

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 :
TRANSCANADA KEYSTONE PIPELINE, LP :
FOR ORDER ACCEPTING CERTIFICATION :
OF PERMIT ISSUED IN DOCKET HP 09-001 :
TO CONSTRUCT THE KEYSTONE XL :
PROJECT, :
:

APPLICANT’S MOTION
CONCERNING PROCEDURAL
ISSUES AT THE EVIDENTIARY
HEARING

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Applicant TransCanada Keystone Pipeline, LP (“Keystone”) moves that the Commission enter an order addressing the following procedural issues at the evidentiary hearing set to begin on July 27, 2015:

1. Parties with a common interest should be limited to one lawyer who may ask questions on cross-examination. The need for such a limitation is clear from the fact that 53 witnesses prefiled direct or rebuttal testimony, there are multiple active Intervenor in the docket, and only seven days are set aside for the evidentiary hearing. The South Dakota Supreme Court has recognized that tribunals possess “inherent authority to ‘manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Annett v. American Honda Motor Co.*, 548 N.W.2d 798, 805 (S.D. 1996) (quoting *Duncan v. Pennington Cty. Housing Auth.*, 382 N.W.2d 425, 426 (S.D. 1986)). Here, the Commission should exercise its inherent authority to ensure that the cross-examination of witnesses is efficient and not duplicative.

This issue is addressed in the *Manual for Complex Litigation*, which is cited in the comments to the Federal Rules of Civil Procedure. The *Manual* addresses multi-party actions

and notes that when there are large numbers of parties, permitting all counsel to examine witnesses “may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily.” *Manual for Complex Litigation*, § 10.22 (2004). The most effective remedy is “to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation.” *Id.* For parties with a common interest, using this procedure is more efficient, saves time, and does not prejudice any party.

Thus, to ensure that the evidentiary hearing can be completed on time, Keystone moves that the Commission require Intervenors with a common interest to designate one lawyer for purposes of cross-examining each witness.

2. Although the Commission’s administrative rules provide for an opening statement and the Commission has stated in its Order For and Notice of Evidentiary Hearing that each party may make an opening statement not to exceed 10 minutes, if even 20 parties make an opening statement of that length, it will take over three hours just for opening statements, which are not evidence. Keystone moves that the Commission require instead a written opening statement to be filed Friday July 24, 2015.

3. The Commission should preclude friendly cross-examination. If a witness is not adverse to a party, the party should not be permitted to cross-examine the witness. Again, this limitation would save time, as the Commission would not be burdened with duplicative testimony having no evidentiary value.

4. If a party is represented by counsel, only counsel should be permitted to conduct cross-examination.

5. Cross-examination should be limited to the scope of the direct examination. This is standard judicial practice because it not only saves time, but also preserves the fairness of the proceedings.

6. The parties should not be permitted to argue evidentiary objections unless directed by General Counsel for the Commission. In other words, an objection should be stated without argument, and no other party should be allowed to argue the objection unless so directed by General Counsel. This will save considerable time given the number of parties.

Keystone respectfully requests that the Commission issue an appropriate order addressing these issues to ensure that the evidentiary hearing is completed efficiently, fairly, and on time.

Dated this 10th day of July, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email James.Moore@woodsfuller.com

- and -

William Taylor
2921 E. 57th Street, #10
Sioux Falls, SD 57108
Phone 605-212-1750
Bill.Taylor@williamgtaylor.com

Attorneys for Applicant TransCanada