

**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-
001 TO CONSTRUCT THE KEYSTONE
XL PIPELINE**

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* STAFF'S RESPONSE TO APPLICANT'S
* MOTION CONCERNING PROCEDURAL
* ISSUES AT THE EVIDENTIARY
* HEARING
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HP14-001

COMES NOW, Staff ("Staff") of the Public Utilities Commission ("Commission") and files this Response to Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing (Motion). In its Motion, Keystone makes six requests: 1) limiting parties with a common interest to one lawyer who may ask questions on cross-examination; 2) require opening statements to be submitted in writing, rather than given orally at the hearing; 3) preclusion of friendly cross-examination; 4) if a party is represented by counsel, allow only counsel to conduct cross-examination; 5) limit cross-examination to the scope of direct examination; and 6) prohibit parties from arguing evidentiary objections unless directed by General Counsel for the Commission.

1. Limiting parties with common interest to one lawyer who may ask questions on cross-examination

The Commission has the inherent power, as well as duty, to conduct fair and orderly hearing. *State v. Means*, 268 N.W.2d 802, 808 (SD 1978). Therefore, the Commission does have the authority, if it chooses, to grant Keystone's request. However, because of the difficulty in determining which parties have a common interest, and on which issues, it may be more workable to expressly prohibit repetitive or redundant questioning. Should the Commission

decline to grant this Motion, the Commission may revisit the issue should it become necessary during the course of the hearing.

2. Opening statements in writing

ARSD 20:10:01:22.05 allows for parties to give opening statements. However, the rule does not require opening statements to be in writing. In the Commission's Order and Notice of Evidentiary Hearing, issued on July 2, 2105, the Commission ordered that opening statements be limited to ten minutes. It is within the Commission's discretion to require opening statements to be submitted in writing. This would likely be an effective use of time, as well as a tool for the Commission to become familiar with the position of each party prior to the evidentiary hearing. Therefore, Staff supports this portion of Applicant's Motion.

3. Preclusion of friendly cross-examination

The South Dakota Supreme Court has stated that the purpose of cross-examination is to test the truth of direct examination. *State v. Johnson*, 139 N.W.2d 232 (SD 1965). Friendly cross-examination does not serve that purpose. However, using its discretion, the Commission may choose to allow cross-examination that does not merely test the truth of direct examination, provided the cross-examination is relevant. See, *State v. Dale*, 439 N.W.2d 121 (SD 1989) (holding that cross-examination is not unlimited and is subject to the rules concerning relevancy).

Therefore, Staff recommends the Commission rule on this request on a case-by-case basis at the hearing, allowing for any friendly cross-examination the Commission finds will aid in making a decision on the ultimate issue in this proceeding.

4. Cross-examination by counsel

Keystone also requests the Commission issue an order requiring that for parties that are represented by counsel, cross-examination be conducted by counsel. This is again within the

Commission's power to conduct an orderly hearing. While counsel may confer with clients in formulating cross-examination, when a party is represented by counsel, it is typical for counsel to handle the direct and cross-examination. Staff recommends the Commission grant this portion of Keystone's Motion. If a represented party asks for leave for non-counsel to participate in cross-examination, that request can be addressed during the hearing. Clearly, those parties not represented by counsel will be permitted to conduct cross-examination.

5. Scope of cross-examination

Staff agrees that cross-examination should be limited to the scope of direct examination. SDCL § 19-19-611(b) provides that “[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” However, the trier of fact does have the latitude to deviate from this rule if necessary. The South Dakota Supreme Court has held that cross-examination “is limited to the subject matter of the direct examination and matters affecting credibility. [However,] the [trier of fact] may permit, in its discretion, inquiry into additional matters as if on direct examination.” *State v. Dale*, 439 N.W.2d 98.

Therefore, Staff recommends the Commission grant the request to limit cross-examination, and entertain requests to go outside the scope of direct on a case-by-case basis as justice requires.

6. Objections

While Staff questions whether this will ultimately save a great deal of time, the Commission does have the authority to grant this portion of Keystone's Motion. SDCL § 19-19-611(a)(2) provides that the trier of fact shall exercise control over the mode and order of interrogation and presentation so as to avoid needless consumption of time. Keystone's Motion

does serve that purpose. However, Staff recommends withholding ruling until the hearing, at which time the Commission can determine whether the requested restriction is necessary.

CONCLUSION

For the foregoing reasons, Staff recommends that the Commission grant in part and deny in part Keystone's Motion. For any portion denied, Staff recommends addressing again during the evidentiary hearing.

Dated this 14th day of July, 2015.



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