

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

IN THE MATTER OF TRANSCANADA
KEYSTONE PIPELINE, LP
FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

JOINT MOTION FOR
CONTINUANCE
AND RELIEF FROM
SCHEDULING ORDER

HP14-001

The following parties, Dakota Rural Action, Rosebud Sioux Tribe, Yankton Sioux Tribe, Bold Nebraska, the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe, through the undersigned counsel, request the Commission grant equitable relief from the scheduling order and to continue the evidentiary hearing scheduled for May 5-8, 2015 as noticed in the PUC Notice of hearing Order dated April 17, 2015. Counsel for Rosebud Sioux Tribe affidavit in support of this motion is attached hereto and incorporated by reference as if reiterated in full herein.

The Commission issued its initial Scheduling Order on December 17, 2014 over the objections of the interveners, who requested a period of time that would allow the parties to engage in a meaningful discovery process consistent with the South Dakota Rules of Civil Procedure and fundamental notions of due process, justice and fair play. Following the initial Scheduling Order, there have been four requests to amend the procedural schedule, three of which have been granted. With the exception of the Staff's Motion to Amend Procedural Schedule which requested a date to file and serve witness and exhibit lists, all of the requests to amend the procedural schedule alleged procedural scheduling deficiencies related to the application of the South Dakota Rules of Civil Procedure. Although the Commission and the

applicant are taking the position that discovery is complete, the facts on the record show otherwise.

The Commission is authorized to grant continuances pursuant to SDCL 15-11-4. Generally speaking, the decision to grant or refuse a continuance lies with the sound discretion of the trial court. *Olesen v. Snyder*, 277 NW 2d 729 (1979). In this case, that sound discretion rests with the Commission. These types of decisions will not be reversed on appeal in the absence of an abuse of discretion. *Farmers and Merchants State Bank v. Mann*, 203 N.W. 2d 173. Additionally, courts may grant continuances upon terms that the court may impose. We are asking for a continuance because discovery is not yet complete. It is entirely unreasonable for the trial to be scheduled, despite the fact that the Commission and Keystone have taken the position that discovery is complete when it is in fact not complete. The parties submit that it is an abuse of discretion to require a trial to take place when discovery is not complete and when the parties have not had a sufficient time to meaningfully review documents produced as a result of the Order to Compel Production. Other Motions will be filed by the parties that address these issues.

Requiring a trial to take place prior to the completion of discovery is an act that is arbitrary, capricious, violates the South Dakota Rules of Civil Procedure as well as fundamental principles of due process and fairness. This action is in violation of the rights of the parties as those rights are protected and understood under the Constitution and Laws of the State of South Dakota and the United States Constitution.

South Dakota Supreme Court addressed this basic concept many years ago in *Mordhorst v. Egert*, 223 NW 2d 501 (SD 1974) when it held ““It is one of the mainstays of our system of

laws that a state cannot affect a person's personal or property rights except after a hearing before a fair and impartial tribunal. * * * A fair and impartial tribunal requires at least that the trier of fact be disinterested * * * and that he also be free from any form of bias or predisposition regarding the outcome of the case * * *. Not only must the procedures be fair, 'the very appearance of complete fairness' must also be present. * * * These principles apply not only to trials, but equally, if not more so, to administrative proceedings. (citations omitted)" *Wall et al. v. American Optometric Association, Inc. et al.*, 379 F.Supp. 175 (N.D.Ga., filed April 19, 1974).

On March 31, 2015, the Commission issued two Orders amending the procedural schedule and issued one Order that denied Standing Rock Sioux Tribe's motion to amend the procedural schedule. The first Order did several things. The Commission granted Rosebud Sioux Tribe's Motion to Amend Scheduling Order, to change Rosebud's deadline for filing pre-filed testimony. The Second Order granted the Staff's Motion to include a date for filing and serving witness and exhibit lists. Finally, the March 31st Order pertaining to Rosebud's Motion to Amend included a scheduled date to file discovery motions to compel, and scheduled discovery hearings for April 14, 2015. This Order further established April 17, 2015 as the date to provide compelled discovery. The March 31st Order pertaining to the Staff's Motion to Amend Procedural Schedule established April 21, 2015 as the date to file and serve witness and exhibit lists. The Commission, again, on April 8, 2015 amended the Scheduling Order regarding the Rosebud Sioux Tribe's date to file testimony. As you will see, the March 31st Order left the parties 5 business days to review, respond and assess the adequacy of over 6000 files prior to the date to file rebuttal testimony on April 27, 2015.

Following a hearing on April 14, 2015 which lasted over ten hours, the PUC issued three separate orders that compelled Keystone to produce responses to certain interrogatories and

request for production of documents made by Dakota Rural Action, the Standing Rock Sioux Tribe and the Yankton Sioux Tribe. Bold Nebraska and the Rosebud Sioux Tribe are both entitled to the same compelled document production because both Bold Nebraska and the Rosebud Sioux Tribe requested that Keystone provide them all of their discovery responses to all other parties under Keystone's continuing duty to supplement their discovery responses. In total, Keystone was compelled to produce answers to 16 interrogatories in addition to 35 document production requests.

Since the issuing of the Amended order that required witness and exhibit lists to be filed with the Commission on April 21, 2015, the parties have stipulated to April 28, 2015 as the new date to file witness and exhibit lists. Although the parties stipulated to this new date for filing witness and exhibit lists, the undersigned parties in no way feel that the new date satisfies underlying concerns that there is not sufficient time in the schedule to allow the discovery process to be completed prior to the scheduled evidentiary hearing taking place. The instant motion is based on the grounds that there is not sufficient time in the procedural schedule to resolve discovery disputes and complete the discovery process in a meaningful manner prior to starting the trial in this matter.

Additionally, if other witnesses are identified based on a review of the new information, these parties will be permitted to present that testimony at the evidentiary hearing as rebuttal testimony, however the incredibly condensed schedule does not actually permit this to take place. Again, adding to the numerous due process violations that have already taken place. These arguments were presented to the Commission through several motions filed by various parties. Each reasonable request for relief from the schedule to properly amend the schedule to account for these requirements has been summarily rejected by the Commission. There is not

ample time to review the information to make a proper determination as to whether or not Keystone has in fact actually fully complied with the Order to Compel Discovery. This results in an additional due process violation as the Rules of Civil procedure provide for this to take place and contemplates that even though parties are compelled or ordered to do certain things, parties to proceedings may not actually do what they are ordered to do. It is worthy to note that Keystone has objected to providing this discovery since at least March 10, 2015. Some of their objections were overruled with the Commission ordering that Keystone be compelled to produce discovery.

Late in the afternoon of April 17, 2015, Keystone made confidential and non-confidential data available electronically in response to the PUC's Order to Compel Production. The confidential data consists of 2,508 files and is contained in 222 folders and consists of 35.7GB of data. The non-confidential data consists of 3,706 files and is contained in 419 folders and is 6.84GB of data. The total amount of documents produced by Keystone is 42.54 GB of data, consisting of 6,214 total files. Due to the limiting nature of the protective order concerning confidential information the parties have not even been able to share the information with experts for purposes of determining actual confidentiality and for the preparation of testimony and exhibit lists. These concerns are being taken up by separate motion.

Upon receipt of the compelled discovery on Friday, April 17th in the late afternoon the parties immediately set out to access the data and transfer to a secured cloud service. Due to the large quantity of data, the number of files provided by Keystone, the inefficient manner in which the information was provided and security concerns with the site utilized by Keystone, it took a considerable amount of time to even do this. This leaves the parties facing an unreasonable and

impossible deadline to fully prepare for the trial of this matter, to file rebuttal testimony by April 27, 2015 and be prepared for a May 5, 2015 trial.

Despite numerous and repeated reasonable requests to adjust the procedural schedule in a meaningful manner, the PUC continues to cling to an unreasonably condensed schedule which is impossible to comply with and unnecessarily restricts the fact-finding process of discovery. The continued application of the current schedule violates all of the parties' due process rights in that it denies the parties the opportunity to participate meaningfully in the case and imposes unreasonable, unrealistic and arbitrary deadlines, especially given the enormity and complexity of the discoverable information already produced along with the information that Keystone produced on April 17, 2015.

The requirement that the enormous amount of data be reviewed for completeness and substance in time for the trial is unreasonable and impossible. Many of the parties are calling witnesses in the evidentiary hearing scheduled for May 5-8, 2015. These witnesses require the opportunity to review and properly analyze the compelled discovery. In addition to these concerns, the Protective Order concerning the compelled discovery limits the review process to "attorneys of record" and as such, prevents meaningful review of these materials by expert witnesses as well as legal support staff and others. Given the unrealistically condensed schedule for the case, it is also impossible to meaningfully review this data in time for the evidentiary hearing scheduled for May 5-8, 2015.

The Court in *Mordhorst* went on to state "that the absence of fundamental fairness in proceedings followed by the South Dakota State Board of Examiners in Optometry spawned this litigation. The trial court was asked to examine the situation and concluded that due process

requirements had been violated. We affirm and decide no more. However, this and other similarly constituted boards should re-examine their structures and procedures, remembering that the final refuge people have in all governmental procedures is that of due process, the eternal friend of justice and unrelenting foe of undue passion.”

The situation currently before the elected body of the Public Utilities Commission is no different. The guidance from the Court in *Mordhorst* is no less valuable today, than it was when was first uttered nearly a half century ago. Accordingly, the Commission should grant the party’s reasonable request for a continuance until such time as all disputes regarding discovery between the parties can be resolved. Only then can the Commission provide a completely fair environment for these important issues to be decided.

Based on the above and foregoing, the undersigned respectfully request the Commission to grant them equitable relief from the Notice of Scheduling Order and grant a continuance for the evidentiary hearing scheduled on May 5-8, 2015.

Dated this 24th day of April, 2015.

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