

**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)	STATEMENT AND OBJECTIONS
DOCKET HP09-001 TO CONSTRUCT THE)	ON BEHALF OF DAKOTA RURAL
KEYSTONE XL PIPELINE)	ACTION WITH RESPECT TO
)	SUBMISSION OF WRITTEN
)	TESTIMONY
)	

Dakota Rural Action (“DRA”), by and through counsel, hereby submits the following statement and objections concerning the South Dakota Public Utilities Commission’s (“Commission”) Order Granting Motion to Define Issues and Setting Procedural Schedule dated December 17, 2014 (the “Scheduling Order”).

Witnesses on Behalf of DRA

This statement and the objections contained herein are applicable to the following witnesses DRA intends to call to testify in these proceedings: John Harter, Paul Seamans, Taylor Vroman, Claudia Vroman, Bret Clanton, Bob Beck, Lillian Anderson, Delwin Hofer, and Kent Moeckly. These witnesses have been previously disclosed to TransCanada Keystone Pipeline, LP (“TransCanada”) in DRA’s responses to TransCanada’s discovery requests.

Objections to Requirement for Submission of Written Testimony

Over the objections of DRA and other intervenors in this proceeding, the Commission elected to accede to TransCanada’s request to adopt an aggressive and highly-accelerated schedule for these proceedings and adopted the Scheduling Order. Notwithstanding motions filed by two intervenors – the Rosebud Sioux Tribe and Standing Rock Sioux Tribe – to amend the Scheduling Order to allow time for meaningful discovery and, hence afford procedural and substantive due process to the intervenors, in its public hearing on March 31, 2015, the Commission again acceded

to TransCanada's desire to maintain the schedule set forth in the Scheduling Order (with one exception afforded to the Rosebud Sioux Tribe).

A key date set forth in the Scheduling Order is April 2, 2015, for submission and service of pre-filed direct testimony. *Scheduling Order*, p. 2. DRA objects to the Commission's requirement that parties submit and serve pre-filed direct testimony because this requirement exceeds the Commission's statutory authority.

The Commission's requirement for the submission of written testimony is found in Section 20:10:01:22.06 of the Commission's Regulations, which provides that:

"When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order. The front page of all prefiled testimony shall show the docket number, docket name, and name of the witness."

This regulation was adopted pursuant to authority granted to the Commission under SDCL §49-1-11, which states in relevant part that:

"The Public Utilities Commission may promulgate rules pursuant to chapter 1-26 concerning: ... (4) Regulation of proceedings before the commission, including forms, notices, applications, pleadings, orders to show cause and the service thereof, ***all of which shall conform to those used in South Dakota courts***; ..." (emphasis added).

DRA notes that the South Dakota Rules of Civil Procedure do not provide any basis for requiring a party to submit written testimony of witnesses in advance of a hearing. In fact, SDCL §15-6-43(a) explicitly provides 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.” Interpretation of statutes is a well-established process that is, in effect, an exercise to determine legislative intent. In analyzing statutory language the South Dakota Supreme Court adheres to two primary rules of statutory construction. “The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction. When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of statutory language.” *R.B.O. v. Congregation of Priests of Sacred Heart, Inc.*, 806 N.W.2d 907, 914 (S.D. 2011), citing *State Auto Insurance Cos. v. B.N.C.*, 702 N.W.2d 379, 386 (S.D. 2005).

In this instance, the plain, ordinary, and popular meaning of the applicable statutes is clear. The Rules of Civil Procedure do not provide for submission of pre-filed written testimony, SDCL §15-6-43(a) requires oral testimony, and the Commission’s enabling statute, at SDCL §49-1-11, requires that its rules of procedure conform to those used in South Dakota’s courts. On this basis, to the extent that the Commission seeks to require intervenors to submit written testimony of witnesses, the Commission has exceeded its statutory authority.

Scope of Witness Testimony

Without waiving the foregoing objection, DRA states that it intends to call fact witnesses to testify with respect to three primary scopes of discussion. First, DRA intends to call witnesses to testify as to TransCanada’s failure to comply with conditions previously imposed by the Commission in connection with TransCanada’s construction of the original XL Pipeline through South Dakota. TransCanada’s non-compliance with the Commission’s conditions set for that project relate principally to TransCanada’s failure to meet its obligations with respect to reclamation of land damaged during the course of pipeline construction. This evidence is relevant

because it demonstrates TransCanada's unwillingness or inability to comply with Amended Conditions 13, 15, 16, 26, and 27 of the Amended Final Decision and Order in HP 09-001. The witnesses DRA intends to call with respect to these matters include:

Lillian Anderson
12189 415th Sve
Langford, SD 57454

Delwin Hofer
40916 192nd St
Carpenter, SD 57322

Kent Moeckly
PO Box 903
Britton, SD 57430

Second, DRA intends to call as witnesses individual landowners whose private property will be taken by TransCanada for the proposed construction of the Keystone XL Pipeline. DRA expects these witnesses will testify about how TransCanada's proposed project will place their soil and precious water resources at risk, and the negative impact that the taking of their land will have on their lives, and the lives of their families. The witnesses DRA intends to call with respect to these matters include:

John Harter
28125 307th Ave
Winner, SD 57580

Taylor and Claudia Vroman
13460 Park Rd
Buffalo, SD 57720

Bret Clanton
12192 Clanton Rd
Buffalo, SD 57720

Bob Beck
32776 299th St
Dallas, SD 57529

Third, DRA intends to call as a witness Dr. W. Carter Johnson. Dr. Johnson is the Distinguished Professor of Ecology at South Dakota State University in Brookings. His research interests include river regulation and riparian forest ecology, climate change and prairie wetlands, seed dispersal in fragmented land. DRA intends to have Dr. Johnson testify as to TransCanada's failure to adequately conduct land reclamation efforts.

DRA notes that the identity and scope of testimony for the foregoing witnesses is being submitted to the Commission as a result of the unreasonably-compressed schedule adopted by the Commission in accordance with TransCanada's wishes. Witnesses, particularly ranchers and farmers, are dealing with the demands of calving season among other things. DRA has on more than one occasion pointed out to the Commission that its arbitrary schedule is unrealistic due to a variety of factors, yet the Commission does not appear willing to permit a full and informed hearing.

We understand why TransCanada seeks such a short schedule – their desire is place intervenors, including DRA, at a distinct disadvantage for the purpose of attempting to keep the Commission and the citizens of South Dakota from hearing evidence from a broad range of sources as to why construction of the proposed Keystone XL Pipeline would be harmful to South Dakota. From TransCanada's perspective, the less said about their proposed project, the better, so that the public will remain uninformed about the risks they face.

No Waiver by DRA

In submitting the identities of the foregoing witnesses and the scope of their testimony, DRA does not waive any of the foregoing objections raised. Nor does DRA waive its objections by virtue of submitting pre-filed written testimony with respect to any other witness. DRA also suggests that by setting an explicit date of April 21, 2015, for the submission of witness and exhibit

lists during its March 31, 2015, hearing, the Commission itself left open the possibility that parties may name additional witnesses as of the April 21, 2015 date. DRA reserves the right to name additional witnesses up to and including that date.

Respectfully submitted,

/s/ Bruce Ellison

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
Telephone: (605) 348-1117
Email: belli4law@aol.com

and

MARTINEZ MADRIGAL & MACHICAO, LLC

By: */s/ Robin S. Martinez*

Robin S. Martinez, MO #36557/KS #23816
616 West 26th Street
Kansas City, Missouri 64108
816.979.1620 phone
888.398.7665 fax
Email: robin.martinez@martinezlaw.net

Attorneys for Dakota Rural Action