

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

|                                            |   |                             |
|--------------------------------------------|---|-----------------------------|
| <b>IN THE MATTER OF THE PETITION OF</b>    | ) | <b>STAFF'S POST-HEARING</b> |
| <b>TRANSCANADA KEYSTONE PIPELINE, LP</b>   | ) | <b>BRIEF</b>                |
| <b>FOR ORDER ACCEPTING CERTIFICATION</b>   | ) |                             |
| <b>OF PERMIT ISSUED IN DOCKET HP09-001</b> | ) | <b>HP14-001</b>             |
| <b>TO CONSTRUCT THE KEYSTONE XL</b>        | ) |                             |
| <b>PIPELINE</b>                            | ) |                             |

**I. Preliminary Statement**

For purposes of this brief, the South Dakota Public Utilities Commission is referred to as "Commission"; Commission Staff is referred to as "Staff"; TransCanada Keystone Pipeline, LP is referred to as "Keystone" or "TransCanada". References to the transcripts are as follows:

Transcript of Prehearing Scheduling Conference .....PT  
Transcript of December 9, 2014 Commission Meeting.....DT  
Transcript of January 6, 2015 Commission Meeting.....JT  
Transcript of March 31, 2015 Commission Meeting.....MT  
Transcript of April 14, 2015 Commission Meeting.....AT  
Transcript of the Evidentiary Hearing .....ET

Each citation will be followed by the appropriate page number(s). Citations to the transcript of the evidentiary hearing will also be followed by a citation to the day of the nine-day hearing, for example a citation to a statement from the first line of the second page on the third day would read ET 3:2:1.

**II. Jurisdictional Statement**

In the current proceeding, Keystone has requested the Commission accept its certification of the construction permit issued in HP09-001. The Commission has jurisdiction over this issue pursuant to SDCL § 49-41B-27.

### **III. Statement of the Case and Facts**

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 (hereafter "Permit") 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, three of whom have since withdrawn their party status.

On November 13, 2014, a Prehearing Scheduling Conference was held by order of the Commission. Commission Counsel John J. Smith presided over the conference. The purpose of the conference was to reach an agreement on a schedule for the proceedings in this docket. PT 11:21-24. The parties were unable to reach an agreement.

Prior to the evidentiary hearing in this docket, approximately 47 motions were filed by the various parties and heard by the Commission. A brief description of each of those motions is provided in this brief.

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. On November 5, 2014, the Commission issued an Order for and Notice of Motion Hearing, scheduling a hearing on the Motion for November 25, 2014, and ordering that all parties file responses on or before November 17, 2014, with Keystone's reply due by November 21, 2014.

On November 14, 2014, Cheyenne River Sioux Tribe (hereafter "CRST"), Dakota Rural Action (hereafter "DRA"), Carolyn P. Smith, Rosebud Sioux Tribe (hereafter "RST"), and

Intertribal Council on Utility Policy (hereafter "ICOUP") filed motions requesting an extension of time to respond to Keystone's motion. The Commission responded by issuing an order allowing parties to file responses to the Keystone's motion until December 1, 2014, with Keystone's reply due by December 5, 2015. The Commission further ordered that the hearing would be held on December 9, 2014.

A hearing on Keystone's Motion to Define the Scope of Discovery 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 Fact 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.

Also at the December 9, 2014 Meeting, the Commission addressed the procedural schedule. The Commission heard argument from numerous parties as to the appropriate schedule. DT 41-60. 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 December 2, 2014, Yankton Sioux Tribe (hereafter "YST") filed a Motion to Dismiss. At the commission meeting on December 9, 2014, the Commission considered scheduling for the Motion to Dismiss. Responses to the Motion to Dismiss were to be filed by December 29, 2014. The Commission heard the Motion to Dismiss on January 6, 2015. The Commission voted unanimously to deny the Motion to Dismiss.

On March 23, 2015, Keystone filed a Motion to Preclude Certain Intervenor (John Harter, Bold Nebraska, Carolyn Smith, Gary Dorr, and YST) 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 Intervenor 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. A hearing was held on this motion on April 14, 2015. The Commission granted the Motion with respect to the request for an order compelling Cindy Myers to provide information regarding expert witnesses. The Commission granted the motion with respect to the 17 named individuals who failed to respond to discovery. The order precluded those 17 parties from presenting evidence or witnesses at the evidentiary hearing. The Commission granted the motion with respect to five intervenors who failed to adequately respond to discovery requests, with the exception of YST and Gary Dorr. The remaining three of the five named parties were precluded from offering evidence or witnesses at

the evidentiary hearing. The motion was denied with respect to sanctions sought against YST and Gary Dorr.

On March 25, 2015, Standing Rock Sioux Tribe (hereafter "SRST") filed a Motion for Discovery Sanctions or to Compel. In that motion, SRST requested an order from the Commission precluding Keystone from introducing any testimony or evidence regarding compliance with state or federal law, which SRST argued should result in the dismissal of the proceeding. SRST requested, in the alternative, an order from the Commission extending the period for discovery, continuing the evidentiary hearing scheduled to begin on May 5, 2015, and compelling Keystone to produce certain documents and answer certain interrogatories. This motion was heard by the Commission on April 14, 2015, at which time the Commission voted to grant in part and deny in part the motion. The Commission denied the request for sanctions. The Commission did, however, grant the Motion to Compel with respect to many of the requested documents and interrogatories. An Order was issued on April 17, 2015.

On March 25, 2015, RST filed a Motion to Amend Procedural Schedule. In this motion, RST sought to change the date on which prefiled testimony was due. According to the Scheduling Order, prefiled testimony was due April 2, 2015. The Commission heard the motion on March 31, 2015. The Commission granted RST's motion and allowed RST to file its prefiled testimony on April 10, 2015.

On March 27, 2015, SRST filed a Motion to Amend Order Setting Procedural Schedule. In its motion, SRST requested that the Commission amend the Procedural Schedule to delay the dates set for close of discovery, prefiled testimony, rebuttal testimony, filing of exhibits, and the evidentiary hearing. The Commission heard this Motion on March 31, 2015. The Commission denied this motion.

Under the Procedural Schedule, prefiled testimony was due on April 2, 2015. On April 2, 2015, DRA filed a Statement and Objections on Behalf of Dakota Rural Action with Respect to Submission of Written Testimony. On April 3, 2015, ICOUP also filed a Statement and Objections. On April 6, 2015, Keystone filed a Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony. On April 14, 2015, the Commission considered this motion. The Commission voted to grant the motion subject to the condition that prefiled rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015 deadline, including testimony and exhibits addressing information obtained as a result of any order to compel discovery granted by the Commission.

On April 7, 2015, DRA filed a Motion and Supporting Memorandum to Compel Discovery. In this motion, DRA sought an order compelling Keystone to provide certain information and answer certain interrogatories to which Keystone had raised several objections. The Commission considered this motion on April 14, 2015. The Commission voted to grant in part<sup>1</sup> and deny in part the motion.

On April 7, 2015, DRA, SRST, RST, CRST, and Indigenous Environmental Network (hereafter "IEN") filed a Joint Motion for Stay of Proceedings. On April 14, 2015, the Commission considered this motion. The Joint Motion for Stay of Proceedings was denied.

On April 7, 2015, Gary Dorr filed a Motion to Compel Discovery and Preclude Keystone from Offering Evidence or Witnesses at Hearing. In the motion, Mr. Dorr requested an order compelling Keystone to disclose answers to certain interrogatories, as well as an order precluding Keystone from offering evidence or witnesses relating to rural water system pipelines

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<sup>1</sup> The Commission granted DRA's Motion with respect to interrogatories 7, 23, 25, 48, 56, 57, 58, 60, 76, and 83. The Commission granted DRA's Motion with respect to requests for production of documents numbers 1, 9, 10, 12, 13, 26, 28, 29, 30, 31, 33, 34, 37, 38, 42, 44, 50, 53, 55, and 56.

and Keystone XL easements, rural water system pipeline maps, and tribal consultation at the evidentiary hearing. The Commission considered the motion on April 14, 2015. Finding that Keystone had provided sufficient information to answer the interrogatories at issue, the Commission voted to deny the motion.

On April 7, 2015, DRA, RST, CRST, and IEN filed a Joint Motion for Appointment of Special Master. In the joint motion, movants requested the Commission appoint a special master for the purpose of resolving discovery disputes. The Commission considered the joint motion on April 14, 2015. The Commission found that it has sufficient resources and is competent to hear and act on the discovery issues presented and, therefore, denied the joint motion.

On April 7, 2015, RST filed a Motion to Compel Discovery. The motion sought an order compelling Keystone to provide answers to certain interrogatories and provide certain requested documents. The Commission considered the motion on April 14, 2015. The Commission found that Keystone had provided sufficient information to answer RST's discovery requests. The motion was denied.

On April 8, 2015, Nancy Hilding filed a Motion for PUC Review and Clarification. The motion requested the Commission undertake a review of all discovery requests submitted by Keystone on December 18, 2014, to determine their appropriateness and enforceability. The Commission considered that motion on April 14, 2015. After considering the Motion, the Commission voted to deny the motion.

On April 7, 2015, YST filed a Motion to Compel. In this motion, YST requested the Commission issue an order compelling Keystone to answer certain interrogatories and provide certain information requested by YST through discovery. The Commission considered the

motion on April 14, 2015. The Commission voted to grant the motion in part<sup>2</sup> and deny the motion in part. Associated attorney's fees requested by YST were denied. Keystone was ordered to comply by Friday, April 17, 2015.

On April 7, 2015, DRA filed a Motion and Supporting Memorandum to Compel Discovery. In this motion, DRA sought an order compelling Commission Staff to produce documents responsive to its request for production of documents. Specifically, DRA requested copies of all communications between the Commission or Staff and Keystone and its affiliates. The Commission considered this motion on April 14, 2015. The Commission denied the motion, finding that the information sought was protected as attorney work product, as all communications were exclusively among attorneys.

On April 8, 2015, RST filed a Motion for Reconsideration, requesting the Commission reconsider its prior order, dated April 3, 2015, and further amend the procedural schedule to allow RST additional time to submit prefiled testimony. The Commission considered the Motion for Reconsideration at an ad hoc meeting on April 9, 2015. The Commission voted to grant the Motion to Reconsider and ordered that RST's testimony for its expert witness be filed no later than April 24, 2015, except to the extent it qualifies for filing on April 27, 2015, as rebuttal testimony.

The Commission issued an Order for and Notice of Evidentiary Hearing on April 17, 2015. This Order, which provided notice of the evidentiary hearing to be held beginning on May 5, 2015, was served on all parties.

On April 24, 2015, the Commission received a Joint Motion for Continuance and Relief from Scheduling Order from DRA, RST, YST, Bold Nebraska, CRST, and SRST. In this

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<sup>2</sup> Keystone was ordered to respond to interrogatories 15 and 21. Keystone was ordered to produce documents responsive to requests for production of documents numbers 2, 3, 4, 7, and 8.



motion, movants requested the Commission continue the evidentiary hearing scheduled to begin May 5, 2015. On April 27, 2015, the Commission considered the motion at an ad hoc meeting. The Commission granted the motion, and an Amended Procedural Schedule was issued, scheduling the evidentiary hearing to begin on July 27, 2015.

Also on April 24, 2015, DRA, RST, SRST, CRST, YST, IEN, and Bold Nebraska filed a Joint Motion to Vacate or, In the Alternative to Clarify or Amend Protective Order. This motion was filed in response to a Protective Order issued by the Commission on April 17, 2015. The Protective Order provided, in part, that all confidential information shared as a result of any motion to compel granted by the Commission was viewable only by attorneys of record for the parties to the motions to compel. The Commission considered the joint motion on April 30, 2015. The Commission voted unanimously to deny the request to vacate but granted the request to clarify or amend the Protective Order. By Commission order, the Protective Order was amended to allow co-counsel, professional staff, and expert witnesses (if the experts executed a Non-Disclosure Agreement) to review confidential information.

On April 27, 2015, SRST, CRST, RST, YST, DRA, IEN, ICOUP, and Bold Nebraska filed a Motion to Exclude Evidence and Testimony by TransCanada. Gary Dorr later joined that Motion. In the motion, movants sought an order precluding Keystone from presenting any witnesses or evidence at the evidentiary hearing because of alleged discovery response violations by Keystone. The Commission denied the motion, finding that Keystone had produced a very large volume of documents in response to intervenor discovery requests and the Commission's Orders to Compel and that the movants had not demonstrated that Keystone had acted in bad faith or with willfulness or fault.

Also on April 27, 2015, the Commission received a Notice of Request for a Time Certain for an Expert Rebuttal Witness from ICOUP. Included in the Request was a description of the scope of testimony for Dr. James Hanson. The Request also named two additional witnesses, Dr. George Seielstad and Dr. Robert Oglesby, whom ICOUP intended to call as rebuttal witnesses. On April 27, 2015, Keystone filed an Objection to ICOUP's Request for a Time Certain and Motion to Preclude Witnesses. Keystone sought an order precluding testimony by the three proffered witnesses, arguing that those witnesses would not be offering testimony within the meaning of rebuttal testimony and did not file pre-filed direct testimony, as required by the Commission. The matter was heard by the Commission on May 26, 2015. Because the evidentiary hearing had already been continued to a later date, the Request for a Time Certain was found to be moot. Therefore, the Commission ruled only on Keystone's Motion to Preclude. Finding that the testimony of the three witnesses was beyond the scope of the certification proceeding, as the testimony dealt with climate change, the Commission voted unanimously to grant the motion.

On May 26, 2015, Keystone filed a Motion to Exclude Testimony of Richard Kuprewicz. RST had filed pre-filed testimony of Richard Kuprewicz. Keystone argued that that the majority of Richard Kuprewicz's testimony should be excluded on the grounds that much of the testimony amounted to a request to reroute the pipeline, an issue over which the Commission lacks jurisdiction, and on the grounds that the testimony was irrelevant. On June 11, 2105, the Commission heard arguments and considered the motion. The Commission voted unanimously to grant the motion in part and deny in part. The Commission found that it lacks authority to order a reroute of the pipeline, but did find that portions of the testimony may be relevant to the proceeding. The testimony was precluded to the extent that it related to rerouting of the pipeline.

On May 26, 2015, Keystone filed a Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements. Keystone argued that such testimony was not relevant to the certification proceeding. On June 11, 2015, the Commission heard arguments and considered the motion. Finding the subject matter was not relevant to the certification proceeding and that the Commission does not have jurisdiction over property rights, the Commission voted unanimously to grant the motion.

On May 26, 2015, the Commission received Keystone's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. Keystone argued that the Commission does not have jurisdiction to determine whether such rights exist and, further, that those issues are not relevant. On June 11, 2015, the Commission heard arguments and considered the motion. The Commission found that issues regarding aboriginal title or usufructuary rights were outside of the Commission's jurisdiction. The Commission issued an Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights on June 15, 2015.

On May 26, 2015, the Commission received YST's and IEN's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. YST and IEN requested that the Commission either issue an order precluding the Commission from amending the findings of fact listed in the Permit or, in the alternative, amend Finding Number 114 to state that "the Commission finds that the permit should *not* be granted" and amend Finding Number 113 to state that "the Commission finds that due consideration had *not* been given to the views of governing bodies of affected local units of government." The Commission, finding that Keystone had not made any request to amend the Findings of Fact, voted unanimously to deny the motion and issued an Order on June 15, 2015.

Per the Order Amending Procedural Schedule, parties were required to file witness lists and exhibit lists by July 7, 2015. On July 7, 2015, DRA and several other parties submitted exhibit lists. DRA's exhibit list identified approximately 1,073 exhibits it intended to introduce at the evidentiary hearing. On July 10, 2015, the Commission received Keystone's Protective Motion *in Limine* Regarding Dakota Rural Action's Exhibit List Dated July 7, 2015. In its motion, Keystone sought an order prohibiting DRA from offering any exhibit or testimony regarding exhibits not otherwise produced in discovery responses. The Commission considered the motion on July 17, 2015. The Commission voted unanimously to grant in part and deny in part the motion. On July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine*. In its Order, the Commission precluded DRA's introduction of 122 DRA exhibits. The Commission denied the motion with respect to the remaining 951 exhibits.

On July 21, 2015, the Commission received DRA's Motion and Memorandum for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits. In its Motion to Reconsider, DRA requested that the Commission reconsider its July 17, 2015 Order. At an ad hoc meeting on July 23, 2015, the Commission considered the Motion for Reconsideration. Finding Keystone would not be prejudiced by admission of certain previously excluded exhibits, the Commission voted unanimously to grant the Motion for Reconsideration only as it relates to DRA exhibits 29-37, 39-65, and 1058-1062.

On July 9, 2015, Staff filed a Motion for Judicial Notice. In its motion, Staff requested that the Commission take judicial notice of the evidentiary record in Docket No. HP09-001, the Final Environmental Impact Statement, the Final Supplemental Environmental Impact

Statement, and SDCL § 49-41B in its entirety. With no objections, the Commission issued an order on July 22, 2015, granting the Motion for Judicial Notice.

On July 10, 2015, Staff filed a Motion for Time Certain. In its motion, Staff requested to reserve August 3, 2015, as a time for a Staff witness and a SRST witness who needed to travel to attend the hearing to testify. On July 22, 2015, the Commission issued an order granting Staff's motion.

On July 10, 2015, Keystone filed Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing. In this motion, Keystone requested an order from the Commission 1) limiting parties with a common interest to one lawyer who may ask questions on cross-examination; 2) requiring parties who wish to give an opening statement to do so in writing; 3) precluding friendly-cross examination; 4) for those parties represented by counsel, limiting the conducting of cross-examination to counsel; 5) limiting cross-examination to the scope of the direct examination; and 6) while allowing for objections, precluding parties from arguing evidentiary objections unless directed by General Counsel for the Commission. The Commission considered this motion on July 21, 2015. On July 22, 2105, the Commission issued an order denying in part and granting in part this motion.

In its Order Denying in Part and Granting in Part Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing, with respect to the first request, the Commission denied the request for parties with a common interested to be limited to one lawyer who may conduct cross-examination, but explicitly precluded redundant and repetitive questioning. The Commission denied the second request, which was to require opening statements to be in writing, however, the Commission voted to allow written opening statements at the option of the party. The Commission denied the third request, but limited cross-examination to new

information and new questions. The fourth request was granted, thereby limiting the conducting of cross-examination to counsel for those parties represented by counsel. The Commission also granted the fifth request, which limited cross-examination to the scope of direct examination and issues effecting credibility. The Commission denied the sixth and final request, which sought to preclude parties from arguing evidentiary objections unless directed to do so by General Counsel.

On July 10, 2015, Keystone also filed Keystone's Motion *in Limine* to Exclude Testimony of Kevin E. Cahill, Ph.D. SRST had previously filed prefiled rebuttal testimony for Dr. Cahill in rebuttal to the prefiled direct testimony of Staff witnesses Kimberly McIntosh and Brian Walsh. In its motion, Keystone argued that Dr. Cahill's testimony was not relevant and was beyond the scope of the proceeding. The Commission found that the testimony, which related to the U.S. Department of State's socioeconomic impact analysis of the pipeline, was not relevant to the proceeding and the Commission voted to grant the motion. On July 22, 2015, the Commission issued an Order Granting Motion to Exclude Testimony of Kevin E. Cahill, Ph.D. On July 24, 2015, the Commission Received Standing Rock Sioux Tribe's Motion to Reconsider Order Granting Motion *in Limine* to Preclude Kevin E. Cahill, Ph.D. The Commission considered this motion prior to the commencement of the evidentiary hearing on July 27, 2015. The Commission voted to grant, in part, Standing Rock Sioux Tribe's Motion to Reconsider Order Granting Motion *in Limine* to Preclude Kevin E. Cahill, Ph.D. and allowed Dr. Cahill to testify at the evidentiary hearing with respect to the portion of his testimony that was responsive to Staff witness Walsh's pre-filed testimony.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Preclude Rebuttal Testimony of Ian Goodman and Brigid Rowan. In this motion, Keystone sought to preclude the

testimony of two witnesses for whom Rosebud filed prefiled testimony. However, at the time the motion was heard, both Keystone and Rosebud agreed that the issue was moot, as Rosebud no longer intended to call the two as witnesses. Therefore, the Commission denied this motion.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Preclude Rebuttal Testimony of Jennifer Galindo and Wasté Win Young. The Commission found that the issues in the proffered testimony of the two witnesses were not relevant to the proceeding and, therefore, voted to grant the Motion. On July 24, 2015, SRST filed a Motion for Reconsideration. The Commission considered the Motion for Reconsideration prior to the evidentiary hearing on July 27, 2015. The Commission voted to deny the Motion for Reconsideration.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Preclude Testimony of Chris Sauncosi. The testimony of Chris Sauncosi was previously filed as rebuttal testimony by YST. Finding that the pre-filed rebuttal testimony contained no substantive information and was not relevant to the issue in the proceeding, the Commission granted this motion.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Preclude Testimony of Dr. Hansen and Dr. Oglesby, both of whom were witnesses proffered by ICOUP. In its response, filed July 20, 2015, ICOUP made a motion requesting the Commission reconsider its May 28, 2015 Order precluding the testimony of Dr. Hansen and Dr. Oglesby on relevancy grounds. On July 21, 2015, the Commission voted unanimously to grant Keystone's motion, finding that the testimony, which related to climate change, was beyond the scope of the proceeding. The Commission voted to deny the request to reconsider the previous order.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Restrict Testimony of Leonard Crow Dog. Leonard Crow Dog filed prefiled testimony on behalf of RST. On July 21, 2015, the Commission voted unanimously to grant the motion, finding that the rebuttal testimony

at issue addressed matters previously ruled by the Commission to be beyond the scope of the proceeding.

On July 10, 2015, the Commission received Keystone's Motion *in Limine* to Restrict Testimony of Yankton Sioux Witnesses Spotted Eagle and Un-Named Member of the B&C Committee. In this motion, Keystone sought an order striking certain portions of the direct testimony and all of the rebuttal testimony of Faith Spotted Eagle. With regard to the testimony of Faith Spotted Eagle, the Commission found that questions 24-33 of her direct testimony were outside the jurisdiction of the Commission and the scope of the proceeding and that the rebuttal testimony did not comport with standards for prefiled testimony and was beyond the scope of the proceeding. With respect to the testimony of the un-named witness, the Commission found that the prefiled testimony did not comport with the requirements of prefiled testimony. Therefore, the Commission voted unanimously to grant this motion. However, the Commission explicitly stated that Ms. Spotted Eagle would be allowed to testify to the extent her testimony was not at issue in this motion.

On July 10, 2015, the Commission received Keystone's Motion *in Limine* to Strike Paula Antoine's Rebuttal Testimony, which was filed on behalf of RST. The Commission voted to grant the motion only as it related to testimony on the Spirit Camp, which it found to be irrelevant, but to allow the remainder of the testimony.

On July 10, 2015, Keystone filed Keystone's Motion *in Limine* to Strike Article by Linda Black Elk and Restrict Her Testimony. The motion related to an article authored by Linda Black Elk and submitted as prefiled testimony by SRST, with no accompanying prefiled testimony or documentation. The Commission found that the article, which related to plant life sacred to



Native Americans, was beyond the scope of the proceeding and that the proffered witness failed to file prefiled testimony. The Commission granted this motion.

On July 10, 2015, RST filed Rosebud Sioux Tribe's Motion *in Limine* to Exclude Testimony. This motion sought an order excluding the rebuttal testimony of Keystone witnesses Heidi Tillquist, Meera Kothari, and Jeff Mackenzie. The Commission considered this motion on July 21, 2015, at which time both RST and Keystone agreed that the motion was moot, as RST determined it would not offer the testimony the three witnesses intended to rebut and Keystone withdrew portions of the rebuttal testimony that responded to RST's witnesses. Therefore, the Commission denied this motion.

On July 10, 2015, YST, CRST, Bold, RST, IEN, and DRA filed a Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact. In the motion, an order was sought precluding Keystone from presenting any testimony, evidence, or exhibits to support the Tracking Table of Changes at the evidentiary hearing. Finding that the testimony at issue is relevant to the proceeding and that amending the findings of fact in the Permit was not requested, the Commission voted unanimously to deny this motion.

On July 16, 2015, Diana Steskal filed a Motion for Time Certain for Witness Testimony. In her motion, Ms. Steskal asked that the Commission allow her to present her direct testimony on a specific date. This motion was granted.

On July 21, 2015, YST filed a Motion for Time Certain for Witness Testimony, requesting that YST witness Faith Spotted Eagle be allowed to testify on one of two dates. This motion was granted.

An evidentiary hearing was held beginning on July 27, 2015. The hearing lasted nine days. Testimony was provided by 24 witnesses. At the close of the hearing, several intervenors

made a motion requesting the Commission deny the application for order accepting certification. The Commission denied the Motion, holding that it was necessary to consider arguments and briefs before reaching a decision.

On September 21, 2015, Keystone filed Applicant's Motion to Strike Testimony and Exhibits of Cindy Myers. Cindy Myers testified on her own behalf at the evidentiary hearing. ET 7:1652. During the hearing it was decided that Keystone would make its objections in writing after the evidentiary hearing. ET 7:1657:14-23. This motion was still pending at the time this brief was filed.

#### **IV. Legal Standard**

As per SDCL § 49-41B-27, Keystone bears the burden to certify to the Public Utilities Commission that the facility continues to meet the conditions upon which the permit was issued.

#### **V. Argument**

*a) Keystone met its burden through its certification on September 15, 2014.*

Per SDCL § 49-41B-27, because construction did not commence within four years, TransCanada is required to certify to the Commission that the pipeline continues to meet the conditions upon which the permit was issued. Black's Law Dictionary defines the word "certify" as to authenticate or verify in writing. *Black's Law Dictionary* 207 (10th ed. 2014). Therefore, the plain meaning of the statute is that [Keystone] must [verify in writing]...that the [Project] continues to meet the conditions upon which the permit was issued. See SDCL § 49-41B-27.

SDCL § 49-41B-27 does not say that a company must prove the project continues to meet the conditions or that the Commission must certify that the company has proven the project can continue to meet the conditions. Therefore, a plain reading of the statute would indicate that

Keystone met its burden simply by submitting the pleading entitled "Certification" on September 15, 2014.

In other contexts, the Legislature has clearly established duties to be placed upon the applicant, such as those set forth in SDCL § 49-41B-22, which provides that the "applicant has the burden of proof to establish that" certain criteria are met. Therefore, had the Legislature intended for "certify" to equate to "establish," it would have said so. See, *Jensen v. Turner County Bd. Of Adjustment*, 2007 S.D. 28, ¶ 8, 730 N.E.2d 411, 414 (holding that had the Legislature intended only require a two-thirds concurrence, it would have said so). The Court has held that "[w]hile it is fundamental that we must strive to ascertain the real intention of the lawmakers, it is equally fundamental that we must confine ourselves to the intention as expressed in the language used." *Id.* citing, *Ex parte Brown*, 21 S.D.515, 519, 114 N.W.2d 303, 305 (1907). Under this rule, the Court would have the Commission confine its decision to the plain meaning of the statute.

b) *The Legislature did not intend for certifications to be denied by the Commission.*

The Legislature established clear direction for a company to reapply if an *initial permit* is denied under SDCL §§ 49-41B-24 or 49-41B-25. (See SDCL §§ 49-41B-22.1 or 49-41B-22.2.) For example, SDCL §49-41B-22.1 states in relevant part: "Nothing contained herein shall prohibit an applicant from reapplying for a permit previously denied *pursuant to SDCL §§ 49-41B-24 or 49-41B-25* within three years..." {emphasis added}

First, the Legislature does not expressly state within SDCL § 49-41B-22.1 that nothing contained herein shall prohibit an applicant from reapplying for a permit previously denied *pursuant to SDCL § 49-41B-27*. As such, within the reapplication statutes of SDCL §§ 49-41B-22.1 or 49-41B-22.2, the Legislature makes no mention of how the company may proceed if

certification is denied under SDCL § 49-41B-27. Therefore, it is argued that the Legislature never intended for a certification pursuant to SDCL § 49-41B-27 to result in a contested proceeding and subsequent denial since the Legislature did not provide clear direction in statute for how a company should proceed if its certification is denied by the Commission.

Next, the language of SDCL § 49-41B-24 must be examined to determine if a certification pursuant to SDCL § 49-41B-27 falls within the meaning of “*denial pursuant to SDCL § 49-41B-24*” as set forth in SDCL § 49-41B-22.1. SDCL § 49-41B-24 reads in relevant part: “Within twelve months of receipt of the *initial application for a permit* for the construction of [...] transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications [...]”

Here, the Legislature stated in SDCL § 49-41B-24 that the Commission must render its decision regarding whether a permit should be granted, denied, or granted upon conditions within twelve months of receipt of the *initial application for a permit*. The Legislature used the language “*initial application for a permit*” and did not include language referring to a “*certification*” or “*initial application for certification*” made pursuant to SDCL § 49-41B-27. Since the Legislature made use of the term “*certification*” in SDCL § 49-41B-27, it would stand to reason that the Legislature would have included “*certification*” in SDCL § 49-41B-24 if it intended for the Commission to render a decision regarding granting, denying, or granting upon conditions a certification made pursuant to SDCL § 49-41B-27.

Furthermore, the existence of SDCL § 49-41B-33(2), which gives the Commission the authority to revoke or suspend a permit for failure to comply with the terms and conditions of the permit, is further evidence that revocation or denial of the permit is not provided for under SDCL

§ 49-41B-27. SDCL § 49-41B-33(2), along with SDCL § 49-41B-24, identifies that when the Legislature contemplated that a permit should be granted, denied, revoked or suspended, it had the wherewithal to clearly state such in statute. Therefore, if the Legislature intended for a permit to be denied under SDCL § 49-41B-27, it would have included specific language in the statute, or elsewhere in SDCL § 49-41B for that matter, clearly identifying such.

c) *What is meant by "conditions"?*

The word "conditions" as used in SDCL § 49-41B-27 is synonymous with terms, rather than circumstances. Had the legislature intended for an applicant to demonstrate it meets all of the circumstances upon which the Commission granted the permit, SDCL § 49-41B-27 would be redundant, as the applicant would necessarily need to reapply, which is covered by SDCL § 49-41B-22.2. In fact, upon a reapplication, the Legislature does not even require an applicant to hold the same burden as in an original application, but allows the Commission the discretion to apply a lesser burden. See SDCL § 49-41B-2.2.

Furthermore, had the Legislature intended for certification to be contingent upon all of the "circumstances" being met without allowing any change, such as PHMSA updating language, the statute would be rendered meaningless, as no project would be able to meet that standard after four years. The Legislature would have known that certain things, such as cost, would change over time with an immaterial effect on an applicant's ability to meet the intent of the conditions and the terms. "It is presumed that the Legislature [does] not intend for an absurd or unreasonable result." *Krukow v. S.D. Bd. Of Pardons*, 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124.

Finally, another indicator of what is meant by "conditions" is the fact that the statute proscribes that the utility meet the conditions. It makes little sense to say that a utility must meet circumstances. However, meeting the *terms* does make logical sense.

Therefore, it is Staff's interpretation that Keystone must certify that it can continue to meet the terms set forth by the Commission in the Permit. However, because certain other arguments were raised during the evidentiary hearing, Staff will address those arguments below.

*d) This is the same project that was permitted in 2010.*

As it pertains to the State of South Dakota, the Keystone XL Pipeline is the same project as permitted by the Commission in 2010. The Commission has taken judicial notice of HP09-001. The Permit issued in 2010, described the Project in paragraphs 13 – 23 of the Findings of Fact. The material aspects of the Project described in the Findings of Fact are described below.

The Project will transport incremental crude oil production from the Western Canadian Sedimentary Basin to markets in the United States. The purpose of the pipeline is still to transport crude oil. Corey Goulet testified that the original intention was to “take in crude at Hardisty, Alberta and deliver it to the Gulf Coast,” and that has “been modified to add the Marketlink Project to allow injections at Baker, Montana and take off crude at Cushing, Oklahoma.” ET 2:247-248. However, because both of those modifications take place outside of the state of South Dakota and do not affect the route or operation within South Dakota, Staff does not view this as a change that would constitute a new project in South Dakota.

The Project will consist of three segments – Steele City Segment, the Gulf Coast Segment, and the Houston Lateral. Nothing in the Permit notes in which order the segments must be built or if they must be built simultaneously. The segment that traverses South Dakota is still the Steele City Segment. This segment would still enter South Dakota in Harding County and exit South Dakota in Tripp County, as described in Finding of Fact 16 in the Permit. The length of the pipeline in South Dakota has only changed by one mile, from 314 to 315 miles, or slightly less than half a percent.

Finding of Fact 19 states that the pipeline will operate at a maximum operating pressure (MOP) of 1,440 psig, with the exception of location specific low elevation segments close to the discharge of pump stations, which will operate at an MOP of 1,600. Keystone now states that the pipeline would operate at an MOP of 1,307 psig, with the exception of location specific low elevation segments close to the discharge of pump stations, which would have an MOP of 1,600 psig. In addition, Corey Goulet testified that the reduction from 9,000 barrels per day to 830,000 barrels per day is due to the fact that the pipeline will be operating at a lower capacity, which is 72 percent, rather than 80 percent. ET 2:254:11-14. Because the new MOP and capacity are lower, Staff does not find this change is less concerning, particularly as the higher capacity and MOP were closely examined and approved in the original filing. Thus, it is not a material or adverse change.

Because there have been no material changes to the Project in South Dakota or changes outside of South Dakota that will have an impact on the pipeline in South Dakota, this is the same Project that was granted a permit in 2010.

## **VI. Conclusion**

Based on the arguments above, it is Staff's position that the Company has met its burden and did so by submitting its certification on September 15, 2014. Moreover, had the Legislature intended for certifications made pursuant to SDCL § 49-41B-27 to be denied by the Commission, it would have clearly stated such with SDCL § 49-41B and would have then provided a process by which a company could reapply for certification or the permit. This does not mean that the proceedings in this docket were meritless. Because of the Commission's continuing authority to revoke or suspend a permit, it stands to reason that the Commission may at any time order a hearing to determine compliance with conditions. Should the Commission

determine from the evidence presented at the hearing that Keystone is not in compliance with the conditions, the Commission may initiate a separate proceeding under SDCL § 49-41B-33.

Dated this 28<sup>th</sup>, September, 2015

A handwritten signature in black ink, appearing to read "Kristen Edwards", written over a horizontal line.

Kristen N. Edwards

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**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 )

CERTIFICATE OF SERVICE

HP14-001

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