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, CHEYENNE RIVER, ROSEBUD AND YANKTON SIOUX TRIBES, DAKOTA RURAL ACTION, INDIGENOUS ENVIRONMENTAL NETWORK, INTERTRIBAL COUP AND BOLD NEBRASKA BRIEF IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE AND TESTIMONY BY TRANSCANADA

I. TransCanada Violated the Orders to Compel Discovery

The *Order Granting in Part Keystone's Motion for Discovery Sanctions* (April 17, 2015), precluding 17 intervenors from presenting evidence for failure to comply with discovery orders of the Commission, established that violating discovery orders results in the exclusion of evidence and testimony in this docket. The Commission issued three orders compelling TransCanada to answer the discovery requests previously submitted by the Yankton Sioux Tribe, Dakota Rural Action and the Standing Rock Sioux Tribe. *Order(s) Granting in Part and Denying in Part Motion(s) to Compel Discovery* (April 17, 2015). TransCanada violated all three orders. Accordingly, the Commission should grant the joint motion to exclude TransCanada from introducing testimony and evidence in this matter.

TransCanada filed and served the Affidavit of James White, its associate general counsel, which acknowledged the failure to comply. *Motion to Exclude*, Exhibit A, ¶¶4-5. White attempted to justify the failure as follows: "It is not reasonably possible to conduct in a few days an email search…" as he deemed necessary to comply with the discovery orders. *Id.* at ¶4. However, the Commission established the timetable for the production of discovery documents at its hearing on March 26, 2015. On that date, the

Commission admonished all parties to be prepared to promptly respond to discovery by April 17.

White is wrong: TransCanada had more than a few days – it had several weeks. TransCanada chose not to utilize that time to prepare for compliance with orders to compel. It must live with the consequences of that choice – loss of the right to present evidence and testimony in this matter. *Haberer v. Radio Shack*, 555 N.W.2d 606, 611 (S.D. 1996).

With respect to the Standing Rock Sioux Tribe, the affidavit of counsel also establishes that TransCanada violated the order compelling discovery. *Affidavit of Peter Capossela*, ¶7. The affidavit contains a TransCanada document addressing National Historic Preservation Act compliance, which TransCanada failed to produce for the Tribe – proof of noncompliance with the order. *Id.*

Moreover, the manner in which TransCanada made the limited number of documents available did not comply with the applicable rule. SDCL §15-6-34(b) requires that "[A] party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." As affirmed in the affidavit of counsel for Standing Rock, many of the documents produced in TransCanada's FTP site were scattered in different folders that were difficult to open, with single documents distributed in scores of different computer files. *Affidavit of Peter Capossela*, ¶¶8-10. A haphazard production of documents does not comply with the rule, and is not countenanced by the courts. *Wagner v. Dryvit Systems, Inc*., 208 F.R.D. 606, 610 (D. Neb. 2001) ("producing large amounts of documents in no apparent order does not comply with a party's obligation under Rule 34.").

II. Exclusion of Evidence and Testimony is the Appropriate Sanction

TransCanada possesses an "affirmative duty to make a reasonable inquiry (and) respond in a manner which was both complete and correct." *Hershberger v. Ethicon Endo-Surgery, Inc.*, 277 F.R.D. 299, 305 (S.D. W.Va. 2011). As described above, it intentionally failed to do so – the White affidavit acknowledges that TransCanada made no effort to comply with the discovery requests until "a few days" before the documents were due. *Affidavit of James White*, ¶4.

Consequently, TransCanada failed to fully comply with the discovery orders. *Id*., *see also* SDCL §1-6-33(a) requiring discovery to be "answered separately and **fully**" (emphasis added). "Providing… incomplete discovery responses violates the Federal Rules of Civil Procedure and subjects the offending party… to sanctions." *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (N.D. Ill. 1993).

When a plaintiff or petitioner deliberately withholds documents and violates an order compelling discovery, as TransCanada did here, the general rule is that its complaint or petition is dismissed. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (dismissal for "callous disregard of responsibilities"); *Lindstedt v. City of Gramby*, 238 F.3d 933, 937 (8th Cir. 2000) ("intentional disregard of requirements and he fashioned his own rule of defense to discovery"); *Serra-Lugo v. Consortium-Las Marias*, 271 F.3d 5 (1st Cir. 2001) (dismissal after "having warned plaintiff" to comply); *Charter House Insurance Brokers Ltd. V. New Hampshire Ins. Co*., 667 F.2d 600, 605 (7th Cir. 1982) ([The noncompliant party] "cannot be heard to justify its conduct on the basis of self inflicted misunderstanding"). The South Dakota courts follow the general rule. *Haberer v. Radio Shack*, 555 N.W.2d at 611; *see also State By and Through Dept. of Transp. v. Grudnik*, 243 N.W.2d 796, 797 (S.D. 1976) ("Our pretrial discovery rules have been modeled on the Federal Rules").

Imposing a sanction such as the exclusion of testimony should result when 'failure to comply has been due to… willfulness, bad faith, or… fault." *Haberer v. Radio Shack*, 555 N.W.2d at 611, citing *Schrader v. Tjarks*, 522 N.W.2d 205, 210 (S.D. 1994) (quoting *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)). Litigants such as TransCanada are sanctioned with the exclusion of evidence, where, as here, "the activities of the Companies 'made it impossible… to prepare for trial.'" *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787 (9th Cir. 2011).

Indeed, the Commission established that the violation of discovery orders by a party results in the exclusion of their evidence and testimony. *Order Granting in Part Keystone's Motion for Discovery Sanctions* (April 17, 2015). Many of the excluded parties are everyday South Dakotans – ranchers and landowners, Indian and non-Indian – intervenors concerned with Keystone XL's potential impact on their land and way of life.

Many of them are unrepresented by counsel. *See e.g. Petition to Intervene by John Harter* (September 30, 2014); *Petition to Intervene of Viola Waln* (October 8, 2014).

For its part, TransCanada is one of the world's largest corporations, with offices from Calgary, Alberta to Houston Texas, and Washington D.C. It has vast resources with which to participate in this proceeding. It would be manifestly unjust for this Commission to penalize ordinary South Dakotans, unrepresented by counsel, by excluding their evidence and testimony for discovery violations, while permitting TransCanada to commit worse infractions and yet continue to pursue its petition. For, "To no one will we sell, to no one will we refuse or delay, right or justice." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) citing the Magna Carta (Engl. 1215).

TransCanada has admitted it violated the discovery orders. *Affidavit of James White*, ¶4. The Commission has excluded the introduction of testimony and evidence by intervenors deemed non-compliant. *Order(s) Granting in Part and Denying in Part Motion(s) to Compel Discovery* (April 17, 2015). As a result of TransCanada's violations, the Motion to Exclude must be granted.

RESPECTFULLY SUBMITTED this 24th day of April, 2015

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