

effect be dismissed. These positions cannot be reconciled and demonstrate the opportunistic nature of both motions.

2. The joint motion fails to address the documents that were provided in response to the specific discovery request that is the subject of the Affidavit of James White. The document request was number 13 from Dakota Rural Action. Keystone responded:

The Design Basis Memorandum for the Project, dated October 2008, is included in the non-confidential FTP site. It is the initial design guidance for the project and mandates compliance with codes and standards in Section 4. The IFC (Issued For Construction) drawings which provide compliance direction on a site-specific basis are included in the confidential FTP site. The IFC drawings are the result of thousands of hours of engineering, surveys, and design, at a cost of millions of dollars, and would substantially injure Keystone if publicly disclosed and made available to competitors. Keystone's Special Permit Application is included in the non-confidential FTP site. Keystone has not submitted any other waiver applications. The correspondence and specific documents related to the Department of State, PHMSA and EPA Independent Engineering Design review are included in the non-confidential FTP site. The correspondence and specific documents related to compliance with the PHMSA special conditions are included in the non-confidential FTP site. Only select conditions were the subject of correspondence based on timing set forth in the conditions relative to work Keystone was undertaking at the time (special condition 1-9 (pipe), 14 (HCAs), 18 (welding procedure development), 58 (QC) and 59 (TPIC)). The correspondence and specific documents related to the development of the special conditions are included in the non-confidential FTP site.

(Taylor Aff. ¶ 2, Ex. A.) Thus, Keystone produced a large volume of documents in response to this request. (*Id.*) The joint motion does not argue that the documents were not responsive.

3. The joint motion contends that Keystone violated the Commission's orders because it did not undertake an e-mail search of at least 1,000 persons over a seven-year period to find communications with PHMSA, the Department of State, and any other federal agency related to the project. The Intervenor's do not dispute that compliance was not reasonably possible. In fact, when counsel discussed issues related to Keystone's document production with counsel for some of the Intervenor's on April 20, opposing counsel acknowledged the factual basis for Mr. White's affidavit, and in response to an inquiry from counsel for Keystone, said that they would be willing to consider narrowing the request. (Taylor Aff. ¶ 3.) That has not

happened. (*Id.*) Thus, when the Intervenors argue that Keystone had an “affirmative duty to make a reasonable inquiry (and) respond in a matter which was both complete and correct,” (Joint Motion Br. at 2 (citing *Hersberger v. Ethicon Endo-Surgery, Inc.*, 277 F.R.D. 299, 305 (S.D. W.Va. 2011)), Keystone does not disagree. It made a reasonable inquiry and produced a substantial volume of responsive documents. The Intervenors do not argue what is missing or how it might be relevant to the proceeding.

4. The suggestion that Keystone had several weeks to comply, not several days, and could have completed an e-mail search within that time is without merit. (Joint Motion Br. at 1-2.) First, Keystone reasonably relied on its objection to the discovery request until the motion to compel was granted. Second, as of March 26, 2015, the date mentioned in the brief in support of the joint motion, Dakota Rural Action had not filed a motion to compel discovery. Keystone’s objection was first stated on January 23, 2015, and not challenged by DRA until its motion to compel was filed on April 7. Based on this argument, Keystone would have had 10 days to conduct the search, not “several weeks.” Third, as demonstrated by White’s affidavit, even several weeks would not have been sufficient time for Keystone to comply with the request for a general e-mail search of 1,000-plus persons over seven years for all communications with PHMSA, the Department of State, or any other federal agency related to the project.

5. The argument that Keystone’s document production was made in a “haphazard” way is without basis. As indicated in the joint motion for a continuance, Keystone produced 42.54 GB of data, consisting of 6,214 total files. Keystone organized the document production with respect to particular document requests, and produced the documents through an FTP site to which counsel for the parties entitled to the discovery were given access. In opening the site, responsive documents were identified by the name of the requesting party and the number of

either the interrogatory or the document request. (Taylor Aff. ¶ 4.) The documents were organized and produced with specific reference to the request to which each document was responsive.

6. The argument that Keystone’s method of production violated SDCL § 15-6-34(b) is contrary to the plain language of the statute, which provides that the producing party “shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.” Keystone did both. It keeps the documents in the ordinary course of business in electronic format, and produced them by organizing and labeling them to correspond with the specific requests. Keystone further notes that the Standing Rock Sioux Tribe initially demanded that Keystone produce paper copies of the documents at its Tribal headquarters at Fort Yates, North Dakota, by 4:30 p.m. on April 17. (Taylor Aff. ¶ 5.) Keystone reasonably responded that South Dakota’s rules of civil procedure did not require that. (*Id.*)

7. The Intervenors argue that the ultimate sanctions they seek are appropriate under a standard reserving such sanctions for a failure to comply due to willfulness, bad faith, or fault. (Joint Motion Br. at 3 (citing *Haberer v. Radio Shack*, 555 N.W.2d 606, 611 (S.D. 1996)). The Intervenors also compare Keystone’s conduct to that of a number of the Intervenors who entirely failed to respond, at all, in any way, to written discovery served by Keystone. (Joint Motion Br. at 4.) Lest the Commission doubt Keystone’s good faith and its compliance with discovery in this case, attached to counsel’s affidavit in connection with this motion are all of Keystone’s discovery pleadings in response to the first and second rounds of discovery, and its supplemental responses. (Taylor Aff. ¶ 6.) Keystone respectfully submits that its compliance with the Commission’s order was substantial, made in good faith, sufficient under South Dakota’s rules of civil procedure, and not prejudicial to the Intervenors.

Conclusion

The joint motion is yet one more effort to forestall or delay the evidentiary hearing on the merits of Keystone’s petition according to the terms of the Commission’s procedural order.

Keystone respectfully requests that the motion be denied.

Dated this 27th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant’s Opposition to Joint Motion to Exclude Evidence and Testimony, to the following:

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