

**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 BRIEF IN RESPONSE TO**
* **MOTION TO PRECLUDE WITNESSES**
* **FROM OFFERING TESTIMONY WHO**
* **DID NOT FILE PRE-FILED**
* **TESTIMONY**
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* **HP14-001**
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COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to Keystone's Motion to Preclude Witnesses from Offering Testimony Who Did Not File Pre-Filed Testimony ("Motion"). For the following reasons, Staff recommends the Commission overrule the objections of those parties objecting to the requirement of filing pre-filed testimony, but does not take a position as to whether or not the appropriate sanction is preclusion.

I. Procedural Background

Per Commission Order, Dated December 17, 2014, parties to this proceeding were to file pre-filed testimony by April 2, 2015. On April 2, 2015, Dakota Rural Action ("DRA") and Intertribal COUP filed objections to the requirement of filing pre-filed testimony. Other parties have since joined in their objection. On April 6, 2015, Keystone filed its Motion.

II. Argument and Authorities

DRA, Intertribal COUP, and parties joining in their objection ("the Objecting Parties") argue that that Commission lacks the authority to order pre-filed testimony. These Objecting Parties contend that SDCL § 15-6-43(a) prohibits the Commission from requiring pre-filed

testimony, in spite of ARSD 20:10:01:22.06. It is the Objecting Parties' argument that the rule and statute are at odds and, therefore, the rule fails. To the contrary, the statute and the rule are not in controversy and can be reconciled. SDCL § 15-6-43(a) requires that testimony of witnesses shall be taken orally in open court. The Objecting Parties' argument might be true should the Commission consider the written testimony without also requiring oral testimony in an open hearing. However, the Commission *does* require that each witness provide oral testimony. As is evidenced by numerous Commission proceedings, pre-filed testimony precedes and is supported by oral testimony, and the pre-filed testimony is typically offered as an exhibit, after which the witness is subject to cross-examination. If the pre-filed testimony is not followed by oral testimony, it is not taken into consideration and made part of the official record. Because it is not part of the record until it is adopted orally, it is not testimonial in nature and, therefore, it could not possibly violate SDCL § 15-6-43(a). However, for the purpose of discussion, Staff will still refer to pre-filed testimony as "testimony".

Nothing in this statute prohibits the Commission from requiring that that testimony also be provided ahead of time in order to give the Commission and all parties adequate time to give due consideration to that testimony. Throughout this hearing, it has been stated repeatedly by many parties that the issues are complex. This is very true and is all the more reason for the Commission and all parties to utilize all tools at their disposal to give all testimony its due consideration. Therefore, every party stands to benefit from the Commission having the opportunity to give thought to witness testimony prior to that testimony actually being offered in an open hearing and put into the record, in accordance with SDCL § 15-6-43(a). Due process, a more complete and better record, time for evaluation of fact and opinion, and resultantly the public interest are all better served with pre-filed testimony.

Furthermore, the objection is untimely. The Commission ordered pre-filed testimony on December 17, 2014. However, no party made any objection to that order until April 2, 2015, 114 days after the hearing in which pre-filed testimony was verbally ordered, 107 days after the Commission released its written order, and not until the very day that pre-filed testimony was due. At the time of the Commission meeting in December, no party raised any objection to the Commission's ordering pre-filed testimony. Therefore, that objection should be considered waived.

III. Conclusion

For the aforementioned reasons, Staff recommends the Commission overrule the objections to the submission of pre-filed testimony and grant, at least in part, Keystone's Motion. However, Staff does not take a position as to whether the testimony should be precluded as Keystone requests.

Dated this 10th day of April, 2015.



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