BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP	)	HP14-001
FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	)	STANDING ROCK SIOUX BRIEF IN OPPOSITION TO MOTION TO DEFINE THE SCOPE OF DISCOVERY

The TransCanada *Motion to Define the Scope of Discovery* should be denied because: (1) it would shield relevant information from discovery in violation of South Dakota law; and (2) it is an untimely request for a protective order, prior to any discovery requests and without any showing of undue burden or oppression.

I. TransCanada Seeks to Prohibit the Discovery of Relevant Information

In its motion, TransCanada makes generalizations about the scope of the certification proceeding, and urges the Commission to issue a premature ruling to limit the scope of discovery. TransCanada mistakenly equates the issues to be heard in the certification hearing, with the permissible scope of discovery prior to the hearing. Even if the statute limits the issues in this certification proceeding, it does not follow that the scope of discovery is restricted as argued in the motion.

"The scope of pretrial discovery is, for the most part, broadly construed." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1999). "The proper standard for a ruling on a discovery motion is whether the information sought is 'relevant to the subject matter involved in the pending action.'" *Id.* Relevancy in discovery is broader than evidence admissible at trial. *Id*. at 20; *see also, e.g. Fann v. Giant Food, Inc.*, 115 F.R.D. 593, 596 (D.D.C. 1987). Any information sought in discovery must merely "relate" to the issues in the proceeding. *State v. Bucholz*, 598 N.W.2d 899, 905 (S.D. 1999).

SDCL §49-41B-27 provides that "the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." The Amended Permit Conditions include:

- "Keystone shall comply with all applicable laws and regulations in its construction and operation of the project." Public Utilities Commission, *Amended Final Decision and Order,* PP09-001, 25 (condition #1).

- "Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement…" *Id*. (condition #3).

- "Keystone shall comply with all mitigation measures set forth in the Construction, Mitigation and Reclamation Plan (CMR Plan)..." *Id.* at 27 (condition #13).

- "Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP." *Id.* at 35 (condition #41).

- "Keystone shall follow the 'Unanticipated Discoveries Plan," as reviewed by the State Historic Preservation Office ("SHPO")." *Id*. at 36 (condition #43).

Thus, the 2010 permit conditions involve environmental compliance (#1), and project impacts on water quality (#1 & #2) and cultural resources (#43). In its motion, TransCanada argues that a protective order is needed to shield it from discovery on issues such as "the effects of the Project on the Ogallala Aquifer and other streams, river and water bodies (sic)… whether the Department of State conducted sufficient consultation with interested tribes under Section 106 of the National Historic Preservation Act… and whether development of the oil sands in Canada harms he environment." *Keystone's Motion to Define the Scope of Discovery*, p. 4. The very issues identified by TransCanada as warranting a protective order do in fact relate to the subject matter of this proceeding – the Amended Permit Conditions. Consequently, these issues are subject to discovery.

"An opportunity to litigate is neither full nor air when a litigant is denied discovery, available in the ordinary course, into matters going to the heart of his claim." *Locurto v. Giuliani*, 447 F.3d 159, 171 (2nd Cir. 2006). "That a refusal by an administrative agency… to resolve and administer competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not

open to debate." *Donnelly Garment Co. v. National Labor Relations Bd.*, 123F.2d 215, 224 (8th Cir. 1941). Thus, there are important due process considerations requiring denial of the *Motion to Limit Discovery*.

For the TransCanada certification, "[T]he statute clearly designates the PUC as the fact finder." *Application of Nebraska Public Power District to Construct and Operate Proposed MANDAN Nominal KV Transmission Facility*, 354 N.W.2d 713, 720 (S.D. 1984). Under South Dakota law, the fact-finding process is deemed to be enhanced by liberal discovery. *See Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d at 20. The courts utilize "a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Id.* This is particularly the case where, as with TransCanada's application, important public health considerations are at issue. *Cf. Stormans Inc. v. Selecky*, 251 F.R.D. 573 (W.D. Wash. 2008).

Ultimately, TransCanada's motion seeks to impede the fact-finding role of the Commission, and undermine the efficacy of this proceeding. It should be denied.

II. The Motion to Limit the Scope of Discovery is a Premature Request for a Protective Order

TransCanada captioned its pleading *Motion to Define the Scope of Discovery*. However, the relief requested is in the nature of a protective order, pursuant to SDCL§15-6-26(c). A protective order may be necessary when a party is subject to an overly burdensome discovery request. *Bertelsen v. Allstate Ins. Co.*, 2011 SD 13 ¶57, 796 N.W.2d 685, 704 (2011). However, "the need for protection usually cannot be determined *before* the examination begins." *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 96 (S.D. Iowa 1992). (emphasis added). Thus, the relief requested may be available only "if any need for protection appears during the course of the examination." *Id.*

TransCanada has not yet received a discovery request. Consequently, the motion is untimely. Moreover, TransCanada is unable to make the required showing of injury for a protective order to be issued.

South Dakota's statute provides that –

> Upon motion by a party… the court in the circuit where (a) deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense…

SDCL§15-6-26(c).

The TransCanada motion does not contain the threshold information required for a protective order under South Dakota law. A request for a protective order must allege conduct on the part of the non-moving party amounting to "oppression or undue burden." *Id.* The South Dakota court has instructed,

> SDCL 15-6-26(c) authorizes a court to grant a protective order upon a showing of good cause. Good cause is established on a showing that disclosure will work a clearly defined and serious injury. *The injury must be shown with specificity.* Broad allegations of harm will not suffice.

Bertelsen v. Allstate Ins. Co., 2011 SD 13 ¶57, 796 N.W.2d at 704 (emphasis added).

TransCanada has not alleged any specific injury from discovery to warrant the relief requested. The motion is insufficient on its face, and should be denied accordingly.

The statute also requires an applicant for a protective order to certify good faith consultation with the opposing parties prior to the filing of its motion. SDCL§15-6-26(c). TransCanada failed to comply with this statutory requirement, as well.

In sum, any subject-matter relevant to a proceeding is discoverable. Relevancy in this context is interpreted liberally. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d at 19-20. The information deemed by Keystone to warrant protection is clearly relevant to the permit conditions which are the subject of this proceeding.

TransCanada's motion is in actuality a request, albeit premature, for a protective order. *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.2d at 96. South Dakota law requires a demonstration of "annoyance, embarrassment, oppression or undue burden or expense" for the issuance of a protective order. SDCL§15-6-26(c). The injury must be shown with specificity. *Bertelsen v. Allstate Ins. Co.*, 2011 SD 13 ¶57, 796 N.W.2d at 704. TransCanada failed to make the threshold showing.

The Motion to Limit the Scope of Discovery should be denied.

RESPECTFULLY SUBMITTED this 1st day of December, 2014

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