BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**YANKTON SIOUX TRIBE'S RESPONSE TO APPLICANT'S MOTION CONCERNING PROCEDURAL ISSUES AT THE EVIDENTIARY HEARING** **HP14-001**

COMES NOW Yankton Sioux Tribe ("Yankton"), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby responds to *Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing* ("*Motion*") as follows:

1. Keystone's Request to Restrict Cross-Examination by Parties with a Common Interest

With respect to Paragraph 1 of the *Motion*, the PUC should reject the request of TransCanada Keystone Pipeline, LP ("Keystone") that the Commission deny parties the right to cross-examine witnesses. While it may be true that some of the interests of the intervenors are aligned, certainly some of the interests of one party are not concerns of another party and vice versa. To allow the attorney of only one of those parties to cross-examine a witness would unfairly deprive the second party of the right to solicit testimony that speaks to its unique interests. The result would be patently unjust. Moreover, if Keystone's request is granted, none of the *pro se* intervenors would be permitted to cross-examine witnesses at all. This creates a particular prejudice against those parties who chose or were forced to forgo the considerable expense of retaining counsel. Keystone's claim that its proposed procedure would not prejudice any party is therefore plainly wrong.

Furthermore, in order for the parties to coordinate with the various counsel involved as Keystone and the federal manual Keystone cites suggest, considerable time would need to be spent by said counsel familiarizing himself with interests and identifying issues and arguments that are unique to each intervening party said counsel would represent during cross-examination. Manual for Complex Litigation (4th) ("Manual") § 10.22 is attached hereto as **Exhibit A**. This would not only pose an unnecessary financial burden on the Parties, but would also require significant time for the additional and unexpected preparation, creating a need to delay the already-delayed evidentiary hearing. Following the hearing on this motion, only one work week will remain prior to the evidentiary hearing. This is certainly not adequate time for the designated counsel to prepare for the additional duties imposed by this procedure.

A delay would also be necessary in order for the Commission to "conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable" in accordance with Manual § 10.22. *See* Exhibit A. Again, with the hearing on this motion set for July 17 and the evidentiary hearing set to begin July 27, there simply is not sufficient time for the Commission to employ Keystone's proposed procedure. While the procedure Keystone suggests might be advisable in the complex federal court cases for which it was intended, and which have significantly lengthier timelines than the instant case, it is clearly inappropriate for condensed proceedings before the Commission such as this one.

The two cases cited by Keystone in support of its request, *Annett v. American Honda Motor Co.*, 548 N.W.2d 798 (S.D. 1996), and *Duncan v. Pennington Cty. Housing Authority*, 382 N.W. 2d 425 (S.D. 1996), both involved the authority of the court to dismiss a case for non-prosecution

because nothing was filed and the cases lay dormant for over a year. Dismissal in these cases was authorized by SDCL 15-6-51(b), which expressly authorizes a court to dismiss an action "[f]or failure of the plaintiff to prosecute." These cases are not at all analogous to the case at bar because no party has "sat on their rights" or failed to take action in the case for some inordinate amount of time, and because there is no statutory authority for the requested relief. The cases cited by Keystone do not support its request.

Any benefit derived from Keystone's proposal is far outweighed by the time and burden it would require and by the prejudice it would place on any intervenor with unique interests as compared to the designated attorney's client and on all *pro se* intervenors. In the interest of timeliness and fairness, Keystone's first request must be denied.

2. Keystone's Request to Prohibit Oral Opening Statements

In accordance with the July 2, 2015 *Order for and Notice of Evidentiary Hearing* and the rules governing the Public Utilities Commission, Keystone's second request should be denied and all parties should be permitted to make an oral opening statement not to exceed ten minutes on the first day of the hearing. ARSD 20:10:01:22.05 provides:

> A hearing shall be opened with a concise statement of its nature and purpose. Appearances shall be entered on the record. *Parties may make opening statements* or appropriate motions. Further oral arguments may be given at the discretion of the commission.

(emphasis added). The commencement of a hearing thus must include an opportunity for parties to make opening statements following the entry of appearances. The rule does not permit the Commission to mandate that opening statements be made on a different date prior to the hearing or that opening statements be made in writing. The Commission lacks authority to depart from this Rule as requested by Keystone.

Furthermore, should the Commission grant this portion of Keystone's motion, the parties would have only three days to prepare their written opening statements. In the meantime, parties cannot be expected to drop everything to focus on an unexpected last-minute deadline of such substance and importance. Moreover, if these statements are filed July 24 as Keystone suggests, there is literally no time during the Commission's business hours for the Commissioners to review the statements. Even if the Commissioners were to spend their weekend reviewing opening statements, which is an unreasonable request at best, it would be impracticable for the Commissioners to read and absorb the contents of opening statements from all parties (or even just twenty parties, to use Keystone's example) over the course of the two days prior to the evidentiary hearing.

Finally, the Commission was aware of the number of parties involved in this proceeding at the time it issued the *Order for and Notice of Evidentiary Hearing*, and it did not find the time required for oral opening statements to be unreasonable or to justify departure from the rule. In fact, it is clear that the Commission did take into consideration time as a factor in its order as it limited the time for oral opening statements to ten minutes for each party. *See Order for and Notice of Evidentiary Hearing* (July 2, 2015). The Commission is plenty capable of assessing the time constraints of the evidentiary hearing and setting a reasonable timetable, as it has done, without Keystone dictating the terms.

ARSD 20:10:01:22.05 requires that parties be permitted to make opening statements on the date of the hearing. The Commission lacks authority to depart from the requirements of that rule. The Commission has clearly considered the issue of time that would be taken by opening statements, and it has issued a proper and appropriate order governing opening statements.

Keystone's request to depart from the rule and require written opening statements prior to the date of the hearing runs contrary to the law and to practicality and must therefore be denied.

3. Keystone's Request to Preclude Friendly Cross-Examination

Keystone's request to preclude "friendly" cross-examination must be denied because this relief is not permitted by law. The Rules of Evidence allow a court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence," but it does not permit a court to prohibit a party (or multiple parties) from exercising this basic due process right altogether. This curtailment of the judicial process is not permitted under the law. In the event that a question on cross-examination is likely to solicit "duplicative testimony having no evidentiary value," Keystone should feel free to object to that question. However, in all likelihood, the attorneys for other intervenors would in fact use their time wisely and ask questions that would lead to valuable testimony – because that is the reason for asking such questions. Keystone's concern about time is artificial because time could just as easily be saved by objecting to questions as described above. Keystone's true purpose in making this request is to further and unlawfully limit the information available to the Commission on which to make its decision. This request must therefore be denied.

4. Keystone's Request to Limit Scope of Cross-Examination

Keystone's motion should be denied with respect to its fifth request regarding the scope of cross-examination because the requested relief runs contrary to the law and to the interests of justice in this proceeding. SDCL § 19-19-611(b) defines the scope of cross-examination. It states: "Cross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness*. *The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination*" (emphasis added). Keystone's fifth request

runs afoul of this statute which, as part of the South Dakota Rules of Evidence, governs this proceeding. At a minimum, the Commission must allow the scope of cross-examination to include matters affecting the credibility of a witness.

In addition, it is within the Commission's discretion to permit questioning on cross-examination to include additional matters. Due to the nature of this proceeding and the Commission's need to make an informed decision, it is appropriate for the Commission to permit questioning on additional matters provided that such matters are still relevant to the proceeding. This is especially true given the sparseness of factual information contained in Keystone's pre-filed testimony that relates to the conditions on which the permit was granted. The only reason to preclude such questioning is to limit the information available to the Commission. This is surely not in the best interest of the public or of the State of South Dakota.

As required by South Dakota law, the Commission must permit the scope of cross-examination to include matters affecting the credibility of the witness, and the Commission should, in the interest of justice and in accordance with South Dakota law, permit the scope of cross-examination to include matters beyond the subject matter of the direct examination so long as those matters are relevant to the proceeding.

5. Keystone's Request to Prohibit Argument of Evidentiary Objections

In its final request, Keystone seeks once again to place the interest of time before the interests of justice by limiting the abilities of counsel to advocate for their clients in this proceeding. The purpose of the South Dakota Rules of Evidence is "to secure fairness in administration, elimination of *unjustifiable* expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained and proceedings justly determined.*" SDCL § 19-19-102 (emphasis added). Keystone wishes to restrict the right of

parties to argue evidentiary objections. The minimal delay that may result from such arguments is insignificant compared to the detriment this request would cause to fairness in the proceeding. Any delay is justified by the interest of ensuring that fairness exists in the evidentiary hearing so that the Commission can ascertain the truth and make a fair determination. Keystone's request therefore runs contrary to the very purpose of the Rules of Evidence.

Any minimal delay that might result from arguments regarding objections is further justified by the need to ensure that an adequate and accurate record is available in the event of an appeal. Pursuant to SDCL § 19-19-103(a), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and … [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection*, if the specific ground was not apparent from the context…" The only way to ensure that due process rights are preserved on appeal is to allow the parties to state the grounds for objections on the record. To deny parties this ability is to deny due process.

The South Dakota Rules of Evidence and procedural due process require that parties be permitted to argue evidentiary objections. Keystone's sixth request contained in its motion must therefore be denied.

For the foregoing reasons, Yankton respectfully requests that the Commission deny *Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing*.

Dated this 17th day of July, 2015.

Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jbaker@ndnlaw.com
Email: trealbird@ndnlaw.com

Attorneys for Yankton Sioux Tribe

and

/s/ Kimberly Craven
Kimberly Craven, AZ BAR #23163
3560 Catalpa Way
Boulder, CO 80304
Telephone: 303.494.1974
Fax: 720.328.9411
Email: kimecraven@gmail.com

Attorney for Indigenous Environmental Network