and that the conditions in the general permit were in compliance with the Clean Water Act and SDCL Ch. 34A-02. (*Id.*) The Tribe does not explain how this answer is deficient, not responsive, or properly the basis of a motion for discovery sanctions.

- With respect to compliance with the Endangered Species Act (Request No. 6), Keystone provided a link to Section 3.8 of the FSEIS; answered that the FSEIS and the May 2013 Biological Opinion, found at Appendix H of the FSEIS were responsive; and that it had not yet started construction or operation. (*Id*.) The Tribe does not explain how this answer is deficient, not responsive, or properly the basis of a motion for discovery sanctions.

- With respect to compliance with the National Environmental Policy Act (Request No. 7), Keystone objected that the request was vague, overbroad, and unduly burdensome, but also answered that "[t]hese extremely voluminous documents are available on the State Department's website for the Keystone XL Project." (*Id*.) The Tribe does not explain how this objection and answer are deficient, not responsive, or properly the basis of a motion for discovery sanctions.

- With respect to compliance with the National Historic Preservation Act (Request No. 8), Keystone objected, but also answered that the issue was addressed in Section 4.11 of the FSEIS, and that cultural resources survey reports were listed in Section 3.11 of the FSEIS, "with results of the SD surveys detailed in Table 3.11-3." (*Id*.) The Tribe does not explain how this answer is deficient, not responsive, or properly the basis of a motion for discovery sanctions.

- With respect to compliance with the Native American Graves Protection and Repatriation Act of 1990 (Request No. 9), Keystone answered that the issue was addressed in Section 3.11 of the FSEIS, and that the Unanticipated Discovery Plan for cultural resources can be found within the Programmatic Agreement in Appendix E of the FSEIS. (*Id.*) The Tribe does not explain how this answer is deficient, not responsive, or properly the basis of a motion for discovery sanctions.

Second, having ignored Keystone's answers in its motion and brief, the Tribe states that it *narrowed* its requests by propounding Interrogatory No. 51, which was "for the purpose of

enabling the Tribe to be more selective and pare down its document requests." (Tribe's Br. at 5.) While Request Nos. 4-9 were specific to certain federal statutes, Interrogatory No. 51 asks Keystone to identify "every document, data compilation or tangible thing in your possession, custody or control relating to the Keystone XL Pipeline." (Tribe's Motion, Ex. D.) This is not a narrower request than the preceding document requests, and it is plainly overbroad and burdensome. Keystone obtained its permit from the Commission in 2010. Since then, it has been involved in a multitude of undertakings and proceedings, including: constitutional litigation in Nebraska; building the Gulf Coast Segment and the Houston Lateral; state permitting in all of the states where the Keystone XL Project is located; land acquisition efforts in Nebraska, Montana, and South Dakota; the process of obtaining a Presidential Permit from the Department of State, a process that started on September 19, 2008; and all of the related review processes that were part of the Final Environmental Impact Statement, the Supplemental Environmental Impact Statement, the Final Supplemental Environmental Impact Statement, the Biological Opinion from the United States Fish and Wildlife Service, and the Independent Engineering Assessment. To suggest that Keystone identify every document in its possession related to these and other activities covering at least seven years is obviously overbroad and burdensome.

Third, the Tribe's understanding of the scope of discovery is wrong. The Tribe states that "[d]iscovery is permitted for all relevant material, whether or lead to admissible evidence at trial [sic]." (Tribe's Br. at 6.) To the contrary, SDCL § 15-6-26(b)(1) states that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The

standard is relevant evidence that appears reasonably calculated to lead to the discovery of admissible evidence. Interrogatory No. 51 does not meet this standard.

Fourth, the Tribe argues that Keystone cannot reasonably refer it to publicly available information, as with the FSEIS. (Tribe's Br. at 6.) This argument is based on a 1979 Pennsylvania decision in which the court noted that it might be difficult for the plaintiff to obtain the records that were requested from the Quebec Asbestos Mining Association, a foreign entity, and the records sought were only those already in the defendant's possession. *Petruska v. Johns-Manville*, 83 F.R.D. 32, 35 (E.D. Pa. 1979). That principle has no application to an unlimited request for every document in Keystone's possession related to the Keystone XL Pipeline, when Keystone reasonably responded by providing a link to a United States government website containing responsive documents.

For all of these reasons, the Tribe's motion based on Keystone's responses, including its answers, to Document Request Nos. 5-9 and Interrogatory No. 51 is without merit.

2. Interrogatory No. 30 and Interrogatory No. 52.

In Interrogatory No. 30, the Tribe asked Keystone to describe in detail all circumstances surrounding the external corrosion of pipe that is described on page 5, finding 68, in Keystone's tracking table of changes. Keystone answered:

> Base Keystone experienced a localized external corrosion wall loss due to DC stray current interference from foreign utility colocation which caused sacrificing significant amounts of protective current to other pipelines in the shared Right-of-Way. This adversely affected CP current distribution to the Keystone line. This anomaly was found during proactive and routine high resolution in-line inspection. This issue has been reviewed, remediated and updates to the CP design where colocation occur have been implemented. In South Dakota specifically, no such location exists for colocation of multiple pipelines in a shared Right-of-Way. However, Keystone has applied these updates to its design and existing CP "construction bridge to energization" plan to address potential for DC stray current interference due to foreign utility crossings and paralleling utilities.

(Tribe's Motion, Ex. B.) The Tribe then served Interrogatory No. 52, asking Keystone to identify the foreign utility involved. (*Id.*) Keystone answered that the request was not relevant and not likely to lead to the discovery of admissible evidence, since the situation occurred in a shared pipeline corridor and no similar situation exists in South Dakota.

In its brief, the Tribe states that "Keystone neither objected nor answered the question." (Tribe's Br. at 7.) That statement is false, as evidenced by the objection cited above. Keystone asked the Tribe's counsel for clarification of this statement, but no response was received. (Moore Aff. ¶ 4, Ex. C.)

Keystone's objection that the identity of the foreign utility is not likely to lead to the discovery of admissible is warranted. Keystone has disclosed the incident, fully described the circumstances, and established that no similar situation exists in South Dakota. The Tribe states that it seeks the identity of the foreign utility for impeachment purposes (Tribe's Br. at 7), but that statement is not explained. The identity of the other utility involved is not relevant to the Keystone XL Pipeline in South Dakota given the different circumstances.

3. The sanctions that the Tribe seeks are unwarranted.

Even if the Tribe were entitled to any of the discovery challenged in its motion and brief, it would not be entitled to the sanctions that it seeks. As the Tribe acknowledges, a sanction excluding testimony is warranted only in circumstances involving a willful refusal to comply with the discovery rules. (Tribe's Br. at 7). Here, Keystone has not acted in bad faith, has not violated any order of the Commission, and has not willfully denied discovery. Rather, Keystone has asserted limited and proper objections to interrogatories or document requests that are not consistent with the rules of civil procedure or with which it simply cannot comply, like the request to identify all documents related to the Keystone XL Pipeline. As indicated, Keystone

answered over 850 interrogatories in 30 days in the first round of discovery and provided extensive information. (Moore Aff., March 30, 2015, ¶ 3.) The Tribe challenges only a handful of Keystone's responses to its 54 interrogatories and 15 document requests.

The facts do not warrant exclusion of evidence or testimony, and certainly do not support dismissal of Keystone's certification petition, which the Tribe requests. That remedy is reserved for the most extreme refusal to engage in discovery. As stated in the case cited by the Tribe, "'[l]ess drastic alternatives [to exclusion] 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.'" *Haberer v. Radio Shack*, 1996 S.D. 130, ¶ 22, 555 N.W.2d 606, 611 (quoting *Mabuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986)). *See also Dudley v. Huizenga*, 2003 S.D. 84, ¶ 14, 667 N.W.2d 644, 648 ("When considering a discovery violation, the severity of the sanction must be tempered with a consideration of the equities. Less drastic alternatives should usually be employed before imposing the severest sanction.").

Conclusion

Keystone's objections to the Tribe's discovery requests were measured and reasonable. The Tribe's motion is based on inaccuracies and is not supported by the law. Keystone respectfully requests that the Tribe's motion be denied.

Dated this 7th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th 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 Opposition to Standing Rock Sioux Tribe's Motion for Discovery Sanctions, to the following:

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