

---

**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

**YANKTON SIOUX TRIBE'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 Yankton Sioux Tribe, by and through Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and for its *Brief in Response to Keystone's Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery* ("Amended Motion to Preclude") asserts the following.

**I. BACKGROUND**

TransCanada Keystone Pipeline, LP ("Keystone") initiated this action by filing a *Petition* on September 15, 2014. Following the *Petition*, Yankton Sioux Tribe ("Tribe") as well as several other individuals and entities submitted applications for party status. At its regularly scheduled meeting on October 28, 2014, the Public Utilities Commission ("Commission") granted intervention to all such applicants. On October 30, 2014, Keystone filed a *Motion to Define the Scope of Discovery Under SDCL 49-41B-27*. Following a hearing on said *Motion*, the Commission issued an *Order Granting Motion to Define Issues and Setting Procedural Schedule* (attached hereto as "Exhibit A") on December 17, 2014. In addition to limiting discovery to matters 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; or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C," that *Order* mandated that, in all discovery requests, "parties shall identify by number and letter the specific Condition or Finding of Fact addressed." *Order Granting Motion to Define Issues and Setting Procedural Schedule* at p. 2 (*emphasis added*).

On December 18, 2014, Keystone submitted its Interrogatories and Requests for Production of Documents ("Requests") to the Tribe, attached hereto as "Exhibit B." Keystone's Requests, however, failed to identify a single Condition or Finding of Fact. As Keystone admitted to the Commission at the hearing of March 31, 2015, the reason for this omission is that Keystone's Requests do not address whether the proposed project continues to meet the fifty Conditions or the proposed changes to the Findings of Fact, but rather, they were "contention interrogatories... It's impossible to tie those to a condition in the permit" (*emphasis added*).

On February 6, 2015, in accordance with the procedural schedule, the Tribe submitted its Answers and Objections to Keystone's First Interrogatories and Requests for Production of Documents to Keystone ("Objections") (attached hereto as "Exhibit C"). In its Objections, the Tribe objected to each of Keystone's Requests in good faith on the grounds that they failed to comply with the Commission's *Order* of December 17, 2014.

On February 12, 2015, Keystone issued the Tribe a letter (attached hereto as "Exhibit D") alleging that the Tribe's Responses did not comply with the South Dakota Rules of Civil Procedure and requesting that the Tribe fully and completely respond to its Requests by March 10, 2015. Despite being placed on notice that its Requests failed to comply with the Commission's *Order*, Keystone did not remedy the deficiencies as the Tribe set forth in its letter. Keystone threatened that if the Tribe did not make a good faith effort to respond, it would seek protections including

dismissal of the Tribe's petition to intervene.

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 and to Compel Discovery*. On March 25, 2015, Keystone filed the *Amended Motion to Preclude*, through which it requests that the Commission overrule all of the Tribe's objections and limit the Tribe's participation in the hearing.

On April 2, 2015, the Commission issued an *Order Amending Procedural Schedule* (Witness and Exhibit Lists), establishing April 21, 2015 as the deadline for parties to file and serve their witness lists and exhibit lists.

## **II. APPLICABLE LAW**

Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. The Rules of Procedure in Circuit Courts are found in SDCL Chapter 15-6, and include rules governing discovery. *See* SDCL 15-6(V). SDCL 15-6-33(a) provides that a party may object to an interrogatory provided that all grounds for the objection are stated with specificity. It further authorizes the party submitting the interrogatories to move for an order under SDCL 15-6-37(a) with respect to any objection to or other failure to answer an interrogatory. SDCL 15-6-37(a) sets forth requirements and relief available if a party contests another party's discovery objections. The relief available under SDCL 15-6-37(a) if the moving party prevails includes an order compelling an answer and reasonable expenses. The Rules of Procedure do not include the preclusion of a party from offering evidence or witnesses at a hearing unless that party acted without substantial justification. SDCL 15-6-37(c).

## **III. ARGUMENT**

**A. YANKTON SIOUX TRIBE'S RESPONSE TO KEYSTONE'S DISCOVERY REQUESTS WAS PROCEDURALLY PROPER PURSUANT TO THE RULES OF EVIDENCE**

As explained above, the Rules of Evidence permit a party to object to an interrogatory provided that all grounds for the objection are stated with specificity. With respect to each of Keystone's requests, the Tribe objected and specifically cited the Commission's *Order* of December 17, 2015 as grounds for the objection. Moreover, the Tribe had substantial justification for not disclosing information sought by Keystone as stated in the Tribe's objections. The Tribe was fully within its rights and acting within the Rules of Procedure by asserting its objections to Keystone's Requests. If Keystone wished to challenge the Tribe's objections, it should have filed a motion to compel the Tribe to respond and produce the requested information as provided by the Rules of Procedure. Because the Tribe's actions are permissible under the Rules of Procedure in Circuit Courts, no grounds exist to preclude the Tribe from offering any testimony or evidence at the hearing or otherwise limiting its participation in the hearing.

**B. YANKTON SIOUX TRIBE WAS UNDER NO DUTY TO PROVIDE INFORMATION OR DOCUMENTS AS KEYSTONE'S REQUESTS FAILED TO COMPLY WITH THE COMMISSION'S ORDER OF DECEMBER 17, 2014.**

Because Keystone's Requests were in clear violation of the Commission's *Order* of December 17, 2014, said requests are improper and invalid. A party is not required to comply with discovery requests if those requests are contrary to an order issued in the pending proceeding. Even after being placed on notice that its requests were contrary to the Commission's *Order*, Keystone failed to take steps to address its noncompliance. The Tribe was therefore fully justified in objecting to Keystone's Requests. The Commission issued an *Order* that specifically outlined the scope of discovery and the requirements with which parties must comply when seeking discovery. Because Keystone failed to act in accordance with the Commission's *Order*, the Tribe

was under no duty to respond and cannot be held accountable for Keystone's failures to follow the Commission's instructions.

**C. YANKTON SIOUX TRIBE WAS UNDER NO DUTY TO PROVIDE INFORMATION OR DOCUMENTS AS KEYSTONE'S REQUESTS WERE OUTSIDE THE SCOPE OF DISCOVERY AS LIMITED BY THE COMMISSION'S ORDER OF DECEMBER 17, 2014.**

Keystone's Requests were invalid not only because they failed to identify the relevant information as required by the Commission's *Order*, but because they plainly exceeded the scope of discovery pursuant to that *Order*. The Commission issued the December 17, 2014 *Order* limiting discovery at Keystone's own request. The fact that Keystone now wishes to curtail the rights of the Tribe because it sought discovery outside of the limitations Keystone itself requested is perplexing. Discovery in this matter has been limited 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; or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C..." *Order Granting Motion to Define Issues and Setting Procedural Schedule* at p. 2. Keystone's discovery requests, however, do not fall within this scope as Keystone has itself admitted. Because the Requests fall outside the scope of discovery as established by the Commission, the Tribe had substantial justification for its refusal to comply with said Requests and Keystone's *Motion* must be denied.

**D. THE RELIEF SOUGHT BY KEYSTONE IS PREMATURE AND WOULD RESULT IN UNNECESSARY SUBSTANTIAL INJUSTICE.**

As stated above, Keystone has asked the Commission to enter an order overruling the Tribe's objections and limiting its hearing participation. However, Keystone has failed to cite any justification for limiting the Tribe's participation rather than requesting an Order to Compel as provided by the Rules of Procedure. If Keystone's concern is that the Tribe has not yet provided

it with a list of the witnesses and exhibits the Tribe intends to use at the hearing, Keystone's concern is invalid because, like Keystone, the Tribe will supply its exhibit and witness lists in accordance with the deadline set by the Commission. Keystone, therefore, has not been prejudiced by the Tribe's refusal to provide this information prior to the deadline. In fact, in response to the Tribe's discovery requests, Keystone itself refused to provide exhibits prior to the deadline and stated that "Keystone will disclose its exhibits as required by order of the Commission." See "Exhibit E," Keystone's Responses to Yankton Sioux Tribe's Second Interrogatories and Request for Production of Documents at p. 5, Request for Production No. 10.

In the event that the Commission overrules the Tribe's objections, it would be premature at this stage, and therefore unjust, to limit the Tribe's participation in the hearing before the Tribe has had any opportunity to cure its responses once a ruling has been made. This is precisely why the Rules of Procedure provide for the issuance of an Order to Compel that provides an opportunity for the non-moving party to comply with an order once the Court or Commission has resolved the dispute. As stated above, the Tribe was fully justified in refusing to answer Keystone's Requests absent a ruling on its objections. The remedy Keystone has requested, limiting the use of evidence at trial under SDCL 15-6-37(c), is therefore unavailable and Keystone has failed to seek the procedurally proper form of relief. The Tribe has a right to object to requests it, in good faith, deems improper. To deny the Tribe its ability to participate in the hearing because the Tribe exercised that right would result in a miscarriage of justice. The *Amended Motion to Preclude* must be denied.

#### **IV. CONCLUSION**

Because Keystone failed to comply with requirements imposed on discovery by South Dakota law and by this Commission, Keystone's *Amended Motion to Preclude* must be denied.

The Tribe has at all times operated within the scope of the Commission's *Orders* and the Rules of Procedure. To grant Keystone the requested relief would be a violation of the Tribe's rights and would jeopardize the integrity of these proceedings. The *Amended Motion to Preclude* must, therefore, be denied.

Respectfully submitted this 8th day of April, 2015.



---

Thomasina Real Bird, SD Bar No. 4415  
FREDERICKS PEEBLES & MORGAN LLP  
1900 Plaza Drive  
Louisville, Colorado 80027  
Telephone: (303) 673-9600  
Facsimile: (303) 673-9155  
Email: [trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)  
*Attorney for Yankton Sioux Tribe*