

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

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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  
MOTION FOR RECONSIDERATION

HP14-001

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Comes now, the Rosebud Sioux Tribe, by and through counsel, Matthew L. Rappold, pursuant to SDCL 1-26-18 the Administrative Procedure Act, ARSD 20:10:01:29 and requests the Public Utilities Commission to reconsider its order dated April 3, 2015, regarding the hearing held on March 31, 2015 on the Rosebud Sioux Tribe's Motion to Amend the Procedural Schedule. In support there in counsel states the following:

1. By Motion dated March 25, 2015 the Rosebud Sioux Tribe moved the PUC to amend its procedural scheduling order dated December 17, 2014 which established April 2, 2015 as the deadline to file and serve direct testimony.

2. The Rosebud Sioux Tribe alleged that the PUC requirement that the Rosebud Sioux Tribe file direct testimony prior to the resolution of on-going discovery disputes would violate the due process rights of the Rosebud Sioux Tribe under the Constitution and the laws of the State of South Dakota as well as the Constitution of the United States.

3. The Rosebud Sioux Tribe requested that the PUC amend its scheduling order to include a date certain for the resolution of all pre-trial discovery disputes. Rosebud also asked the PUC to then set a deadline to pre-file direct testimony which would allow sufficient and meaningful time to review all discovery prior to filing testimony.

4. Following hearing on the motion, the PUC found good cause to amend the schedule and to permit the Rosebud Sioux Tribe to file its direct testimony on April 10, 2015 rather than on April 2, 2015 like the rest of the parties. In its amended order the PUC also required motions to compel discovery to be filed and served by April 7, 2015. The PUC scheduled all outstanding prehearing motion for April 14, 2015. The amended order also required discovery responses to be served as a result of PUC actions on motions to compel on April 17, 2015 and that pre-filed rebuttal testimony to be filed and served by April 27, 2015. The amended scheduling Order did not change the date of the evidentiary hearing of May 5-8, 2015.

5. The PUC declined to amend the filing date for pre-filed testimony for any other party. That although the PUC gave the Rosebud Sioux Tribe an additional 8 days to file its pre-filed

testimony, that relief did nothing to satisfy the due process violations of the scheduling order which requires testimony to be filed before the discovery process is complete. As such, the scheduling order still violates the due process rights of the Rosebud Sioux Tribe as well as all of the parties.

6. In its application of the Rules of Civil Procedure, the PUC has acted arbitrarily and capriciously and in blatant disregard for the rights of the Rosebud Sioux Tribe as well as all of the parties. Furthermore, the PUC has erred as a matter of law and is continuing to err as a matter of law.

7. Appearing to be central to the PUC's decision was the prejudicial effect to Rosebud Sioux Tribe of Keystone's last minute disclosure of 34 documents to the Rosebud Sioux Tribe on March 30, 2015, just 3 days before direct testimony was due. The PUC also heard testimony that the Rosebud Sioux Tribe requested Keystone to provide access to these documents on February 20, 2015.

8. Although the PUC recognized that Keystone's disclosure of 34 documents 3 days before testimony was due was entirely unreasonable, the PUC did nothing to actually solve the due process concerns of the Rosebud Sioux Tribe by taking the action that it did.

9. At the hearing, counsel for the Rosebud Sioux Tribe informed the Commission that the Rosebud Sioux Tribe was engaged in ongoing discovery discussions with Keystone's attorneys and also acknowledged that motions to compel discovery would be filed with the Commission. Counsel for Keystone did not disagree with this assertion.

10. In the Rosebud Sioux Tribes second set of Interrogatories and Request for Production of Documents dated February 20, 2015, in Interrogatory 1a, the Rosebud Sioux Tribe asked Keystone to produce "for the most recent and accurate Project route (as described in ref (iii)) and facility locations, provide an approximate elevation profile of the proposed pipeline (elevation vs. pipeline milepost) capturing the segments from the nearest upstream pump station north of the state border to the nearest pump station just south of the state border."

11. That in Interrogatory 1h) "if the information in (g) is confidential as indicated on IR no.1 to other parties, please indicate (on the above pipeline elevation profile) the approximate location by milepost of (i) water crossings; (ii) the High Plains aquifer (Ogallala Formation) in Tripp County; (iii) other areas of unconfined aquifers including alluvial aquifers associated with streams, and occasional unconfined stretches in the Hell Creek, Fox Hills, and Pierre Shale aquifers (as per ref (v)); and (iv) any Karst Aquifers, which are crossed by the project."

12. That Keystone's answers and objections to the Rosebud Sioux Tribe's Second Set of Interrogatories and Request for Production of Documents dated March 10, 2015 is attached as Exhibit 1 and incorporated by reference as if reiterated in full herein.

13. Keystone objected to providing the requested elevation profiles from Interrogatory 1a of the current project on the grounds that “the request for an elevation profile seeks information that is confidential for security reasons,” and that the request for an elevation profile is “not relevant or likely to lead to the discovery of admissible evidence.” These objections are boilerplate and baseless.

14. That on April 7, 2015 the Rosebud Sioux Tribe filed its motion to compel Keystone to produce discovery with the PUC requesting that Keystone provide the elevation profiles along with other information that Keystone has refused to provide. The motion to compel is scheduled for hearing on April 14, 2014.

15. Also, on April 7, 2015, Keystone’s attorneys notified the Rosebud Sioux Tribe that they would be providing the elevation profiles to the Rosebud Sioux Tribe on Wednesday April 8, 2015 as they were requested to do on February 20, 2015.

16. That the Rosebud Sioux Tribe has retained the services of expert witnesses from the Goodman Group, Ltd., as well as the services of Richard B. Kuprewicz to provide testimony regarding Keystone’s application for certification.

17. The Goodman Group are expected to testify to changes in economic benefits and costs of the Keystone XL in South Dakota and are recognized as experts in their field and require the requested information to prepare their testimony.

18. Richard B. Kuprewicz specializes in gas and liquid pipeline investigation, auditing, risk management, siting, construction, design, operation, maintenance, training, leak detection, management review, emergency response, and regulatory development and compliance. Mr. Kuprewicz has consulted for numerous local, state and federal agencies, NGO’s, the public, and pipeline industry members on pipeline regulation, operation and design, with particular emphasis on operation in unusually sensitive areas of high population density or environmental sensitive areas and is recognized as an expert in his field.

19. That Richard B. Kuprewicz has indicated by letter dated April 7, 2015, that he is unable to prepare or file any testimony related to the proposed pipeline because Keystone has refused to provide the necessary information that they are required by law to provide. Said referenced letter is attached hereto as Exhibit 2 and is incorporated by reference as if reiterated in full herein.

20. The Rosebud Sioux Tribe will also be calling Syed Huq, the Director for the Rosebud Sioux Tribe Water Resources program which oversees the operation and distribution of water services to the Rosebud Sioux Indian Reservation through the Mni Wiconi Rural Water System.

21. That the U.S. Government has invested nearly half a billion dollars on the construction of the Mni Wiconi project that serves non-Indians in West River/Lyman Jones area, and Indians in Rosebud, Oglala and Lower Brule Reservations. Rosebud Rural Water System serves Tribal members in the communities of Ideal, Winner, Gregory and Milks Camp through the Tripp County Water User District (TCWUD). The Rosebud Rural Water System provided half a million dollars to the TCWUD to upgrade their water system and provide safe drinking water to the Tribal members in four communities and other scattered sites along the pipeline route. TCWUD derives the safe drinking water from the Ogallala Aquifer.

22. All of the requested information that has been purposefully and baselessly withheld from the Rosebud Sioux Tribe by Keystone is highly relevant and critical information associated with the elevation profile and is central to all of our witnesses ability to (i) evaluate the safety of the pipeline, (ii) assess the risks of the pipeline, (iii) determine worst case spill scenarios and (iv) evaluate the oil spill response plan.

23. That Keystone's purposeful withholding of highly relevant information for reasons that are baseless and not even arguably supported by law prejudices the Rosebud Sioux Tribe and their ability to fully and meaningfully participate and otherwise present evidence in this case.

24. Keystone's actions in purposefully withholding this information necessarily interferes with the Rosebud Sioux Tribe's protected due process rights to participate in this case as required by SDCL 1-26-18 which provides that "opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross examine all witnesses, may present evidence in support of his interest and may have subpoenas issued to compel attendance of witnesses and production of evidence in his behalf."

25. Had Keystone actually complied with the Rules of Civil Procedure and with the March 10, 2015 deadline to respond to discovery in a timely fashion, the Rosebud Sioux Tribe would have been able to comply with the original April 2, 2015 deadline to file testimony.

26. The existing schedule produces an absurd result – that upon receipt of critical information 2 days before testimony is due, our witnesses are forced to explain that they can't submit full testimony because they don't have all necessary information from Keystone and then be required to turn around and analyze new information from Keystone, followed by filing substantive testimony that is based on the new information, which should have been provided by March 20, 2015. There simply is not time and resources to do that. Keystone, as one of the largest multi-national corporations on the planet, may have those kinds of resources, but the Rosebud Sioux Tribe certainly does not.

27. This result is a classic example of “placing the cart before the horse” and should not be employed by agencies such as the PUC in deciding issues of such critical importance as the pipelines possible detrimental effect on limited quantities of existing safe drinking water among other critical issues and is in violation of the law.

28. The results of this schedule is that the Rosebud Sioux Tribe is actually punished because of Keystone’s bad acts in purposefully delaying the discovery process by refusing to provide requested information and also withholding the same. Our witnesses were planning on providing testimony by the April 2, 2015 deadline, but all of those efforts and resources have been thwarted by the tactics employed by Keystone and supported by the PUC.

29. That due to other commitments and the time and expertise required for analyzing the requested information, the earliest that the Rosebud Sioux Tribe could file pre-filed testimony is April 24, 2015 and that date is based on immediate and full compliance with the Rules of Civil Procedure, particularly the discovery provisions.

30. That due to the serious nature of the issues raised and presented in this Motion for Reconsideration the Rosebud Sioux Tribe is entitled to an immediate ruling on the motion prior to April 10, 2015 and requests the PUC to schedule an emergency meeting to address the same.

31. The Rosebud Sioux Tribe refers to its March 28, 2015 Memorandum of Law in Support of its Motion to Modify the Procedural schedule in full on file with the PUC for legal issues associated with the requirements that the PUC comply with due process requirements in its proceedings.

WHEREFORE, based on the above and foregoing, the Rosebud Sioux Tribe moves the PUC to schedule an emergency meeting to address the issues put forth in this motion and to reconsider its April 3, 2015 order amending the procedural schedule and for such further relief as just and equitable under the circumstances.

Dated this 8<sup>th</sup> day of April, 2015.

RESPECTFULLY SUBMITTED:

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