

addressed its concerns to Keystone’s initial discovery responses, which were made on February 6, in a letter dated March 3, 2015, almost one month later. (*Id.* ¶ 4.) Counsel for the parties discussed the Tribe’s concerns in a telephone conference on March 13, 2015. (*Id.* ¶¶ 5-6.)¹ Two weeks after Keystone served its responses to the second round of discovery on March 10, the Tribe addressed its concerns in a letter dated March 25, 2015. (*Id.* ¶ 7.) The length of the Tribe’s letters and the pace at which it has pursued its concerns are at odds with the Commission’s Scheduling Order and the impending hearing date. If the Tribe believed that Keystone’s discovery responses were legally insufficient and precluded it from preparing for the hearing, it could have expeditiously pursued a motion to compel discovery under SDCL § 15-6-37(a). It has not done so.

3. The Tribe does not explain how any unresolved discovery issues affect its ability to prepare for the hearing beginning on May 5 or to present its case. Despite lengthy letters addressing discovery issues, the Tribe does not explain in its motion how any discovery issues have prevented or hampered its hearing preparation. 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 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. Other relevant factors include prejudice to the opposing party; whether the continuance motion was motivated by procrastination, bad planning, or dilatory tactics; prejudice caused to the moving party by denial of the continuance; and prior

¹ Per the March 13 discussion, counsel for the Tribe rephrased several interrogatories and narrowed the scope of others per a letter sent March 16, 2015. Keystone has not yet completed responses to the letter of March 16.

continuances or delays. *Id.* ¶ 25, 743 N.W.2d at 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. Here, the Tribe has waited until the last minute to seek a continuance, a continuance would significantly delay the ultimate disposition of the proceeding, the Tribe does not state why a continuance is necessary other than in the broadest general terms, and it is clear that Keystone would be prejudiced if the motion were granted, as discussed below. The Tribe therefore has not met its burden.

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 answered 850 interrogatories and document requests, not including subparts, in the initial round of discovery. (Moore Aff., March 30, 2015, ¶ 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 asks for an indefinite extension, 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's due-process argument does not support the requested relief. Keystone does not dispute that due process requirements apply to this proceeding. *See In re Union Carbide Corp.*, 308 N.W.2d 753, 757-58 (S.D. 1981). In *Union Carbide*, the South Dakota Supreme Court held that a permit application for uranium ore exploration before the Conservation Commission was a contested case under SDCL Ch. 1-26, that the proceeding was adjudicatory in nature, and that due process applied. *Id.* at 757-58. That proposition, however, does not establish that the Commission's Scheduling Order or the proceedings in this case violate due process. The Scheduling Order, dated December 17, 2014, provided for two rounds of written discovery over almost three months. The Tribe argues that this is constitutionally insufficient because it has not had sufficient time to pursue discovery objections. Nothing in *Union Carbide*, however, dictates a certain amount of time for discovery. The parties have been given several months for discovery, they have a right to appear at a hearing, to be represented by counsel, to present testimony and documentary evidence, and to cross-examine witnesses. These opportunities are consistent with SDCL § 1-26-18. As the Tribe notes, the rules of civil procedure apply. Under those rules, however, it is within the Commission's discretion to determine discovery motions brought under SDCL § 15-6-37(a) and to address motions to amend the Scheduling Order, which can be granted only for good cause. The Tribe's suggestion that due process would be violated if the Commission exercised its discretion to deny the motion to amend is not supported by *Union Carbide*, any other authority, or the particular nature of this certification proceeding under SDCL § 49-41B-27, which is not a retrial of Keystone's permit application.

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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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the foregoing Keystone's Response to Rosebud Sioux Tribe's Motion to Amend Scheduling Order, to the following:

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