

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

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**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 KEYSTONE'S  
MOTION *IN LIMINE* TO PRECLUDE  
REBUTTAL TESTIMONY OF JENNIFER  
GALINDO AND WASTÉ WIN YOUNG

**HP14-001**

COMES NOW, Staff ("Staff") of the Public Utilities Commission ("Commission") and files this Response. Keystone filed a Motion *in Limine* to Preclude the Rebuttal Testimony of Jennifer Galindo and Wasté Win Young ("Motion"). Staff supports the Motion for the reasons stated below.

**I. Rebuttal Testimony of Jennifer Galindo**

Jennifer Galindo offers testimony in rebuttal to that of Staff's witness, Paige Olson. However, the majority of Galindo's testimony is not in the form of rebuttal testimony, as it does not rebut the statement offered by Olson. Moreover, Galindo's testimony is not relevant, as it does not offer any insight into whether or not anything has changed since June of 2010 that would cause Keystone to be unable to meet the conditions of the permit.

Ms. Galindo bases her testimony on Conditions 1 and 3. She alleges that Keystone can no longer meet those conditions, because it cannot comply with the National Historic Preservation Act of 1966, specifically Section 106 of the Act. However, that burden is on the federal government. Staff does not, in this brief, take a position as to whether or not the federal government has met its obligation. If any person does not believe that the federal government has met its burden under Section 106, now 54 U.S.C. § 306108, the proper procedure would be to take action against the agency responsible for fulfilling that obligation. (See, e.g. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Circ. 2006) (Tribe suing BLM over proposed

geothermal power plant to be constructed by private corporation)). The Commission has no jurisdiction over that action, rather it would likely be venued in a court of law.

Because the Commission-ordered conditions of the permit required Keystone to follow all applicable laws, whether or not the federal government has done so is irrelevant to this proceeding. Therefore, the Motion should be granted with respect to the rebuttal testimony of Jennifer Galindo, to the extent that no witness opens the door to Ms. Galindo's proffered testimony at the evidentiary hearing.

## **II. Direct Testimony of Wasté Win Young**

The direct testimony of Wasté Win Young, like the rebuttal testimony of Ms. Galindo, would erroneously transfer a government obligation to Keystone, a private company. Because the law does not provide for such a transfer of obligations, the testimony is not relevant.

## **III. Conclusion**

The only relief that can be granted by the Commission with regard to 54 U.S.C. § 306108 is for the Commission to order Keystone to comply with the Federal Supplemental Environmental Impact Statement. This has been ordered and there is no allegation in the proffered testimony of a change or failure in that respect. Therefore, Staff believes that the testimony at issue does not fit within the Commission's jurisdiction or the limited scope of SDCL § 49-41B-27, and the Motion should be granted.

Dated this 17<sup>th</sup> day of July, 2015.



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TRANSCANADA KEYSTONE PIPELINE, LP )  
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TO CONSTRUCT THE KEYSTONE XL )  
PIPELINE )**

**CERTIFICATE OF SERVICE  
  
HP14-001**

I hereby certify that true and correct copies of Staff's Response to Keystone's Motion *in Limine* to Preclude Rebuttal Testimony of Jennifer Galindo and Wasté Win Young and Certificate of Service were served electronically to the Parties listed below, on the 17<sup>th</sup> day of July, 2015, addressed to:

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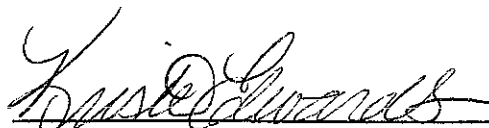
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