

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

IN THE MATTER OF TRANSCANADA
KEYSTONE PIPELINE, LP
FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

ROSEBUD SIOUX TRIBE'S
RESPONSE TO KEYSTONE'S
MOTION IN LIMINE TO STRIKE
PAULA ANTOINE'S REBUTTAL
TESTIMONY

HP14-001

For its response to Keystone's Motion in Limine to Strike Paula Antoine's Rebuttal Testimony, the Rosebud Sioux Tribe states the following:

The Rosebud Sioux Tribe filed the rebuttal testimony of Paula Antoine on June 26, 2015. The whole of her testimony addresses the conditions related to Findings of Fact 107-110 and whether or not the facility continues to meet the 2010 conditions upon which the permit was issued. The testimony seeks to rebut the direct testimony of Keystone witnesses Corey Goulet, Meera Kothari and PUC Staff witness Daniel Flo. The testimony provides a summary of these witnesses direct testimony as it relates to the conditions contained in Findings of Fact 107-110. Antoine's testimony asserts that although these witnesses testify in their direct testimony that the facility continues to meet the conditions upon which the permit was issued, none of these witnesses provide any actual direct testimony to make the required evidentiary showing related to these specific conditions.

Antoine's testimony also addresses the substance of Michael Maddens testimony and report "Assessment of Socio-Economic Impacts Expected with the Keystone XL Pipeline Project" from the HP09-001 docket (the original proceeding) and highlights the fact that none of the identified witnesses put on any direct testimony as it relates to the conditions tied to the Socio-Economic requirements of SDCL 49-41B-22. Each witness testifies that Keystone can

continue to meet the conditions upon which the permit was issued, without providing any direct testimony to support this assertion.

By filing dated July 10, 2015 Keystone seeks to strike the rebuttal testimony of Paula Antoine on the grounds that:

1. The portion of Paula Antoine's testimony related to the tribe's Spirit Camp near winner, SD is irrelevant to any issue under consideration at this proceeding;
2. That the portion of Paula Antoine's relating to Findings of Fact 107-110 is not testimony but rather is a combination of argument and legal conclusions;
3. The portion of Paula Antoine's testimony relating to Dr. Madden's 2009 testimony from the underlying permit proceedings an attempt to impeach the Commissions 2010 Order.

Keystone further asserts that none of the proffered testimony is appropriate to the proceeding and the testimony is not legally admissible. The Rosebud Sioux Tribe requests the PUC to deny Keystone's Motion in Limine in its entirety. Each of the arguments raised in support of the motion will be identified and addressed in turn. SDCL 49-41B-27 requires Keystone to certify to the Public Utilities Commission that the facility continues to meet the conditions upon which the permit was issued where construction has not begun within 4 years of being granted the permit. At issue in this case is whether or not Keystone can properly certify that the "facility continues to meet the conditions upon which the permit was issued" over four years ago.

1. Testimony related to the Tribe's Spirit Camp

Part one of Antoine's testimony establishes that there is Tribal land in close proximity to the proposed route and that the Tribe conducts activities there and identifies tribal socio-economic factors that have not been considered. The Rosebud Sioux Tribe established a permanent spiritual camp along the pipeline route on tribal land with the following legal description "W 1/2 W 1/2 NE1/4 of Section 34, T.101N., R. 77W, s P.M., Tripp County" as

evidenced by Rosebud Sioux Tribe Exhibit 16 filed in support of Paula Antoine's rebuttal testimony, by Resolution in March 2014. Keystone alleges that the land the camp is located on is not Indian Country, nor is it a part of the Rosebud Sioux Indian Reservation and that any activities that take place there are irrelevant to the matter before the PUC.

Relevant evidence is defined at SDCL 19-19-401 and it means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Clearly, Antoine's rebuttal testimony is relevant because it satisfies the statutory definition of relevance.

2. Testimony Related to Findings of Fact 107-110

The burden to properly certify that the facility continues to meet the conditions upon which the permit was issued clearly lies with the applicant, Keystone. In order to meet his burden, Keystone must put on evidence and testimony to carry this burden. Keystone asserts and the PUC Staff agrees, that there are no conditions upon which the permit was issued that it cannot continue to meet. Goulet signed the certification petition for Keystone and he is therefore responsible for the required overall showing that Keystone can certify that the facility continues to meet the conditions upon which the permit was issued. However, neither Keystone nor the PUC staff presented any direct testimony that relates even remotely to Findings of Fact 107-110, the Socio-Economic requirements of SDCL 49-41B-22. Antoine's rebuttal testimony that highlights the lack of evidence presented by Keystone and the PUC staff is clearly relevant to Keystone's burden to show that the facility continues to meet the conditions upon which the permit was issued. Under the statutory definition of relevance, it is a "fact of consequence" that Antoine's testimony points out to the PUC that there has been no testimony or evidence presented regarding Findings of Fact 107-110. Antoine's rebuttal testimony directly rebuts the

identified witness's testimony. Antoine's rebuttal testimony also is evidence that has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Under the definition of relevant evidence, Antoine's rebuttal testimony is clearly relevant. Keystone's motion should be denied accordingly.

The Rules of Evidence permit witnesses to offer opinions on facts at issue. See SDCL 19-19-701. Opinion testimony by lay witnesses. "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- (c) Not based on scientific, technical or other specialized knowledge within the scope of § 19-19-702."

The Rules of Evidence also permit witnesses to form and state an opinion on the ultimate issue SDCL 19-19-704 - Opinion on ultimate issue provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Keystone seeks to have one set of rules for Keystone and Staff and another set of rules for the other interveners in this case. All of Keystone's witnesses form an opinion of the only fact at issue. It is incomprehensible that they would again seek to limit party's rights, while themselves offering opinion evidence on the same subjects that they seek to exclude. It is without question that Keystone witnesses testify as to their opinion on whether or not Keystone can certify that it continues to meet the conditions upon which the permit was issued. All

parties have a right to properly submit relevant testimony and evidence under the Rules of Civil Procedure. Again, it is another situation where Keystone is asking the PUC to apply two sets of rules. If Antoine's testimony is stricken because she offers an opinion on a fact in issue, then all of the other testimony that offers the same should be stricken. Witnesses do this routinely without usurping the power of the PUC to remain the finder of fact. In the eyes of Keystone, the only relevant evidence that the Commission should hear regarding facts at issue is Keystone's and Staff's testimony. This approach is clearly not contemplated by the Rules of Civil Procedure or the Rules of Evidence. The result is an unfair process which violates the due process rights of all parties.

3. Dr. Madden's 2009 testimony

Antoine's testimony also addresses and points out the inadequacies of Madden's 2009 report which formed the basis for a finding that Keystone can satisfy the socio-economic requirements of the permit requirements. It also points out that this report is not made reference to or incorporated by any witness in the present proceeding. It points out that neither Keystone or Staff has presented any testimony to show that those conditions can still be satisfied. Accordingly, without presenting any testimony or evidence related to Findings of Fact 107-110, Keystone cannot meet its burden to certify that the facility continues to satisfy the conditions upon which the permit was issued. Again the testimony is relevant under the statutory definition of the term, which the Commission must follow. Accordingly, the motion must be denied.

CONCLUSION

Based on the above and foregoing, the Commission should reject Keystone's Motion in its entirety.

Dated this 17th day of July, 2015.

RESPECTIVELY SUBMITTED:

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