

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 14-001

IN THE MATTER OF THE PETITION OF	:	APPLICANT’S REPLY TO DAKOTA
TRANSCANADA KEYSTONE PIPELINE, LP	:	RURAL ACTION’S BRIEF RESISTING
FOR ORDER ACCEPTING CERTIFICATION	:	THE PROTECTIVE LIMINE MOTION
OF PERMIT ISSUED IN DOCKET HP09-001 TO	:	REGARDING DAKOTA RURAL
CONSTRUCT THE KEYSTONE XL PROJECT	:	ACTION’S EXHIBIT LIST
	:	

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Keystone offers the following as a supplement to its Friday, July 10, 2015, motion in limine objecting to the Dakota Rural Action’s list of previously unproduced and unidentified exhibits, and associated untimely production of documents, and as a reply to DRA’s July 14, 2015, brief.

Background

On Tuesday, July 7, Dakota Rural Action filed a list of 1,073 exhibits it apparently intends to offer in evidence at the coming hearing.¹ All but 36 of the documents had not been identified or produced in discovery. After business hours on Thursday, July 9, DRA posted files containing the documents on a website and sent counsel for Keystone a link to the website.

On Friday, July 10, 2015, Keystone filed a protective motion ahead of the *limine* motion deadline challenging the exhibit list and associated belated production of documents.

On Tuesday, July 14, attorney William Taylor, representing Keystone, discussed the exhibit list and website content with DRA attorney Robin Martinez, as detailed in the affidavit filed herewith. On Wednesday, July 15, DRA filed “. . .suggestions. . .” in opposition to

¹ In actuality, the list indentifies 1,073 files, far more than 1,073 documents. Some of the files contain multiple subfiles, and presumably multiple documents. The actual number of documents has not yet been ascertained because of time constraints due to the belated production.

Keystone's motion. This brief supplements Keystone's protective motion of July 10 and responds to DRA's "suggestions."

The Documents

A portion of the 1,073 files/exhibits listed on DRA's Exhibit List have never been identified or produced by anyone in this case. In Tuesday's conference between counsel, DRA's attorney conceded that items numbered 67-128 were delivered to DRA by its proposed witness Evan Vokes, and have never surfaced before in this case, either by way of response to document requests or as attachments to Vokes direct or rebuttal testimony. DRA more or less admitted the same in its "suggestions" filing July 14. *See* paragraph 9 thereof.

Items numbered 397-409 are photographs taken by DRA's proposed witness Sibson.² None of the photos have ever been produced in the case, either in response to discovery requests or in conjunction with pre-filed testimony.

Items numbered 1058-1062 are geologic reports, some prepared by the SD Geological Survey or the SD Department of Environment and Natural Resources. None of the reports were produced in response to document requests or shown as exhibits to pre-filed testimony.

Items numbered 1063-1073 are photos taken or acquired by Vokes of pipeline construction in Texas. None of the photos have been previously produced or appended to pre-filed testimony.

DRA asserts that items 29-36 are publically available on the internet, that items 37 and 67 came from a PHMSA Freedom of Information Act request that it made, and that 39-65 came

² There is no item numbered 409 posted on the website. Attorney Martinez says it is video taken from a drone, and that he has not yet seen it. He said he noted it on the exhibit list as a "placeholder."

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from a document request it made to South Dakota DENR. None of the documents have been previously produced or appended to pre-filed testimony.

DRA asserts the remainder of the materials are from Keystone's document production, either formal or posted on the internet FTP site April 17 in response to the Commission's production order following the April 14 discovery hearing. Because of time constraints and the volume of files involved, Keystone cannot confirm the accuracy of DRA's representations as to those materials.

Procedural History

On December 14, 2014, the Commission entered a scheduling order requiring discovery requests to be filed in January and answered in February. A second round of discovery requests were allowed in February and answered by March 10.

Keystone filed discovery requests on December 18, 2014, several weeks ahead of the Commission's deadline. Interveners, including DRA, asserted they had until February 6 to respond, despite South Dakota Civil Procedure rules to the contrary. Keystone didn't object to the response date.

In its initial discovery requests, Keystone asked DRA to produce ". . .all documents you intend to offer as exhibits at the evidentiary hearing." *See* Applicant's document request No. 1. On February 6, DRA responded by saying it didn't know what documents it intended to offer, producing no documents.

On March 10, DRA supplemented its February 6 response, producing ten documents comprising about 500 pages. Two were witness resumes and a third was a transcript from the 2007 Keystone hearings. The balance were documents were from the public domain and are

duplicated in the July 7 exhibit list as items 31-36. By supplementing its response, DRA demonstrated it clearly understood its discovery obligations. DRA made no further production.

DRA has said for months that it intended to call Evan Vokes, a former TransCanada employee and self-described “whistle-blower” as a witness. DRA has had ample time to determine what documents and pictures Vokes had available and to produce them as supplemental discovery. Instead it waited until July 9, after the close of business.

In the same manner, DRA has said it intends to call Ms. Sibson, a landowner on the base Keystone Pipeline. Again, DRA has had ample time to determine what photos she had and to produce them as supplemental discovery. Again it waited until July 9.

On April 17, 18 days before the hearing then set for May 5, Keystone produced thousands of pages of documents pursuant to the Commission’s order. On April 24, citing *Mordhurst v Egert*, 223 NW 2d 501 (SD 1974), DRA moved the Commission to continue the hearing date, arguing

The requirement that the enormous amount of data be reviewed for completeness and substance in time for the trial is unreasonable and impossible. *Joint Motion Brief*, filed April 24, 2015.

Now DRA is attempting to do exactly what it objected to in April...produce thousands of documents exactly 18 days before the hearing, after having had months to make its production. DRA is clearly out to prejudice Keystone’s trial preparation by waiting until Keystone had filed its rebuttal testimony and made its case, then producing a volume of previously undisclosed documents and indicating its intention to introduce them as exhibits.

Discovery Statutes

The South Dakota Rules of Civil Procedure apply to this proceeding. The Rules contain very specific direction regarding production of documents and spell out the consequences for failure to comply.

SDCL § 15-6-26(e) provides, in part

- (1) A party is under a duty to supplement at appropriate intervals the party's response to a discovery request. . .if additional . . . information has not otherwise been made known to the other parties during the discovery process.

SDCL § 15-6-37(c) provides, in part

- (1) A party that without substantial justification fails to disclose information required by subdivision 15-6-26(e)(1). . .is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing. . .any. . .information not so disclosed.

In December, Keystone asked DRA to produce or identify the exhibits it intended to introduce at trial. DRA responded, at first saying it didn't know, then, on March 10, producing a volume of documents. The discovery responses were never supplemented.

Last Tuesday, in the form of an exhibit list, DRA identified thousands of documents it intends to offer as exhibits. All but six had never been previously identified as exhibits, despite discovery requests served almost seven months previously seeking the documents be identified. Last Thursday, long after the discovery deadline and only hours before the *limine* motion deadline, an enormous volume of materials were produced.

DRA identified documents it intended to use at trial on March 10. Keystone is entitled to rely on DRA's March 10 discovery responses. SDCL 15-6- 26(e) requires DRA to timely supplement its discovery responses, which DRA did not do. Keystone prepared its defenses to DRA's claims based on the un-supplemented March 10 discovery responses and the pre-filed testimony. To allow late production, on the eve of the final motion deadline, corrupts the

discovery process, is prejudicial to Keystone and is nothing more than a calculated attempt by DRA to disrupt the discovery and trial preparation process established by the Commission.

SDCL 15-6-37(c) places the burden on DRA to explain why it didn't timely produce the documents, and requires exclusion of the documents if DRA cannot provide *substantial justification* for its failure. DRA made no attempt to explain why it failed to timely produce more than 1,000 of the documents it now wants to offer into evidence. In its response to Keystone's motion, DRA skips over its statutory discovery obligations. It offers no explanation for why it should be allowed to ignore or violate the Commission's orders on production of documents. Rather, it simply contends that the documents it identified "are documents prepared or produced by TransCanada itself", as if that somehow cures DRA's failure to either produce the documents or identify them in response to Keystone's first document request of December 18, which asked for all documents intended to be used at trial.

Trial Preparation Impact

DRA contends that because many of the undisclosed documents it intends to offer are either from the internet or TransCanada documents, it should somehow be excused from compliance with the discovery orders. DRA ignores the fact that Keystone requested, in December 18 discovery request number 1, that DRA produce and disclose ". . .all documents that you intend to use at the evidentiary hearing. . . ."

Keystone, like any experienced litigant, asked for disclosure of documents anticipated to be used in the coming trial for a very specific reason. Advance knowledge of what documents DRA intended to offer allows Keystone to tailor its pre-filed testimony and trial presentation to address, rebut or impeach the documents. Production of documents in that context isn't about whether they were TransCanada documents or whether they were in the public domain...rather,

it is about trial preparation and the opportunity to prepare and present a case. It would be palpably unfair to allow DRA to produce, for the first time, a thousand files containing a myriad of documents 18 days before the hearing, and then offer them into evidence, long after the deadline for submitting pre-filed rebuttal. It is nothing more than an effort to sandbag Keystone and thumb its nose at the Commission's procedural orders, a gambit no trial judge would ever allow.

Second, DRA's belated identification of unproduced exhibits fouls the evidentiary process. Months ago the Commission set a deadline for *limine* motions. As the parties pointed out in their *limine* motion briefing, the purpose of *limine* motions is to resolve questions regarding admissibility, foundation, and relevance of evidence ahead of trial, to avoid prejudice, unnecessary disputes, and to streamline the hearing. DRA's belated identification of unproduced documents, followed by production two days later, after business hours the day before the *limine* motion deadline, effectively eliminates the opportunity to resolve pretrial challenges to the evidentiary relevance of those exhibits, requiring Keystone to challenge the documents one by one as they are proffered.

DRA no doubt will offer to cure its belated production by offering to agree to a continuance. Keystone has no interest in a continuance. At DRA's request the hearing was continued once. The case is ready to try and Keystone is ready to try it.

Conclusion

DRA's document identification of previously unidentified and unproduced exhibits is untimely. Failure to produce the documents is a blatant violation of the discovery statutes. Per SDCL § 15-6-37(c)(1), the appropriate sanction is to refuse to allow the exhibits to be admitted at trial.

In *Haberer v Radio Shack*, 555 N.W.2d 606 (SD 1996), our Supreme Court held that imposing sanctions for failure to comply with the discovery statutes is designed to promote, rather than stifle, truth-finding.

DRA offers no explanation for its flagrant violation of the Commission orders and the Rules of Civil Procedure. Keystone's motion to prevent introduction of the 1000 belatedly produced exhibits must be granted.

Dated this 16th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Reply to Dakota Rural Action's Brief Resisting the Protective Limine Motion Regarding Dakota Rural Action's Exhibit List, to the following:

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