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	* * * * * * * * * *	**STAFF'S BRIEF IN RESPONSE TO KEYSTONE'S AMENDED MOTION TO PRECLUDE CERTAIN INTERVENORS FROM OFFERING EVIDENCE OR WITNESSES AT HEARING AND TO COMPEL DISCOVERY** **HP14-001**

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing ("Motion") filed by TransCanada Keystone XL Pipeline, LP ("Keystone").

I. Jurisdictional Statement

In the current proceeding, Keystone filed a Motion requesting the Commission impose sanctions against certain parties for alleged violations of the discovery process. The Commission has jurisdiction over this issue pursuant to ARSD 20:10:01:01.02 and 20:10:01:22.01 and SDCL § 15-6-37.

II. Procedural Background

On September 15, 2014, the Commission received a filing from Keystone seeking an order accepting certification of the permit issued in HP09-001. The Commission issued an Amended Final Decision and Order granting a permit to Keystone on June 29, 2010. Because it has been at least four years since the permit was issued, Keystone is now seeking an order

accepting certification, per SDCL 49-41B-27. An intervention deadline of October 15, 2014, was set. The Commission granted intervention to several parties.

On December 17, 2014, the Commission issued an Order establishing a procedural schedule. An evidentiary hearing was set for May 5-8, 2015. In addition to dates for an evidentiary hearing, the procedural schedule established the date for an initial round of discovery as January 6, 2015, with initial discovery responses served by February 6, 2015. The procedural schedule also established that final discovery would be served by February 20, 2015, with responses to final discovery serve no later than March 10, 2015.

On October 30, 2014, Keystone filed a Motion to Define the Scope of Discovery Under SDCL § 49-41B-27. In that motion, Keystone requested the commission issue an order limiting the scope of discovery. A hearing on that motion took place at the regular commission meeting on December 9, 2014.

Following argument from the parties, the commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule ("December 17 Order"). In that Order, with Commissioner Fiegen dissenting, the commission ordered that

> discovery shall be limited to only discovery regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Face in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C, that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed.

On March 23, 2015, Keystone filed a Motion to Preclude Certain Intervenors (John Harter, Bold Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) From Offering Evidence or Witnesses at Hearing. Along with that Motion, Keystone filed Affidavit of James E. Moore in Support of Motion to Compel Discovery. On March 25, 2015, Keystone amended that motion by filing an Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery. The purpose of the amended motion was simply to change the title of the motion to more clearly reflect the information included in and relief sought by the motion. No substantive changes were made.

Staff did participate in discovery, both sending and receiving requests for discovery. While Staff was not involved in the discovery at issue and is not a subject of Keystone's Motion, Staff, in its discovery requests to Keystone did ask for and was provided with copies of all discovery and responses served on and by Keystone. Thus, Staff is aware of the information at issue in this Motion.

III. Motion to Compel

In its Motion, Keystone seeks an order requiring Cindy Myers to disclose additional expert information if she intends to present expert testimony.

SDCL § 15-6-26(b)(4)(A)(i) provides

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

The South Dakota Supreme Court has held that the statute concerning discovery should be liberally construed. *Bean v. Best*, 76 SD 462, 80 N.W.2d 565, 566. However, Staff does not believe the Commission need take a broad reading of the aforementioned statute in order to conclude that the information sought by this Motion must be provided. SDCL § 15-6-26(b)(4)(A)(i) clearly requires parties to respond to a request for disclosure of expert witnesses, and is plain and concise in this requirement.

It does appear from the testimony submitted by Ms. Myers on April 2, 2015, that Ms. Myers will be testifying on her own behalf and will call no other witnesses in her direct testimony. At this time, Staff questions whether she does intend to call an expert for whom she has not provided full discovery. It is Staff's impression from reading Ms. Myers' prefiled testimony that she does not. However, if Ms. Myers does intend to call an expert, either in her direct case or as a rebuttal witness, Staff would agree with Keystone that the information sought by Keystone's Motion must be provided. Therefore, Staff recommends this portion of Keystone's Motion be granted.

IV. Motion to Preclude

Keystone argues in its Motion that several parties should be precluded from presenting witnesses and evidence at the evidentiary hearing on the grounds that, as Keystone asserts, those parties failed to answer discovery or answered "but failed to identify witnesses or documents based on their continuing investigation or objections." (Keystone's Motion at 2). The analysis for the commission is twofold. First, is the information sought by Keystone discoverable, or is this information which is protected by privilege and, therefore, not subject to discovery? Second, if this information is subject to discovery, what is the appropriate sanction for failure to

respond to Keystone's request for discovery? While Staff does provide a legal analysis on the latter, Staff does not take a position on that issue, as it is clearly within the Commission's discretion to do what it deems appropriate.

a. The informational sought by Keystone is not protected and is, therefore, subject to discovery.

As discussed above, SDCL 15-6-26(b)(4)(A)(i) allows a party to discover "each person whom the other party expects to call as an expert witness at trial." Therefore, refusal to provide information as to expert witnesses is in direct violation of the rules of discovery.

b. The objections to Keystone's interrogatories based upon Keystone's alleged failure to comply with the December 17 Order should be overruled.

To analyze this issue, Staff focuses on Keystone's interrogatories numbered 3 through 8, as those are the interrogatories through which Keystone sought information as to witnesses and evidence to be presented at the evidentiary hearing. The parties responding to those interrogatories made similar objections. Staff will address those objections individually.

Several courts across the country have taken a negative view of what have been deemed "boilerplate objections." *See e.g., McCleod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482 (5th Cir. 1990) (noting that boilerplate objections are an "all-too-common practice in the legal profession"); *see also, e.g., St. Paul Reinsurance Co. v. Commercial Fin. Corp.* 198 F.R.D. 508, 512 (N.D. Iowa 2000) (sanctioning lawyer for using boilerplate objections in response to requests for production of documents). The term "boilerplate objection" refers to an objection that fails to specify how the discovery request is deficient and also fails to specify how the objecting party would be harmed if required to respond to the discovery request. *St. Paul*

Reinsurance Co., 198 F.R.D. at 512. The court in *St. Paul Reinsurance Co.*, took issue with the plaintiff's assertion that the discovery requests were "vague, ambiguous, overbroad, unduly burdensome, etc." *Id.*

Several parties objected to answering Keystone's interrogatories on the basis that Keystone did not comply with the December 17 Order, because Keystone did not identify by number and letter the specific Condition or Finding of Fact addressed by the interrogatory. However, it is clear from a reading of the transcript of the December 9 hearing that it was the intent of the Commission in ordering such specification was to clarify which Condition or Finding of Fact was being addressed as a means of ensuring that all discovery requests sought information relevant to the certification proceeding, rather than to arbitrarily create extra work or obstacles for parties engaging in discovery. Staff submits that when a question is as generic as a request for identification of witnesses, which would apply to all Conditions and Findings of Fact, it would be redundant to list each and every Condition and Finding of Fact within that interrogatory. Moreover, no helpful information would be gained by doing so. In addition, when asking of another party which Condition or Finding of Fact it believes Keystone cannot now or in the future meet, it is again clearly implied that the question refers to each and every condition. This objection should be overruled.

The next objection made by several of the parties was that each of the interrogatories was overly broad, vague, and unduly burdensome. Staff is unaware of any case in which a court has found that disclosure of witnesses prior to trial has been found to be overly broad or unduly burdensome. When evaluating whether production of requested discovery presents an undue

burden, the Commission must weigh the need for the requested information against the hardship created in producing it.

The objections raised appear to be boilerplate objections and Staff recommends overruling the objections discussed above.

c. Staff does not take a position on the appropriate sanction.

While Staff does not take a position on the appropriate sanction, Staff does feel it is necessary to discuss the relevant legal authority. The Commission has broad discretion in imposition sanctions under the statute governing motions SDCL § 15-6-37(a). *Widdoss v. Donahue,* 331 NW2d 831, 835 (SD 1983) (citing, Wright & Miller, *Federal Practice & Procedure*, § 2284). The South Dakota Supreme Court has held that,

> The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and this defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

Haberer v. Radio Shack, a Div. of Tandy Corp., 555 N.W.2d 606, 611 (S.D. 1996) (citing, *Magbahat v. Kovarik*, 382 N.E. 43 (S.D. 1986)). The Court further stated the

> [p]rohibition of evidence offered by a party who has not complied with the discovery rules is designed to compel production of evidence and to promote, rather than stifle, the truth finding process. Imposing a sanction such as the exclusion of the testimony should result when failure to comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

Id. at 610 (quoting, *Schrader v. Tjarks,* 522 N.W.2d 205, 209 (S.D.1994) (internal citations and quotations omitted). However, the Court also has made it clear that it takes seriously deadlines

for discovery and compliance with the discovery process. The Court has stated that "...order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in this manner should not be heard to complain that a sanction was too severe." *Schwarts v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999).

V. Conclusion

For the reasons mentioned above, Staff respectfully recommends the Commission 1) issue an Order compelling Cindy Myers to produce the requested information with regard to any expert whom she intends to call as a witness, either for direct or rebuttal testimony; 2) issue an Order finding that certain intervenors, named in the Motion, failed to comply with the rules of discovery; and 3) apply appropriate sanctions as the Commission sees fit.

Dated this 6th day of April, 2015.

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