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 HP09-0001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	))))))	Docket 14-001

RESPONSE OF BOLD NEBRASKA IN SUPPORT OF THE MOTIONS TO AMEND PROCEDURAL SCHEDULE OF THE ROSEBUD SIOUX TRIBE AND THE STANDING ROCK SIOUX TRIBE

COMES NOW Bold Nebraska ("Bold"), by and through its counsel, in response to the Rosebud Sioux Tribe ("RST") and Standing Rock Sioux Tribes ("SRST") (together "Tribes") Motions to Amend Procedural Schedule ("Tribes' Motions"), filed with the South Dakota Public Utilities Commission ("Commission") on March 25, 2015, and March 27, 2015, respectively. For the reasons provided below, Bold supports the Motions.

PROCEDURAL BACKGROUND

In its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule, the Commission established the following schedule ("Schedule"):

Yankton Sioux Tribe's Motion to Dismiss heard at Commission's regular meeting	January 6, 2015
Initial round of discovery served	January 6, 2015
Initial discovery responses served	February 6, 2015
Final discovery served	February 20, 2015
Responses to final discovery served	March 10, 2015
Pre-filed direct testimony filed and served	April 2, 2015
Pre-filed rebuttal testimony filed and served	April 23, 2015

Evidentiary hearing	May 5-8, 2015

On March 17, 2015, the Commission's Staff ("Staff") filed its Motion to Amend Procedural Schedule ("Staff Motion") to include a deadline of April 21, 2015, for filing witness and exhibit lists. Although such deadlines are commonly required in procedural schedules, they were not included in the Schedule.

On March 23, 2015, TransCanada Keystone XL Pipeline, LP ("TransCanada") filed its Motion to Preclude Certain Intervenors (John Harter, Bold Nebraska, Carolyn Smith, Gary Dorr, And Yankton Sioux Tribe) from Offering Evidence or Witnesses at Hearing ("Sanctions Motion"). TransCanada argued, *inter alia*, that the March 10 deadline for delivery of "final discovery" "essentially set a discovery deadline," by which it apparently means that all discovery must have been completed by this date. TransCanada appears to reason that the impending April 2, 2015, direct testimony deadline followed so closely on the March 10 "responses to final discovery served" deadline, that it is reasonable to consider the March 10 deadline as a deadline for the completion of all discovery activities. Rather than file motions to compel discovery and then seek sanctions on parties for failure to comply with any orders to compel issued in response, TransCanada has instead requested that the Commission altogether skip consideration of motions to compel and the objections that would be addressed therein. Instead, TransCanada asks that the Commission impose sanctions on Bold, the Yankton Sioux Tribe and 16 individual intervenors in this proceeding (not just the organizations and entities called out by name in the caption), without consideration of the merits of any objections or the discovery responses provided.

On March 24, 2015, the Commission docketed consideration of TranCanada's Sanctions Motion for hearing on April 14, 2015.

On March 25, 2015, the RST filed its Motion to Amend Procedural Schedule, in which it asserted, *inter alia*, that discovery negotiations were continuing in good faith and that TransCanada had failed to fully respond to the RST's discovery requests and had also failed to provide it with TransCanada's discovery responses to other parties, which TransCanada had committed to do. The RST argued that the Schedule did not provide sufficient time between the "final discovery" and pre-filed direct testimony deadlines in which to:

- receive and review the March 10 discovery responses and then, based on these responses, prepare pre-filed direct testimony;
- attempt to informally resolve discovery disputes; or
- allow for the filing of discovery motions, that would include consideration of objections raised by the intervenors.

The RST also argued that requiring the filing of pre-filed direct testimony before resolution of discovery disputes violates the RST's state and federal Constitutional due process rights, and therefore requested that the Commission set a date certain for resolution of all discovery issues and postpone setting the date for pre-filed direct testimony until after such date.

Also on March 25, 2015, the SRST filed a Motion for Discovery Sanctions or to Compel, which seeks to resolve discovery disputes between it and TransCanada.

Also on March 25, 2015, TransCanada filed is Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery, which apparently is identical to its originally filed motion, except that it removed the names of particular entities and individuals from the caption and introductory paragraph.

On March 26, 2015, the Commission docketed the RST scheduling motion for hearing on March 31, five days later.

On March 27, 2015, the SRST filed its own Motion to Amend Order Setting Procedural Schedule, in which it proposed the following amended schedule.

Close of discovery	May 11, 2015
Pre-filed testimony	June 2, 2015
Rebuttal testimony	June 23,2015
Filing of exhibits	June 23, 2015
Hearing	July 14-17, 2015

The SRST asserted that it lacked sufficient time to procure expert witness assistance and to allow its expert to prepare and submit testimony by the pre-filed testimony deadline. It also alleged that TransCanada's failure to respond fully to SRST's discovery violated South Dakota law. Additional time is required to resolve SRST's discovery dispute with TransCanada.

On March 27, the Commission docketed the SRST scheduling motion for March 31, 2015, four days later.

On March 28, the RST filed a Memorandum in Support of Motion to Amend Schedule.

STATEMENT OF FACTS

I. Status of Bold Discovery to TransCanada

Bold submitted its initial and final discovery to TransCanada (Attachments A and B, respectively) by the deadlines established in the Schedule. Bold's initial discovery requested information related to a number of matters, including the current need for the Keystone XL Pipeline ("Project"), changes to the Project since the Commission's issuance of the June 29, 2010 Final Permit for the Project ("Final Permit"), and TransCanada's compliance with Final Permit conditions. Bold's final discovery was more focused. It sought data on the physical design of the pipeline, which data is needed to analyze the size of possible worst case discharges

at key locations in South Dakota. It also sought limited information as follow up to initial discovery.

TransCanada responded to Bold's requests on January 23, February 6, and March 10 (Attachments C, D, E and F; due to the volume of attachments provide by TransCanada, only TransCanada's written responses to discovery are provided here and not their attachments, but such attachments are available should the Commission or a party request them). On January 23 TransCanada provided its objections to Bold's initial discovery. On February 6 it provided its substantive responses to Bold's initial discovery that also included objections. On March 10 it provided objections and substantive responses to Bold's final discovery requests and also supplemented its response to Bold initial round of discovery. Although TransCanada provided limited information, much of which is publicly available, TransCanada primarily responded with multiple objections to most of Bold's discovery responses, all told amounting to hundreds of individual objections.

Rather than respond to each of the TransCanada objections immediately, Bold waited until it had determined its financial capacity to hire expert witnesses, determined the scope of testimony planned by other parties to avoid duplication, and then, based on capacity and evidentiary need, reached a tentative agreement with an expert witness to testify on matters related to spill response. As a result of this effort, Bold limited decided to limit its discovery disputes to those related to the calculation of potential worst case discharge amounts and TransCanada's capability to respond to such discharges. This voluntary decision to limit its testimony and related discovery has significantly narrowed the potential range and scope of discovery disputes between Bold and TransCanada.

On March 26, 2015, in an attempt to informally resolve discovery disputes, Bold sent a six page letter to TransCanada (Attachment G) in which it discussed all of TransCanada's objections to Bold discovery requests 45, 46, 48, 49, and 71-79, which concern worst case discharge calculations and TransCanada's capacity to respond to such discharges. This letter provided legal and/or factual bases for Bold's requests and where TransCanada's objections were vague, also sought clarification from TransCanada of its rationales for its objections because many of them were very general in nature. With regard to TransCanada's substantive responses, Bold also described why the limited responses that TransCanada did provide are insufficient. Finally, counsel for Bold offered to discuss these issues with TransCanada's counsel for the purpose of informally resolving these disputes to avoid Commission resolution based on a motion to compel.

On the same day, TransCanada responded to Bold's letter by stating only that it would respond during the week of March 30.

II. Status of TransCanada Discovery to Bold

TransCanada submitted initial discovery to Bold (Attachment H) by the Schedule deadline and chose not to submit "final discovery" requests. TransCanada's initial discovery was very broadly stated and generally sought the identity of witnesses, the contents of their testimony, and all documents on which their testimony relied, as well as all information related to all contested Final Permit Facts and Conditions.

Bold timely responded to TransCanada's initial discovery on February 6 (Attachment I). Bold's response included a number of objections based on the attorney-client privilege and because the requests were overly broad and vague. With regard to substantive responses, Bold

stated that it had not at that time identified the witnesses it intended to present, which meant that Bold could not identify the content of or the documentary foundations for such testimony. Bold also provided a list of the Final Order Findings of Fact that Bold believes are no longer accurate and a list of the conditions that Bold believes TransCanada cannot meet, but Bold could not identify experts who would testify on these facts and conditions because Bold had not been able by the initial discovery deadline to retain any experts.

On February 12, 2015, TransCanada sent a letter in response to Bold's discovery responses (Attachment J). The full text is provided below:

> We received your discovery responses on February 6. While we appreciate the information that you provided, not all of your responses comply with the South Dakota Rules of Civil Procedure. The rules require a good faith effort to fully answer the questions and provide the documents requested. Given the time available for discovery and the fixed hearing date, we need to know the identity of all lay and expert witnesses you intend to call and need all documents that you intend to introduce at the hearing.
>
> Please fully and completely respond to our discovery requests by the close of business March 10, 2015, the date discovery closes per the Public Utilities Commission order. If you do not make a good faith effort to respond, you can expect that TransCanada will seek protections allowed by the Rules of Civil Procedure, which would include limiting your participation in the hearing.

TransCanada did not seek to discuss any refinements to its broad discovery requests, did not discuss any of Bold's objections, and did not offer to negotiate on discovery. Instead, it:

(1) stated its opinion that Bold's discovery response did not comply with the Rules of Civil Procedure, without explaining how;

(2) stated that the Rules of Civil Procedure require a good faith effort to fully answer requests, which is a matter of law;

(3) stated that TransCanada needed Bold to identify all of its lay and expert witnesses, such that TransCanada stated that its deadline for Bold to "fully and completely respond to our discovery requests" was March 10, because it was the "date that discovery closes per the Public Utilities Commission order;" and

(4) issued a threat to seek sanctions against Bold for any failure by it to make a good faith effort to respond by March 10.

Thus, TransCanada's letter was not informal communication intended to resolve discovery disputes, but rather merely provided TransCanada's interpretation of the Schedule as it related to discovery (that all discovery matters closed on March 10) and voiced a threat to seek sanctions if Bold did not comply with TransCanada's interpretation of the Schedule. The letter did not discuss discovery disputes and did not invite any opportunity for informal discussions of discovery disputes. It is Bold's understanding that TransCanada sent similar letters to all or almost all of the intervenors in this proceeding. Thus, it appears that TransCanada itself has not initiated any informal attempt to resolve discovery disputes.

On March 23, 2015, Bold submitted its First Supplemental Response to the Interrogatories and Requests for Production of Documents of TransCanada (Attachment K). In this document, Bold stated that it did not intend to call any fact (non-expert) witnesses, and that it intends to call Richard Kuprewicz, a well-known pipeline engineer, as its only expert witness. Bold provided identifying material and a copy of Mr. Kuprewicz's resume, and also described the scope of Mr. Kuprewicz's proposed testimony as:

> (1) the potential worst case discharge volumes from the proposed Keystone XL Pipeline in critical areas within the State of South Dakota and in critical areas in other states immediately adjacent to boundary waters shared with the State of South Dakota, a spill from which could threaten South Dakota waters; (2) the placement of valves and control equipment to minimize the potential impacts

> of such worst case discharges; (3) the potential impacts of various types of crude oil on the water resources of the State of South Dakota; and (4) the adequacy and effectiveness of TransCanada's planned on-the-ground capacity to respond to such worst case discharges.

Bold stated that it could not provide information about Mr. Kuprewicz's opinions or the facts and documents on which he would base such opinions, because Mr. Kuprewicz's opinion testimony is dependent on receipt of information requested from TransCanada in discovery, which Bold has not received due to TransCanada's discovery objections, and formal engineering analysis of such information.

In order to calculate potential worst case discharges from Project operations, should it be built, Mr. Kuprewicz requires specific pieces of information about the design of the pipeline. TransCanada has objected to release of almost all of this information. Thus, Mr. Kuprewicz is unable to form an opinion about the size of potential worst case discharges in South Dakota. In order to determine the potential impacts of worst case discharges in South Dakota and TransCanada's readiness to respond to such discharges, Mr. Kuprewicz must first know how much oil might be spilled, because the volume of the potential worst case discharge is an essential element in determining the impacts of potential oil spills, how much equipment and personnel is needed for response, and where such personnel and equipment must be located.

Since TransCanada has objected to discovery of the information needed by Mr. Kuprewicz based on the Commission's jurisdiction, the testimony's relevance to this proceeding, federal preemption issues, and confidentiality and security issues, it appears that TransCanada believes that the Commission should entirely exclude Mr. Kuprewicz's proposed testimony, or if it is allowed, condition discovery response on Bold's entering into a non-disclosure agreement approved by a protective order. Assuming that TransCanada and Bold are not able to informally

resolve these disputes, a motion to compel submitted by Bold against TransCanada would allow the Commission to determine whether or not it will hear Mr. Kuprewicz's testimony. It is possible that the Commission could rule in favor of TransCanada on its discovery disputes with Bold, thereby in effect finding that testimony and evidence related to worst case discharges and TransCanada's capacity to respond to oil spills is inadmissible. On the other hand, should the Commission decide to compel discovery, then it would also need to determine if TransCanada's confidentiality and security concerns are real and protected by state law, which would require that TransCanada seek and the Commission issue of a protective order, including a non-disclosure agreement for execution by Bold and its expert.

In short, Bold cannot fully respond to TransCanada's discovery requests unless and until TransCanada responds to Bold's discovery requests, and it is likely that TransCanada will provide requested information pursuant only to an order to compel discovery and possibly a protective order. Unfortunately, the Schedule failed to expressly provide time for, and does not as a practical matter include sufficient time to allow, resolution of discovery disputes.

ARGUMENT

I. The Schedule Does Not Terminate All Discovery Activities on March 10, 2015

TransCanada interpreted the schedule as requiring that all parties must "fully and completely respond" to discovery by March 10, or risk sanction, in part because of the impending deadline for filing direct testimony. TransCanada essentially argues that <u>all</u> discovery responses by all parties must have been provided by March 10, 2015, because this is necessary to meet the direct testimony deadline. TransCanada's interpretation fails to interpret the Schedule

according to its plain language, is contrary to the discovery supplementation instructions included by TransCanada itself in its discovery requests, and is illogical.

The Schedule provides for two rounds of discovery: "initial discovery" and "final discovery." The Commission scheduling order does not state that all discovery activities must be completed by the "final discovery" deadline of March 10, nor would such position be rational. Instead, the Schedule describes March 10 deadline as the time that parties must serve "responses to final discovery" on requesting parties. This deadline only relates to the initial response to the second ("final") round of discovery. Thus, the plain language of the Schedule contains no express deadline for completion of all discovery activities or resolution of discovery disputes.

Also, TransCanada's discovery instructions anticipated that parties would be required to supplement their discovery responses after the date that an initial discovery response is due. The first page of TransCanada's discovery requests to Bold (and presumably all parties) specifically states:

> These Interrogatories and Requests for Production are to be deemed continuing and if you or your attorneys and agents obtain any information with respect to them after making the original answers, it is requested that supplemental answers be made.

This statement anticipates that discovery does not end upon the deadline for an initial response to a discovery round, because otherwise there would be no opportunity for supplementation. Thus, TransCanada's position that all parties must "fully and completely respond" to discovery by March 10 is inconsistent with its own discovery instructions, which expressly recognize an ongoing duty to supplement discovery responses after parties "obtain any information," including presumably information obtained from or based on discovery responses by TransCanada.

Finally, it is illogical to interpret the schedule as terminating all discovery activities on March 10. It is axiomatic that the purpose of discovery is to acquire information to use in the preparation of testimony. Since parties have a duty to supplement their discovery responses as they develop their cases, acquire and analyze information, and prepare testimony, they must supplement their discovery responses based on their use of information acquired from other parties in discovery. Such supplementation logically must follow disclosure of first responses to each round of requests.

Since TransCanada's "final discovery" response was required to be delivered on March 10, it was impossible for intervenors on this same day to also analyze information provided by TransCanada, prepare testimony based on this analysis, and answer discovery about such analysis and testimony. Logically, the day that a response to a final round of discovery is first due cannot also be the final day on which all discovery responses must be provided, because it would be impossible to use the information acquired by such discovery in subsequent analysis and testimony and provide it via supplemental discovery responses.

Bold's situation provides a clear example of why all discovery activities cannot end on the "responses to final discovery served" deadline. The Commission gave Bold the right to participate in two rounds of discovery. Due to the challenge of identifying and retaining expert assistance, Bold was not able to request from TransCanada the information required by Bold's intended witness until the second discovery round. This meant that Bold did not receive TransCanada's responses to these requests until March 10. Even if TransCanada had provided all of the information required by Mr. Kuprewicz on March 10, it was logically impossible for him to analyze and prepare testimony and for Bold to provide responses to TransCanada's discovery requests about such testimony, on the same day. Perhaps not surprisingly,

TransCanada objected to Bold's discovery requests and provided almost none of the information required for Mr. Kuprewicz's testimony, such that Commission resolution of discovery disputes will likely be necessary. This situation demonstrates why it would be fundamentally unfair to end all discovery activities on March 10.

II. The Schedule Does Not Provide a Reasonable Period in Which to Resolve Discovery Disputes

Since the "responses to final discovery served" date cannot be the final day of all discovery activities, it follows that the Schedule does not expressly provide for a date by which all discovery activities must be completed. TransCanada states that the April 2, 2015, deadline for submission of direct testimony "essentially" makes the March 10 deadline the practical deadline for all discovery activities. However, the plain language of the Schedule does not in fact say this.

Moreover, treating April 2 as the effective date that all discovery disputes must be resolved would mean that the intervenors would have 23 days in which to:

(1) review and analyze TransCanada's discovery responses;

(2) resolve all discovery disputes, including resolution of all motions to compel; and

(3) prepare and file testimony based on any information required.

As a practical matter, it is impossible for Bold and likely other intervenors to comply with such an abbreviated schedule.

Even if all of the parties had analyzed TransCanada's hundreds of objections and reviewed all of its responses on March 11, the day after it received TransCanada's responses, (which was practically impossible), it is unreasonably optimistic to think that between March 11 and April 2 the Commission could have:

(1) scheduled a hearing on motions to compel;

(2) conducted such hearing;

(3) written its orders based on this hearing;

(4) allowed time for preparation of discovery responses in compliance with such orders; and

(5) provided a reasonable time for receipt, analysis, and testimony drafting based on such responses.

The only way that the April 2 deadline makes sense is if the Commission assumed that there would be no discovery disputes because all information required for testimony would be delivered on March 10, as this process would provide three weeks solely for preparation of direct written testimony. If the Commission made such assumption, it was unreasonable.

In the Commission's Pre-Hearing Conference on the schedule, a number of parties voiced concerns about the length of time needed to complete discovery, including but not limited to the time needed to resolve discovery disputes. Pre-Hearing Conference Transcript at 16, 20-22, 24-27, 32-34, 36-48. Yet, the Commission failed to include in the Schedule an express period of time in which to resolve discovery disputes, and also failed to provide a schedule with sufficient practical flexibility to allow for resolution of discovery disputes. The lack of a defined time in which to resolve discovery disputes is a more significant schedule omission then the Schedule's failure to provide a deadline for identification of witnesses and exhibits.

Given the breadth of issues in this proceeding, the technical matters at issue, the number of intervenors, and the lack of precedence about the scope of discovery allowed in certification hearings, it is unreasonable to assume that no discovery disputes would arise and that all

discovery matters could be resolved in time to allow preparation and filing of direct testimony by April 2.

III. A Failure to Amend the Schedule Would Violate the Due Process Rights of Bold and Other Intervenors

Bold supports the arguments made by the RST in its Memorandum in Support of Motion to Amend Procedural Schedule, filed on March 28, 2015.

Bold also asserts that the Commission issued a fundamentally flawed and unfair schedule that has put the intervenors in an untenable position. Intervenors identified the likelihood that discovery disputes would require substantial time for resolution, but the Commission failed to expressly provide for or allow sufficient schedule flexibility to address discovery disputes. Moreover, the Commission is fully aware of the potential for discovery disputes and the time typically required for their resolution, yet it failed to provide a reasonable schedule.

IV. Conclusion

For the foregoing reasons, Bold respectfully requests that the Commission grant both the RST and SRST motions to amend the schedule to allow reasonable times for:

1) resolution of discovery disputes, including motions to compel (minimum of two weeks);

2) compliance with motions to compel (minimum of two weeks);

4) Analysis and preparation of testimony and identification of exhibits (minimum of three weeks); and

5) Supplementation of discovery responses before the hearing (minimum of one week).

Therefore, Bold requests that the deadline for filing pre-filed direct testimony be extended by approximately eight weeks and that the balance of the schedule be adjusted to account for this extension.

Dated March 30, 2015

Respectfully submitted,

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