

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

IN THE MATTER OF THE APPLICATION BY)
TRANSCANADA KEYSTONE PIPELINE, LP)
FOR A PERMIT UNDER THE SOUTH DAKOTA)
ENERGY CONVERSION AND TRANSMISSION)
FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

HP 14-001

**STANDING ROCK SIOUX TRIBE, ROSEBUD SIOUX TRIBE AND
YANKTON SIOUX TRIBE JOINT SUR-REPLY IN OPPOSITION TO
APPLICANT’S MOTION TO STRIKE TESTIMONY AND EXHIBITS OF
CINDY MYERS**

Intervenors Standing Rock Sioux Tribe, Rosebud Sioux Tribe and Yankton Sioux Tribe are concerned with the *Motion to Strike* because TransCanada has consistently urged the Commission to exclude evidence based upon a stilted and narrow interpretation of the South Dakota Rules of Evidence, and important Tribal evidence has been excluded as a result. *E.g. Order Granting Motion in Limine to Preclude Testimony of Jennifer Galindo and Waste Win Young* (July 22, 2015); *Order Granting Motion in Limine to Preclude Testimony of Chris Saucosi* (July 22, 2015); *Order Granting in Part Keystone Motion’s for Discovery Sanctions* (April 17, 2015). The Commission should deny the *Motion to Strike the Testimony and Exhibits of Cindy Myers*, and re-open the record to hear relevant, admissible testimony pro-offered by Standing Rock and other Tribes but improperly excluded. *State Div. of Human Rights v. Miller*, 349 N.W.2d 42, 44-45 (S.D. 1984) (affirming agency which re-opened record to take additional testimony).

In its Reply Brief, TransCanada cites *Oesterling v. Oesterling*, 354 N.W.2d 735, 736 (S.D. 1984), which stands for the proposition that pro se litigants must strictly comply with procedural rules in *circuit court*. The application of *Oesterling* is limited to the circuit courts; it does not apply to hearings conducted by administrative agencies. The rule for agency hearings is that the absence of counsel relaxes the traditional, technical impediments to the introduction of testimony, because the agency fact-finder is deemed to possess expertise in the area of the agency’s jurisdiction, and is able to weigh

evidence accordingly. *See Highfill v. Bowen*, 832 F.2d 112 (8th Cir. 1987) (pro se appellant in disability claim); *St. Dept. of Labor and Employment v. Esser*, 30 P.3d 189 (Colo. 2001). “It is well established that ‘the ALJ has a duty to develop the facts fully and fairly, particularly when (a litigant)... is not represented by counsel.’ ” *Highfill v. Bowen*, *id.* at 115.

The argument that the PUC must strictly apply the rules of evidence in order to strike Ms. Myers testimony and exhibits is erroneous. *Id.* The only evidence which the Commission is obligated to exclude is identified in SDCL 1-26-19(1), which states, “Irrelevant, incompetent, immaterial or unduly repetitious evidence shall be excluded.”

There is nothing wrong with Cindy Myers’ testimony or exhibits. It clearly does not fit the definition of evidence to be excluded in an agency hearing. *Id.* In fact, the testimony is very helpful to the Commission.

Significantly, under South Dakota Rule of Evidence 701, a lay witness may give opinion and inference testimony that based upon her experience and perceptions, as long as the testimony is helpful. SDCL §19-19-701. With respect to the pre-filed testimony:

- The description of benzene’s toxicity as a carcinogen and proper protocols for emergency responders (challenged in *Applicant’s Motion*, pp. 1-2, #1-2, 4-6) is clearly admissible testimony by a registered nurse under Rule 701.
- The pre-filed testimony on the location of aquifers (challenged in *Applicant’s Motion*, pp. 1-2, #3-4) is admissible testimony by someone who lives near the aquifer, under SDCL §19-19-602 (personal knowledge).
- The location of federally-funded drinking water intakes on maps (challenged on p. 2, #7) is admissible under the public records exception to the hearsay rule. SDCL §19-19-803(8). *See Dubray v. South Dakota Dept. of Social Services*, 690 N.W.2d 657 (S.D. 2007) (hearsay admissible before an agency if it falls within exception). This applies to the challenge to exhibit 2 (6001), as well. (*Applicant’s Motion*, p. 4, #1).

Moreover, the *Motion to Strike* the pre-filed testimony resembles a motion in limine, and should have been filed as such. The Commission established a deadline for the filing of such motions in its Amended Scheduling Order, and the deadline has long passed. *Amended Scheduling Order*, May 5, 2015. The motion is dilatory and untimely,

as well as unmeritorious. Ms. Myers' pre-filed testimony should not be stuck from the record.

With respect to Ms. Myers' hearing testimony:

- The statements by Kevin Schlosser and Carol Moyer (challenged on pp. 2-3, #1, 8) are admissible under the then-existing state of mind exception to hearsay. SDCL §19-19-803(3). The Commission need not consider this testimony for the purpose of determining the truth of whether TransCanada has worked with Sioux Falls emergency responders or demonstrated sensitivity to the threat to Colome's water supply, but it is clearly admissible for the purpose of showing that these city officials do not believe that TransCanada worked with them in earnest. *Id.* This applies to the challenge to exhibits 6027-6028, as well. (p. 4, #11-12).
- Testimony by a registered nurse is sufficient foundation for information of the International Agency on Cancer Research (challenged in *Applicant's Motion*, p. 2, #2).
- The references to the Agency for Toxic Substances and Disease Registry and Iowa Department of Natural Resources (challenged on p. 3, #4-5, 7, 11) are admissible under the public records exception to the hearsay rule. SDCL §19-19-803(8). This applies to the challenge to exhibits 40, 50, as well. (*Applicant's Motion*, p. 4, #4, 8).
- The Stansbury quote (challenged on p. 3, #6) is admissible as an exception to hearsay under both the public records exception (it is part of the Final Supplemental Environmental Impact Statement) and the learned treatise exception. SDCL §19-19-803(8) & (18). This applies to the challenge to exhibits 4, 40 and 47-49 (6003-6005), as well. (*Applicant's Motion*, p. 4, #2, 4, 7).
- The information accumulated by Paul Seamans is admissible public information, the fact that it is provided as a compilation makes it reasonable inference testimony from public records. SDCL §§19-19-602, 19-19-803(8). This applies to the challenge to exhibit 2 (6001), as well. (*Applicant's Motion*, p. 4, #10).

- The power point presentation is a helpful summary and is admissible as inference testimony under Rule 701. SDCL §19-19-701.

Ultimately, TransCanada's continuing efforts to limit the evidence considered by the Commission in deciding whether to certify the permit are heavy-handed and unmeritorious. The Applicant's *Motion to Strike Testimony and Exhibits of Cindy Myers* should be denied, and the Commission should reconsider the previous exclusion of intervenor witnesses. Only then will HP-14-001 be a fair hearing within the meaning of South Dakota law. SDCL §§1-26-21 – 1-26-26.

DATED this 28th day of October, 2015

By: *Peter Capossela*
Peter Capossela, P.C.
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

/s/ Chase Iron Eyes
Chase Iron Eyes
Iron Eyes Law Office, PLLC
Post Office Box 888
Fort Yates, North Dakota 58538
(701) 455-3702
chaseironeyes@gmail.com
S.D. Bar No. 3981

Attorneys for Standing Rock Sioux Tribe

/s/Matthew L. Rappold
Attorney for the Rosebud Sioux Tribe
P.O. Box 873
Rapid City, SD 57709
(605) 828-1680
Matt.rappold01@gmail.com

/s/ Thomasina Real Bird

Thomasina Real Bird, SD Bar No. 4415

Jennifer S. Baker, *Pro Hac Vice*

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

Certificate of Service

The undersigned hereby certifies that, on this day, I served the afore Sur-Reply to Applicant's Motion to Strike Testimony and Exhibits of Cindy Myers via electronic mail to –

William G. Taylor
bill.taylor@woodsfuller.com

James E. Moore
james.moore@woodsfuller.com

James P. White
jim_p_white@transcanada.com

Attorneys for TransCanada Keystone Pipeline, LP

Patty Van Gerpen
Patty.Vangerpen@state.sd.us

Darren Kearney
Darren.Kearney@state.sd.us

Kristen Edwards
Kristen.Edwards@state.sd.us

Brian Rounds
Brian.Rounds@state.sd.us

Tina Douglas
Tina.douglas@state.sd.us

Kristie Fiegen
Kristie.fiegen@state.sd.us

Gary Hanson
Gary.hanson@state.sd.us

Chris Nelson
Chris.nelson@state.sd.us

Greg Rislov
Greg.rislov@state.sd.us

John Smith
John.smith3@state.sd.us

Rolayne Wiest
Rolayne.wiest@state.sd.us

Amy Schaffer
amyannschafter@gmail.com

April D. McCant
April.mccant@martinezlaw.net

Arthur Tanderup
atanderu@gmail.com

Benjamin D. Gotschall
ben@boldnebraska.org

Bruce & RoxAnn Boettcher
boettcherann@abbnebraska.com

Bruce Ellison
Belli4law@aol.com
Attorney for Dakota Rural Action

Byron & Diana Steskal
prairierose@nntc.net

Carolyn Smith
Peachie_1234@yahoo.com

Chastity Jewett
chasjewett@gmail.com

Chris Hesla
sdwf@mncomm.com

Cindy Myers, RN
csmyers77@hotmail.com

Dallas Goldtooth
goldtoothdallas@gmail.com

Debbie J. Trapp
mtdt@goldenwest.net

Duncan Meisel
Duncan@350.org

Elizabeth Lone Eagle
bethcbest@gmail.com

Eric Antoine
ejantoine@hotmail.com
Attorney for Rosebud Sioux Tribe

Frank James
fejames@dakotarural.org

Gary Dorr
gfdorr@gmail.com

Gena Parkhurst
Gmp66@hotmail.com

Honorable Harold Frazier
haroldcfrazier@yahoo.com

Jane Kleeb
jane@boldnebraska.org

John H. Harter
johnharter11@yahoo.com

Joye Braun
jmbraun57625@gmail.com

Kimberly Craven
kimecraven@gmail.com
Attorney for Indigenous Environmental Network

Lewis GrassRope
Wisestar8@msn.com

Louis Genung
Tg64152@windsream.net

Mary Turgeon Wynne
tuc@Rosebudsiouxtribe-nsn.gov
Attorney for Rosebud Tribal Utility Commission

Matthew Rappold
Matt.rappold01@gmail.com
Attorney for Rosebud Sioux Tribe

Nancy Hilding
nhilshat@rapidnet.com

Paul F. Seamans
jackknife@goldenwest.net

Robert Allpress
bobandnan2008@hotmail.com

Honorable Robert Flying Hawk
Robertflyinghawk@gmail.com

Robert P. Gough
bobgough@intertribalcoup.org
Attorney for ICOUP

Robin Martinez
Robin.martinez@martinezlaw.com
Attorney for Dakota Rural Action

Paula Antoine
wopila@gwtc.net

Sabrina King
Sabrina@dakotarural.org

Terry & Cheryl Frisch
tcfrisch@q.com

Thomasina Real Bird
trealbird@ndnlaw.com
Attorney for Yankton Sioux Tribe

Tom BK Goldtooth
ien.igc.org

Tony Rogers
tuc@rosebudsiouxtribe-nsn.gov

Tracey Zephier
Tzephier@ndnlaw.com
Attorney for Cheyenne River Sioux Tribe

Viola Waln
walnranch@goldenwest.net

Wrexie Lainson Bardaglio
Wrexie.bardaglio@gmail.com

Dated this 28th day of October, 2015

By: *Peter Capossela*
Peter Capossela