

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

IN THE MATTER OF THE APPLICATION BY)
TRANSCANADA KEYSTONE PIPELINE, LP)
FOR A PERMIT UNDER THE SOUTH DAKOTA) HP 14-001
ENERGY CONVERSION AND TRANSMISSION)
FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

**STANDING ROCK SIOUX TRIBE
BRIEF IN OPPOSITION TO TRANSCANADA’S MOTION IN LIMINE
TO PRECLUDE REBUTTAL TESTIMONY OF KEVIN E. CAHILL PH.D.**

I. Introduction

The motion in limine to exclude the rebuttal testimony of Kevin E. Cahill, Ph.D. is improperly filed because Cahill’s report rebuts staff testimony and not any evidence pro-offered by TransCanada. Staff did not move to exclude this testimony and its timeline to do so has elapsed. TransCanada’s motion should be denied outright.

Moreover, the motion requests the Commission to take action prohibited by South Dakota law. The South Dakota Supreme Court has established requirements for the admission of expert testimony and the Standing Rock Sioux Tribe has complied with these requirements in every respect. *Burley v. Kytac Innovative Sports Equip.*, 737 N.W.2d 397, 402-403 (S.D. 2007). Indeed, the weak motion cites no principle of law in support of its contention that Cahill’s testimony in any respect violates South Dakota law. There are no legal citations, merely conclusory commentary which mis-portrays South Dakota evidentiary law.

Dr. Cahill’s testimony and report focus on issues arising from the *Final Supplemental Environmental Impact Statement on the Keystone XL Project*, released by the State Department in January, 2014. The *Final SEIS* is clearly relevant, as indicated by the *Staff Motion to Take Judicial Notice* (July 9, 2015) of it. Expert testimony relating to the information and recommendations contained in the *Final SEIS* – which did not exist when HP 09-001 took place – are clearly relevant and admissible under South Dakota law in this certification proceeding.

II. The Standing Rock Sioux Tribe has Fully Complied with the Procedural and Evidentiary Requirements for Admission of the Cahill Report

The record in this docket indicates full compliance with South Dakota law by the Standing Rock Sioux Tribe, in every respect. On March 10, 2015, the Tribe disclosed to TransCanada in *Supplemental Answers to Interrogatories* that Dr. Cahill was asked by the Tribal Council to present expert testimony. *Exhibit A, attached hereto*. This was in compliance with the timelines for such disclosures established by the Commission in this docket. *Order Granting Motion to Define Procedural Issues and Setting Schedule*, December 17, 2014. Dr. Cahill's rebuttal testimony and report were pre-filed on June 26, 2015 and he was included in the Tribe's witness list, both of which were filed in compliance with the Commission's *Order Amending Procedural Schedule*, May 5, 2015.

The pre-filed rebuttal testimony includes a description of Dr. Cahill's academic credentials, a list of dozens of peer-reviewed publications in the areas of labor and environmental health economics and statistical analysis, and a summary of his expert witness testimony in other proceedings. *See Standing Rock Sioux Tribe Pre-filed Rebuttal Testimony and Expert Report of Kevin E. Cahill, Ph.D.* App. A. The report rebuts testimony pro-offered by staff witnesses regarding the economics of oil spill remediation, *id.* at pp. 23-25, and comments the recent State Department findings on the socioeconomic impacts of Keystone XL on South Dakota by reference to the IMPLAN economics model. *Id.*, at pp. 12-22.

As described by the South Dakota Supreme Court:

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be "qualified." *citing Arneson v. Arneson*, 2003 SD125, ¶14, 670 N.W.2d 904, 910. Furthermore... expert testimony must show that the expert's theory qualifies as scientific, technical, or specialized knowledge as required under Rule 702. *citing State v. Guthrie*, 2001 SD 61, ¶34, 627 N.W.2d 401, 415-416; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based upon a reliable foundation. *Guthrie, supra...* We interpret our rules of evidence liberally with the general approach of relaxing the traditional barriers of opinion testimony. *Guthrie, Daubert.*

Any other deficiencies can be tested through the adversarial process at trial.

Burley v. Kyttec Innovative Sports Equip., 737 N.W.2d at 402-403, 405-406.

III. Dr. Cahill's Rebuttal Testimony Addresses Issues Raised by Staff Witnesses and Exhibits and Clearly Meets the Liberal Threshold for Relevancy Under South Dakota Law

TransCanada's only challenge to Dr. Cahill's expert rebuttal testimony is based on relevance. Rule 401 of the Rules of Evidence governs the admission of evidence. As explained by the South Dakota Supreme Court, the threshold is low:

Relevance is defined by SDCL 19-12-1 (Rule 401). " 'Relevant evidence' means evidence having *any* tendency to make the existence of *any* fact that is of consequence... more or less probable..." SDCL 19-12-1 (Rule 401). As we have previously noted, "Rule 401 uses a lenient standard for relevance." *citing Supreme Pork v. Master Blaster*, 2009 SD 20, ¶46.

St. John v. Peterson, 804 N.W.2d 71, 75 (S.D. 2011) *emphasis added*.

South Dakota follows the general rule that Rule 401 is interpreted liberally, especially in the context of expert testimony properly pro-offered under Rule 701. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) (vacating exclusion of expert testimony). The South Dakota Court deems evidence relevant "even if it only slightly affects the trier's assessment." *Supreme Pork v. Master Blaster*, 764 N.W.2d 474, 488 (S.D. 2009) (affirming the admission of expert testimony at trial). All that is needed is "a probative connection, however slight." *V.C. v. Cassidy*, 634 N.W.2d 798, 810 (Neb. 2001) (ordering new trial due to improper exclusion of relevant evidence).

"The standard for relevance is 'extremely liberal.'" *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 468 (6th Cir. 2012) (summary judgment reversed due to improper exclusion of expert testimony). "The relevancy threshold established by the Federal Rules of Evidence is fairly low." *Harrington v. City of Council Bluffs, Iowa*, 902 F. Supp.2d 1195, 1202 (S.D. Iowa 2012) (evidence ruled relevant and admissible). In order to be relevant under Rule 401, evidence must merely "shed light upon or touch the issues" in dispute. *Dean v. Nunez*, 534 So.2d 1282, 1289 (La. App. 1988).

In South Dakota, for example, the Supreme Court reversed a circuit court ruling which granted a motion in limine to exclude expert testimony on a subject not originally disclosed by the party, but which was offered as expert rebuttal to information obtained in discovery immediately prior to the trial. *Burley v. Kytac Innovative Sports Equip.*, 737 N.W.2d at 406. The South Dakota Court has also ruled that expert testimony rebutting evidence presented by an opposing party is relevant and admissible, even if not initially disclosed under Rule 702. *Supreme Pork v. Master Blaster*, 764 N.W.2d at 481. The Court explicitly rejected the contention that South Dakota law prescribes a “narrow interpretation of ‘relevance.’” Chief Justice Gilbertson explained:

The dissent suggests that the only evidence that is “relevant” in this case is that which relates to the one ultimate fact issue... Quite simply, this narrow view of relevancy misinterprets Rule 401... Evidence, to be relevant to an inquiry, *need not conclusively prove the fact in issue.* citing *Weinstein’s Federal Evidence*, §401.04[2][c].

Id. at 488 *emphasis original.*

In *Supreme Pork v. Master Blaster*, the South Dakota Supreme Court rejected the very argument advanced by TransCanada in its motion. The motion states, “(Cahill’s) opinions are not relevant to the issue in this case, which is whether under SDCL §49-41B-27, Keystone can continue to meet the conditions upon which the permit was granted.” *Motion to Limine to Exclude Kevin E. Cahill*, p. 2. The conditions were imposed in the permit because of the requirement under South Dakota law that “it is necessary to ensure that the location, construction and operation of facilities will produce minimal adverse effects upon the environment and upon the citizens of this state.” SDCL §49-41B-1. Condition 1 requires that the Keystone XL Pipeline be built and operated “in compliance with all applicable laws and regulations.” HP 09-001, *Amended Final Order*, p. 25. Condition 3 state that “Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement.” *Id.*

The Staff moved for judicial notice of the *Final SEIS* for these reason. Any testimony that “shed light upon or touches” important information in the *Final SEIS* is relevant, including Dr. Cahill’s. *Dean v. Nunez*, 534 So.2d at 1289.

The testimony may not be determinative in this case – it does not have to be. That is the lesson of the South Dakota Supreme Court decision in *Supreme Pork v. Master*

Blaster, 764 N.W.2d at 481. Testimony that has any probative value with respect to the *Final SEIS* is relevant, admissible testimony in this proceeding, with the finder of fact (the Commission) possessing reasonable discretion to give it whatever weight it sees fit in making the decision whether to certify the permit.

TransCanada's motion and the Staff Response confuse "relevancy" with "weight" of evidence. That is precisely the mistake that the South Dakota Supreme Court inveighed against in *Supreme Pork v. Master Blaster*, 764 N.W.2d at 481.

The Staff Response argued "By calling its prior witnesses, staff has not opened the door to rebut any and all testimony offered by witnesses in HP 09-001, as the issues are different." *Staff Response to Motion in Limine to Exclude Kevin Cahill*, pp. 1-2. That is misleading because Dr. Cahill's testimony does not challenge any testimony given in HP 09-001, it only challenges Staff pre-filed testimony and exhibits in the current docket.

While it is true to some extent that "the issues are different," the issues are not so different that Cahill's testimony and report are inadmissible on relevancy grounds. The Staff's argument confuses admissibility of evidence with the weight of admissible evidence to be accorded by the finder of fact. The PUC might not deny certification because of Cahill's testimony on flaws in the State Department analysis, but it *is* admissible evidence the issue of whether Keystone XL complies with "all applicable laws and regulations," and "implement the Recommendations set forth" in the Final SEIS. HP 14-001 *Amended Final Order*, Amended Condition 1, p. 25.

Significantly, the South Dakota Court follows the rule as outlined by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579. In requiring the admittance of expert testimony, the U.S. Supreme Court explained:

(The objecting party) seems to us overly pessimistic about the capabilities of the jury and of the adversarial system generally. Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence... *These conventional devices, rather than wholesale exclusion... are the appropriate safeguards.*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 596 *emphasis added*.

Ultimately, general and amorphous complaints about relevance are not countenanced by the courts – the moving party must demonstrate specific reasons to

exclude evidence on grounds of relevance. *Doe v. Young*, 664 F.3d 727, 733 (8th Cir. 2011) (trial court improperly excluded testimony, new trial ordered). In order to exclude testimony, the moving party “should state exactly the objection.” *Davidson Oil Country Supply, Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1247 (5th Cir. 1990) (reversing trial court grant of motion in limine). TransCanada’s motion lacks this. It also lacks any grounding in South Dakota law.

The South Dakota case law is very strong on relevancy and the admittance of expert testimony. *St. John v. Peterson, supra*; *Supreme Pork v. Master Blaster, supra*; *Burley v. Kytac Innovative Sports Equip., supra*. *Id.* The granting of the *Motion in Limine to Exclude Kevin Cahill* would violate South Dakota law. It must be denied.

RESPECTFULLY SUBMITTED this 17th day of July, 2015

By: *Peter Capossela*
Peter Capossela, P.C.
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

/s/ Chase Iron Eyes
Chase Iron Eyes
Iron Eyes Law Office, PLLC
Post Office Box 888
Fort Yates, North Dakota 58538
(701) 455-3702
chaseironeyes@gmail.com
S.D. Bar No. 3981

Attorneys for Standing Rock Sioux Tribe