

before then. If the Tribe has political or legal issues that complicate its process for retaining litigation experts, those are issues that should have been recognized and addressed by the Tribe well in advance of December 17, 2014. Indeed, the Tribe was on notice as of November 13, 2014, that Keystone sought a Scheduling Order with a hearing date in March, 2015.

2. The Tribe's motion is a variation on its earlier objections stated when the Scheduling Order was entered. At a hearing on December 9, 2015, the Tribe objected that the proposed Scheduling Order did not allow sufficient time for its processes. The Tribe's objections were overruled. The Tribe offers no reason why the Commission's earlier determination should not stand.

3. In its initial discovery responses to Keystone's written discovery, served on February 6, 2015, the Tribe did not disclose any expert testimony. In supplemental responses served on March 10, the Tribe disclosed two expert witnesses: Linda S. Black Elk, from Fort Yates, North Dakota; and Kevin E. Cahill, of EcoNorthwest, in Boise, Idaho. (Moore Aff. ¶ 2 & Ex. A.) The Tribe disclosed documents supporting the expert testimony of Linda Black Elk, but stated that while Dr. Cahill would testify about "the economic and environmental conditions relating to Keystone XL," the substance of each opinion to which he would testify had "not been fully determined at the present time." The Tribe does not explain why Linda Black Elk's testimony could be timely obtained, but not the testimony of Dr. Cahill. Moreover, Keystone is prepared to meet the testimony of Dr. Cahill, even though the substance of his proposed testimony has not been disclosed as of this late date, as long as his prefiled direct testimony is submitted as required on April 2, 2015.

4. Keystone would be prejudiced by the continuance that the Tribe proposes. Keystone has worked diligently to meet the deadlines in the Scheduling Order. Keystone

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answered 850 interrogatories and document requests, not including subparts, in the initial round of discovery. (Moore Aff.¶ 3.) Keystone answered another 180 interrogatories and document requests, not including subparts, in the second round of discovery. (*Id.*) Keystone is prepared to serve its prefiled direct testimony on April 2; it has arranged its preparations to enable it to meet the deadline for prefiled rebuttal testimony; it is preparing its witnesses for the hearing beginning on May 5; its witnesses have arranged their schedules to appear at the hearing; and Keystone has made travel, hotel, and other logistical arrangements for the hearing. Changing the schedule at this late date for reasons previously stated by the Tribe and rejected by the Commission would prejudice Keystone. Moreover, the Tribe's proposed continuance, which includes a rescheduled hearing in mid-July, would delay this proceeding well beyond the time necessary for resolution given the limited scope of a certification proceeding under SDCL 49-41B-27.

5. The Tribe contends that Keystone failed to comply with discovery, and has filed a separate motion for discovery sanctions, which motion is set for hearing on April 14. Keystone will respond to the merits of the Tribe's arguments in response to that motion. For purposes of this motion, however, the Commission should consider that the Tribe is objecting to discovery answers that were made on February 6, 2015. Counsel for Keystone and the Tribe spoke about the Tribe's concerns on February 24, 2015. (Moore Aff.¶ 4.) Yet the Tribe waited until March 25 to file its motion for discovery sanctions, and until March 27 to file its motion to amend the Scheduling Order. Having failed to act expeditiously, the Tribe should not be heard to complain only three days before its prefiled testimony is due that its dissatisfaction with Keystone's discovery responses served almost two months ago is a basis for amending the Scheduling Order.

6. The Tribe bears the burden of proving good cause for an amendment of the scheduling order. SDCL § 15-6-16 (“[a] schedule shall not be modified except by leave of the judge upon a

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showing of good cause”). The South Dakota Supreme Court has noted that the most relevant factor to consider “is usually the effect that the amendment will have on delaying the ultimate disposition of the case.” *Tosh v. Schwab*, 2007 S.D. 132, ¶ 24, 743 N.W.2d 422, 430.

Ultimately, “a continuance may properly be denied when the party had ample time for preparation or the request for a continuance was not made until the last minute.” *State v. Moeller*, 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431.

For all of these reasons, Keystone respectfully requests that the Tribe’s motion to amend the Scheduling Order be denied.

Dated this 30th day of March, 2015.

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