

**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)

HP 14-001

**STANDING ROCK SIOUX TRIBE, ROSEBUD SIOUX TRIBE AND
YANKTON SIOUX TRIBE JOINT SUR-REPLY IN OPPOSITION TO
APPLICANT’S MOTION TO STRIKE TESTIMONY AND EXHIBITS OF
CINDY MYERS**

Intervenors Standing Rock Sioux Tribe, Rosebud Sioux Tribe and Yankton Sioux Tribe are concerned with the *Motion to Strike* because TransCanada has consistently urged the Commission to exclude evidence based upon a stilted and narrow interpretation of the South Dakota Rules of Evidence, and important Tribal evidence has been excluded as a result. *E.g. Order Granting Motion in Limine to Preclude Testimony of Jennifer Galindo and Waste Win Young* (July 22, 2015); *Order Granting Motion in Limine to Preclude Testimony of Chris Saucosi* (July 22, 2015); *Order Granting in Part Keystone Motion’s for Discovery Sanctions* (April 17, 2015). The Commission should deny the *Motion to Strike the Testimony and Exhibits of Cindy Myers*, and re-open the record to hear relevant, admissible testimony pro-offered by Standing Rock and other Tribes but improperly excluded. *State Div. of Human Rights v. Miller*, 349 N.W.2d 42, 44-45 (S.D. 1984) (affirming agency which re-opened record to take additional testimony).

In its Reply Brief, TransCanada cites *Oesterling v. Oesterling*, 354 N.W.2d 735, 736 (S.D. 1984), which stands for the proposition that pro se litigants must strictly comply with procedural rules in *circuit court*. The application of *Oesterling* is limited to the circuit courts; it does not apply to hearings conducted by administrative agencies. The rule for agency hearings is that the absence of counsel relaxes the traditional, technical impediments to the introduction of testimony, because the agency fact-finder is deemed to possess expertise in the area of the agency’s jurisdiction, and is able to weigh

evidence accordingly. *See Highfill v. Bowen*, 832 F.2d 112 (8th Cir. 1987) (pro se appellant in disability claim); *St. Dept. of Labor and Employment v. Esser*, 30 P.3d 189 (Colo. 2001). “It is well established that ‘the ALJ has a duty to develop the facts fully and fairly, particularly when (a litigant)... is not represented by counsel.’ ” *Highfill v. Bowen*, *id.* at 115.

The argument that the PUC must strictly apply the rules of evidence in order to strike Ms. Myers testimony and exhibits is erroneous. *Id.* The only evidence which the Commission is obligated to exclude is identified in SDCL 1-26-19(1), which states, “Irrelevant, incompetent, immaterial or unduly repetitious evidence shall be excluded.”

There is nothing wrong with Cindy Myers’ testimony or exhibits. It clearly does not fit the definition of evidence to be excluded in an agency hearing. *Id.* In fact, the testimony is very helpful to the Commission.

Significantly, under South Dakota Rule of Evidence 701, a lay witness may give opinion and inference testimony that based upon her experience and perceptions, as long as the testimony is helpful. SDCL §19-19-701. With respect to the pre-filed testimony:

- The description of benzene’s toxicity as a carcinogen and proper protocols for emergency responders (challenged in *Applicant’s Motion*, pp. 1-2, #1-2, 4-6) is clearly admissible testimony by a registered nurse under Rule 701.
- The pre-filed testimony on the location of aquifers (challenged in *Applicant’s Motion*, pp. 1-2, #3-4) is admissible testimony by someone who lives near the aquifer, under SDCL §19-19-602 (personal knowledge).
- The location of federally-funded drinking water intakes on maps (challenged on p. 2, #7) is admissible under the public records exception to the hearsay rule. SDCL §19-19-803(8). *See Dubray v. South Dakota Dept. of Social Services*, 690 N.W.2d 657 (S.D. 2007) (hearsay admissible before an agency if it falls within exception). This applies to the challenge to exhibit 2 (6001), as well. (*Applicant’s Motion*, p. 4, #1).

Moreover, the *Motion to Strike* the pre-filed testimony resembles a motion in limine, and should have been filed as such. The Commission established a deadline for the filing of such motions in its Amended Scheduling Order, and the deadline has long passed. *Amended Scheduling Order*, May 5, 2015. The motion is dilatory and untimely,

as well as unmeritorious. Ms. Myers' pre-filed testimony should not be stuck from the record.

With respect to Ms. Myers' hearing testimony:

- The statements by Kevin Schlosser and Carol Moyer (challenged on pp. 2-3, #1, 8) are admissible under the then-existing state of mind exception to hearsay. SDCL §19-19-803(3). The Commission need not consider this testimony for the purpose of determining the truth of whether TransCanada has worked with Sioux Falls emergency responders or demonstrated sensitivity to the threat to Colome's water supply, but it is clearly admissible for the purpose of showing that these city officials do not believe that TransCanada worked with them in earnest. *Id.* This applies to the challenge to exhibits 6027-6028, as well. (p. 4, #11-12).
- Testimony by a registered nurse is sufficient foundation for information of the International Agency on Cancer Research (challenged in *Applicant's Motion*, p. 2, #2).
- The references to the Agency for Toxic Substances and Disease Registry and Iowa Department of Natural Resources (challenged on p. 3, #4-5, 7, 11) are admissible under the public records exception to the hearsay rule. SDCL §19-19-803(8). This applies to the challenge to exhibits 40, 50, as well. (*Applicant's Motion*, p. 4, #4, 8).
- The Stansbury quote (challenged on p. 3, #6) is admissible as an exception to hearsay under both the public records exception (it is part of the Final Supplemental Environmental Impact Statement) and the learned treatise exception. SDCL §19-19-803(8) & (18). This applies to the challenge to exhibits 4, 40 and 47-49 (6003-6005), as well. (*Applicant's Motion*, p. 4, #2, 4, 7).
- The information accumulated by Paul Seamans is admissible public information, the fact that it is provided as a compilation makes it reasonable inference testimony from public records. SDCL §§19-19-602, 19-19-803(8). This applies to the challenge to exhibit 2 (6001), as well. (*Applicant's Motion*, p. 4, #10).

- The power point presentation is a helpful summary and is admissible as inference testimony under Rule 701. SDCL §19-19-701.

Ultimately, TransCanada's continuing efforts to limit the evidence considered by the Commission in deciding whether to certify the permit are heavy-handed and unmeritorious. The Applicant's *Motion to Strike Testimony and Exhibits of Cindy Myers* should be denied, and the Commission should reconsider the previous exclusion of intervenor witnesses. Only then will HP-14-001 be a fair hearing within the meaning of South Dakota law. SDCL §§1-26-21 – 1-26-26.

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