

**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)
ENERGY CONVERSION AND TRANSMISSION)
FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

Docket No. HP 14-001

**STANDING ROCK SIOUX TRIBE
MOTION TO RECONSIDER ORDER GRANTING MOTION IN LIMINE
TO PRECLUDE KEVIN E. CAHILL PH.D.**

COMES NOW, intervenor, Standing Rock Sioux Tribe, by and through counsel, and respectfully moves the Public Utilities Commission for reconsideration of its Order dated July 23, 2015 granting the Motion in Limine to Preclude the Testimony of Kevin E. Cahill Ph.D. By this motion, the Tribe requests an order reconsidering and vacating the preclusion of Cahill’s rebuttal testimony and expert report.

This motion is based upon Amended Conditions 1 and 3 incorporated in the South Dakota permit issued to TransCanada for the Keystone XL Pipeline Project (Amended Final Order, HP 09-001 June 29, 2010); SDCL §§ 19-12-01 (admissibility of relevant evidence) and 1-26-18 (right to respond to evidence offered by opposing party in administrative hearing); the Memorandum of Points and Authorities below; and the papers and pleadings on file herein

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF RECONSIDERATION**

“Administrative agencies have the inherent authority to correct adjudications which appear to be erroneous.” *Jundt v. Fuller*, 736 N.W.2d 508, 512 (S.D. 2007) *citations omitted*. Of course, all state agencies must follow South Dakota law. SDCL §1-26-36(1). The Order Granting Motion in Limine does not comport with South Dakota law. *Burley v. Kyttec Innovative Sports Equipment*, 737 N.W.2d 397, 401-403, 411 (S.D.

2007) (circuit court judgment reversed and remanded, due to improper exclusion of expert testimony in violation of liberal rules of relevancy). The *Burley* case is directly on point and governs the introduction of Dr. Cahill's testimony. The *Order Granting Motion in Limine* to exclude Dr. Cahill should be reconsidered and vacated.

Cahill's testimony was timely pre-filed in rebuttal to opinions given by Staff witnesses Brian Walsh and Kimberly McIntosh that the State Department's *Final Supplemental Environmental Impact Statement* adequately evaluates Keystone XL's impacts on South Dakota under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.* It directly relates to Staff testimony and exhibits, and is relevant to:

- Amended Condition 1 – “Keystone shall comply with all applicable laws” – i.e. NEPA.
- Amended Condition 3 – “Keystone shall comply with and implement the recommendations set forth in the Final Environmental Impact Statement.”).

Staff witness Brian Walsh pre-filed testimony on the interplay between the Amended Conditions and the Final SEIS, as follows:

Q. Have you reviewed the Final Supplemental Environmental Impact Statement (FSEIS) for the Keystone XL Project?

A. Yes.

Q. On March 12, 2009, the DENR submitted comments on the scope of the Draft EIS to the U.S. Department of State. In addition, on May 20, 2011, the DENR submitted comments on the Supplemental Environmental Impact Statement. Do you believe that DENR's comments were adequately addressed by the Department of State now that the FSEIS is available for review?

A. Yes. DENR's comments were adequately addressed in the FSEIS.

Q. In your opinion, do the FSEIS and conditions set forth in the PUC's Amended Final Decision and Order adequately address the protection of South Dakota resources?

A. Yes. If the pipeline is constructed and operated as designed and in compliance with all applicable laws and regulations, permit conditions, and the recommendations of the FSEIS, risks to South Dakota resources will be minimized.

Pre-filed Testimony of Brian Walsh, April 2, 2015.

In response, Cahill provided expert rebuttal testimony as follows:

Mr. Walsh is incorrect when he asserted in his pre-filed testimony that “pursuant to the recommendations in the FSEIS risks to South Dakota’s natural resources is minimized.” Simply put, the application in the FSEIS of the IMPLAN economic forecasting model contains no quantitative analysis of non-positive socioeconomic impacts of either construction or operation of the Keystone XL Pipeline...

The economic costs of an oil spill on local economic activity can be near devastating. The State Department considers none of these effects in their quantitative analysis... Just as it ignores the possibility of negative socioeconomic effects from the construction and operation of the proposed Keystone pipeline, the State Department ignores the possibility of negative impacts on productivity and quality of life associated with living with the risk of an oil spill.

Pre-filed Rebuttal Testimony and Expert Report of Kevin E. Cahill, Ph.D., April 28, 2015, 19-20.

Thus, Mr. Walsh’s testifies on the import of the Final SEIS with respect to protection of South Dakota resources and quality of life. Compliance by TransCanada with Amended Condition 1 requires federal environmental reviews that properly evaluate the potential impacts on South Dakota. Mr. Walsh’s testimony includes his opinion that it does; Cahill’s rebuttal gives a different opinion with supporting analysis. Both testimonies are relevant and admissible evidence in this proceeding on whether Keystone XL complies with conditions 1 and 3.

In South Dakota, the presentation of rebuttal evidence in a contested administrative proceeding is a right. SDCL §1-26-18. As the Nebraska Supreme Court explained, “The parties are to be given a chance to rebut or to comment on any evidence considered by the agency in making its decision.” *Langvardt v. Horton*, 581 N.W.2d 60, 69 (Neb. 1998). The test on the admissibility of rebuttal evidence in this docket is not whether it addresses an Amended Condition – as the presentation of rebuttal evidence is a right under South Dakota law, the test is whether it addresses testimony or evidence presented by the opposing party. Cahill’s testimony does so, without any question.

With respect to the relevancy of expert testimony, the South Dakota Court has ruled, “We interpret our rules of evidence liberally with the general approach of relaxing traditional standards of opinion testimony.” *Burley v. Kytac Innovative Sports Equipment*,

737 N.W.2d at 405. Dr. Cahill's rebuttal testimony and expert report directly address testimony and exhibits pre-filed by Staff and TransCanada, and relates to Amended Conditions 1 and 3. It is relevant, admissible rebuttal evidence which the Standing Rock Sioux Tribe has a right to introduce in this proceeding under South Dakota law. *The Order Granting Motion in Limine to Preclude Rebuttal Testimony of Kevin E. Cahill* should be reconsidered and vacated.

RESPECTFULLY SUMMITTED this 24th day of July, 2015

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