

**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**

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**STAFF'S BRIEF IN RESPONSE TO
STANDING ROCK SIOUX TRIBE'S
MOTION FOR DISCOVERY
SANCTIONS OR TO COMPEL**

HP14-001

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Motion for Discovery Sanctions or to Compel ("Motion") filed by Standing Rock Sioux Tribe ("Standing Rock").

I. Jurisdictional Statement

In the current proceeding, Standing Rock filed a Motion requesting the Commission impose sanctions against TransCanada Keystone Pipeline, LP ("Keystone") for alleged violations of the discovery process. The Commission has jurisdiction over this issue pursuant to ARSD 20:10:01:01.02 and 20:10:01:22.01 and SDCL § 15-6-37.

II. Procedural Background

On September 15, 2014, the Commission received a filing from Keystone seeking an order accepting certification of the permit issued in HP09-001. The Commission issued an Amended Final Decision and Order granting a permit to Keystone on June 29, 2010. Because it has been at least four years since the permit was issued, Keystone is now seeking an order accepting certification, per SDCL 49-41B-27. An intervention deadline of October 15, 2014, was set. The Commission granted intervention to several parties.

On December 17, 2014, the Commission issued an Order establishing a procedural schedule. An evidentiary hearing was set for May 5-8, 2015. In addition to dates for an evidentiary hearing, the procedural schedule established the date for an initial round of discovery as January 6, 2015, with initial discovery responses served by February 6, 2015. The procedural schedule also established that final discovery would be served by February 20, 2015, with responses to final discovery serve no later than March 10, 2015.

On October 30, 2014, Keystone filed a Motion to Define the Scope of Discovery Under SDCL § 49-41B-27. In that motion, Keystone requested the commission issue an order limiting the scope of discovery. A hearing on that motion took place at the regular commission meeting on December 9, 2014.

Following argument from the parties, the commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule (“December 17 Order”). In that Order, with Commissioner Fiegen dissenting, the commission ordered that

discovery shall be limited to only discovery regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone’s Tracking Table of Changes attached to the Petition as Appendix C, that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed.

On March 25, 2015, Standing Rock filed a Motion for Discovery Sanctions or to Compel. In its Motion Standing Rock requests the Commission issue and Order prohibiting Keystone from introducing evidence regarding compliance by Keystone with state and federal law and, as

a result of this sanction, dismissing this proceeding. In the alternative, Standing Rock seeks an order to compel Keystone to fully answer Standing Rock's interrogatories.

III. Legal Argument and Analysis

Staff was not a party to the discovery at issue and does not have enough information to take a position on whether or not Keystone has violated the rules of discovery. Through this response, Staff merely seeks to provide input into the appropriate legal standard, as well as object to the certain sanctions. Much of Staff's discussion will echo that provided in Staff's Brief in Response to Keystone's Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery. Again, the analysis for the Commission is twofold. First, is the information sought by Standing Rock discoverable, or is this information which is protected by privilege and, therefore, not subject to discovery? Second, if this information is subject to discovery, what is the appropriate sanction for failure to respond to Standing Rock's request for discovery?

a. Was the information sought discoverable?

The South Dakota Supreme Court has held that the statute concerning discovery should be liberally construed. *Bean v. Best*, 76 SD 462, 80 N.W.2d 565, 566. In addition, as per the Commission's December 17 Order, a party to this docket may discover any information

regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C, that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed.

Staff does not have enough information to take a position on whether Keystone has violated the rules of discovery.

b. If Keystone did violate the rules of discovery, should the requested sanctions be imposed?

The Commission has broad discretion in imposition of sanctions under the statute governing motions SDCL § 15-6-37(a). *Widdoss v. Donahue*, 331 NW2d 831, 835 (SD 1983) (citing, Wright & Miller, *Federal Practice & Procedure*, § 2284). 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 the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

Haberer v. Radio Shack, a Div. of Tandy Corp., 555 N.W.2d 606, 611 (S.D. 1996) (citing, *Magbuhat v. Kovarik*, 382 N.E. 43 (S.D. 1986)). The Court further stated the

[p]rohibition of evidence offered by a party who has not complied with the discovery rules is designed to compel production of evidence and to promote, rather than stifle, the truth finding process. Imposing a sanction such as the exclusion of the testimony should result when failure to comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

Id. at 610 (quoting, *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D.1994) (internal citations and quotations omitted). The Court also has made it clear that it takes seriously deadlines for discovery and compliance with the discovery process. The Court has stated that "...order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in

this manner should not be heard to complain that a sanction was too severe.” *Schwartz v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999).

However, Court noted in *Magbuhat*, that SDCL 15-6-37(b) is:

designed to compel *production* of evidence and to promote, rather than stifle, the truth finding process. *See Chittenden, supra*. 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 thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

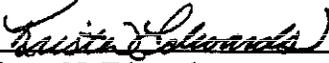
Magbuhat, 382 N.W.2d at 45 (internal citations omitted). To grant the request to preclude would greatly stifle the truth finding process. This fact is no more clearly demonstrated than by Standing Rock's request to follow the requested sanction with a dismissal of the entire proceeding. No remedy could be more contrary to the Court's holding in *Magbuhat*. Therefore, Staff recommends the Commission not grant Standing Rock's motion to preclude. Instead, should the Commission determine Keystone has failed to properly conduct discovery, Staff recommends less drastic sanctions.

While Staff objects to the request for Commission to preclude Keystone from presenting evidence on compliance with state and federal law, Staff does not take a position on the motion to compel.

IV. Conclusion

While Staff does not take a position on whether Keystone has violated the rules of discovery, Staff does not believe that precluding Keystone from introducing evidence regarding compliance with state or federal law and dismissing this proceeding is an appropriate sanction.

Dated this 6th day of April, 2015.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

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I hereby certify that true and correct copies of Staff's Brief in Response to Standing Rock Sioux Tribe's Motion for Discovery Sanctions or to Compel, and Certificate of Service were served electronically to the Parties listed below, on the 6th day of April, 2015, addressed to:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Mr. Bill G. Taylor
Attorney
Woods, Fuller, Shultz and Smith P.C.
PO Box 5027
Sioux Falls, SD 57117
bill.taylor@woodsfuller.com

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us

Mr. Paul F. Seamans
27893 249th St.
Draper, SD 57531
jackknife@goldenwest.net

Mr. Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
brian.rounds@state.sd.us

Mr. John H. Harter
28125 307th Ave.
Winner, SD 57580
johnharter11@yahoo.com

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us

Ms. Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

Mr. James E. Moore
Attorney
Woods, Fuller, Shultz and Smith P.C.
PO Box 5027
Sioux Falls, SD 57117
james.moore@woodsfuller.com

Mr. Tony Rogers
Rosebud Sioux Tribe - Tribal Utility
Commission
153 S. Main St.
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Ms. Viola Wain
PO Box 937
Rosebud, SD 57570
wainranch@goldenwest.net

Ms. Jane Kleeb
Bold Nebraska
1010 N. Denver Ave.
Hastings, NE 68901
jane@boldnebraska.org

Mr. Benjamin D. Gotschall
Bold Nebraska
6505 W. Davey Rd.
Raymond, NE 68428
ben@boldnebraska.org

Mr. Byron T. & Ms. Diana L. Steskal
707 E. 2nd St.
Stuart NE 68780
prairierose@nntc.net

Ms. Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Mr. Arthur R. Tanderup
52343 857th Rd.
Neligh, NE 68756
atanderu@gmail.com

Mr. Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com
(605) 208-0606 - voice

Ms. Carolyn P. Smith
305 N. 3rd St.
Plainview, NE 68769
peachie_1234@yahoo.com

Mr. Robert G. Allpress
46165 Badger Rd.
Naper, NE 68755
bobandnan2008@hotmail.com
(402) 832-5298 - voice

Mr. Jeff Jensen
14376 Laflin Rd.
Newell, SD 57760
jensen@sdplains.com

Mr. Louis T. Genung
902 E. 7th St.
Hastings, NE 68901
tg64152@windstream.net

Mr. Peter Capossela, P.C.
Attorney at Law
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com

Ms. Nancy Hilding
6300 W. Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Mr. Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Mr. Bruce & Ms. RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Ave.
Bassett, NE 68714
boettcherann@abbnebraska.com

Ms. Wrexie Lainson Bardaglio
9748 Arden Rd.
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com
(607) 229-8819 - voice

Mr. Cyril Scott
President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
cscott@gwtc.net
ejantoine@hotmail.com

Mr. Eric Antoine
Attorney
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

Ms. Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Mr. Harold C. Frazier
Chairman
Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldcfrazier@yahoo.com

Ms. Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschaffer@gmail.com

Ms. Debbie J. Trapp
24952 US HWY 14
Midland, SD 57552
mtdt@goldenwest.net

Ms. Gena M. Parkhurst
2825 Minnewasta Place
Rapid City, SD 57702
gmp66@hotmail.com

Ms. Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

Mr. Robert Flying Hawk
Chairman
Yankton Sioux Tribe
PO Box 1153
Wagner, SD 57380
Robertflyinghawk@gmail.com

Ms. Thomasina Real Bird
Attorney
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com

Ms. Chastity Jewett
1321 Woodridge Dr.
Rapid City, SD 57701
chasjewett@gmail.com

Mr. Duncan Meisel
350.org
20 Jay St. #1010
Brooklyn, NY 11201
duncan@350.org

Ms. Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabrina@dakotarural.org

Mr. Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Mr. Bruce Ellison
Attorney
Dakota Rural Action
518 Sixth St. #6
Rapid City, SD 57701
belli4law@aol.com

Mr. Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org

Mr. Dallas Goldtooth
38371 Res. HWY 1
Morton, MN 56270
goldtoothdallas@gmail.com

Ms. Bonny Kilmurry
47798 888 Rd.
Atkinson, NE 68713
bjkilmurry@gmail.com

Mr. Robert P. Gough
Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Mr. Terry & Cheryl Frisch
47591 875th Rd.
Atkinson, NE 68713
tcfrisch@g.com

Ms. Tracey Zephier
Fredericks Peebles & Morgan LLP
Ste. 104
910 5th St.
Rapid City, SD 57701
tzephier@ndnlaw.com

Mr. Robin S. Martinez
Martinez Madrigal & Machicao, LLC
616 W. 26th St.
Kansas City, MO 64108
robin.martinez@martinezlaw.net

Ms. Mary Turgeon Wynne, Esq.
Rosebud Sioux Tribe - Tribal Utility
Commission
153 S. Main St
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Ms. April D. McCart
Certified Paralegal
Martinez Madrigal & Machicao, LLC
616 W. 26th St.
Kansas City, MO 64108
april.mccart@martinezlaw.net

Mr. Matthew L. Rappold
Rappold Law Office
816 Sixth St.
PO Box 873
Rapid City, SD 57709
Matt.rappold01@gmail.com

Mr. Paul C. Blackburn - Representing: Bold
Nebraska
Attorney
4145 20th Ave. South
Minneapolis, MN 55407
paul@paulblackburn.net

Ms. Kimberly E. Craven - Representing:
Indigenous Environmental Network (IEN)
Attorney
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

And on April 6, 2015, a true and accurate copy of the foregoing was mailed via U.S. Mail, first class postage prepaid, to the following:

Mr. Cody Jones
21648 US HWY 14/63
Midland, SD 57552

Mr. Jerry Jones
22584 US HWY 14
Midland SD 57552

Ms. Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748

Mr. Ronald Fees
17401 Fox Ridge Rd.
Opal, SD 57758



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501