

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

IN THE MATTER OF THE PETITION OF)	
TRANSCANADA KEYSTONE PIPELINE,)	Docket 14-001
LP FOR ORDER ACCEPTING)	
CERTIFICATION OF PERMIT ISSUED IN)	SUGGESTIONS IN OPPOSITION
DOCKET HP09-001 TO CONSTRUCT THE)	TO TRANSCANADA KEYSTONE
KEYSTONE XL PIPELINE)	PIPELINE LP'S MOTIONS TO
)	EXCLUDE INTERVENOR AND
)	WITNESS TESTIMONY
)	

Dakota Rural Action (“DRA”), by and through counsel, submits the following suggestions in opposition to TransCanada Keystone Pipeline LP’s (“TransCanada”) motions to exclude certain intervenors and witnesses from testifying in these proceedings before the South Dakota Public Utilities Commission (the “Commission”).

In its ongoing effort to stifle a full and fair hearing before the Commission as to the risks posed by its proposed Keystone XL pipeline project (the “Pipeline”) to the people, land, and water of South Dakota, on March 23, 2015, TransCanada filed its motion to preclude certain intervenors from offering evidence or witnesses at the final evidentiary hearing to be conducted before the Commission. The intervenors whose voices TransCanada seeks to silence include John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and the Yankton Sioux Tribe. TransCanada’s March 23 motion was followed by an amended motion on March 25, 2015, which sought to preclude 20 separate intervenors from offering testimony or evidence at the hearing.¹

¹ The intervenors TransCanada is attempting to silence include: the Rosebud Sioux Tribe’s Tribal Utility Commission, Viola Waln, Cheryl & 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, John Harter, BOLD Nebraska, Carolyn Smith, and Gary Dorr.

In partial response to TransCanada's motion, on April 2, 2015, DRA objected to the Commission's rule requiring pre-filed testimony, suggesting that it exceeded the Commission's statutory authority. DRA reserved the right to call additional witnesses and provided the names of additional witnesses it intends to call. DRA's objection and reservation of rights was followed by a similar filing on April 3, 2015, by the Intertribal Council on Utility Policy ("COUP"). Apparently alarmed at the fact that it might have to actually face additional witnesses who could testify that its proposed Pipeline is a bad idea, on April 6, 2015, TransCanada filed an additional motion seeking to justify the Commission's extra-statutory actions and seeking to exclude specific witnesses identified by DRA and COUP.²

DRA strongly opposes TransCanada's efforts to prevent the Commission and the public from hearing evidence relating to TransCanada's ability (or, quite frankly, the lack thereof) to meet the conditions set forth in the Commission's Amended Final Decision and Order dated June 29, 2010 (the "Original Permit"). DRA further objects to granting TransCanada's motions to exclude witnesses or intervenor testimony because it would deprive potentially-impacted and concerned citizens of South Dakota of their statutory right to "present evidence," embodied in SDCL §1-26-18(2). Should the Commission accede to TransCanada's desires and prevent intervenors and witnesses from presenting evidence, the barred intervenors would be deprived of their right to due process of law – both substantively and procedurally. "Parties to a contested case proceeding are entitled to due process of law." *Application of Farmers State Bank*, 466 N.W.2d 158 (S.D. 1991),

² The additional witnesses whose voices TransCanada seeks to silence include Lillian Anderson, Delwin Hofer, Kent Moeckly, John Harter (also the subject of TransCanada's previous motion to exclude), Taylor & Claudia Vroman, Bret Clanton, Bob Beck, Dr. W. Carter Johnson, Dr. George A. Seielstad, Dr. Robert J. Oblesby, and renowned NASA scientist Dr. James Hansen.

citing, *In re Application of Union Carbide Corp.*, 308 NW2d 753, 758 (S.D. 1981);³ *Valley State Bank v. Farmers State Bank*, 213 N.W.2d 459, 463 (S.D. 1973).

Finally, DRA objects to TransCanada's effort to impose the most drastic sanctions on *pro se* intervenors. While DRA is not providing legal counsel to the unrepresented intervenors in these proceedings, we would note that it is crucially important that the Commission not silence their voices. While TransCanada, DRA, and the tribal organizations have the benefit of legal counsel, the majority of the intervenors in these proceedings are individual citizens who have serious concerns about how the proposed Pipeline will affect their land and water. Even though they may not have been able to afford to "lawyer up," their voices need and deserve to be heard. The sanctions TransCanada suggests are inappropriate and TransCanada's motions should be overruled.

First, the sanctions sought by TransCanada are inappropriate and disproportionate. The South Dakota Supreme Court has held that:

The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and this defeat of the very objective of litigation, namely to seek the truth from those who have knowledge of the facts.

Haberer v. Radio Shack, 555 N.W.2d 606, 611 (S.D. 1996), citing *Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986). The *Haberer* Court continued that the sanction of exclusion of testimony for a discovery violation was only warranted "when failure to comply has been due to

³ The South Dakota Supreme Court noted: "The statutes provide generally for appointment of a hearing examiner, rules of evidence, oath, subpoena power and deposition evidence. That such procedure is at least quasi-judicial in nature is beyond dispute. We therefore hold that a party thereto is entitled to due process." *Id.* The import of these cases is that parties to proceedings before the Commission are entitled to due process of law and all that it entails.

willfulness, bad faith, or fault’.” *Id.*, 555 N.W.2d at 610, quoting, *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994).

In its motions, TransCanada has presented no substantive evidence that any discovery violation by the respective Intervenor whose testimony it wants excluded was the result of “willfulness, bad faith, or fault.”

Second, by filing its motions, TransCanada is putting the proverbial horse before the cart. The remedy in discovery proceedings is to file a motion to compel discovery. In this instance, TransCanada is jumping to head of the line and seeking the imposition of sanctions prior to filing any motions to compel – an amusing scenario given TransCanada’s ongoing and formulaic assertions that the rules must be adhered to.

TransCanada’s motions should be overruled by the Commission and intervenors and witnesses should have a full opportunity to present testimony and evidence to be heard by the Commission and the public in order to permit a fully-informed and careful decision as to whether TransCanada’s petition for certification of the Original Permit should be approved or denied.

Respectfully submitted,

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