

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

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**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**

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**STAFF'S BRIEF IN RESPONSE TO  
STANDING ROCK SIOUX TRIBE'S  
MOTION FOR DISCOVERY  
SANCTIONS OR TO COMPEL**

**HP14-001**

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Motion for Discovery Sanctions or to Compel ("Motion") filed by Standing Rock Sioux Tribe ("Standing Rock").

**I. Jurisdictional Statement**

In the current proceeding, Standing Rock filed a Motion requesting the Commission impose sanctions against TransCanada Keystone Pipeline, LP ("Keystone") for alleged violations of the discovery process. The Commission has jurisdiction over this issue pursuant to ARSD 20:10:01:01.02 and 20:10:01:22.01 and SDCL § 15-6-37.

**II. Procedural Background**

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 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.

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 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. A hearing on that motion 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 Face 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.

On March 25, 2015, Standing Rock filed a Motion for Discovery Sanctions or to Compel. In its Motion Standing Rock requests the Commission issue and Order prohibiting Keystone from introducing evidence regarding compliance by Keystone with state and federal law and, as

a result of this sanction, dismissing this proceeding. In the alternative, Standing Rock seeks an order to compel Keystone to fully answer Standing Rock's interrogatories.

### **III. Legal Argument and Analysis**

Staff was not a party to the discovery at issue and does not have enough information to take a position on whether or not Keystone has violated the rules of discovery. Through this response, Staff merely seeks to provide input into the appropriate legal standard, as well as object to the certain sanctions. Much of Staff's discussion will echo that provided in Staff's Brief in Response to Keystone's Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery. Again, the analysis for the Commission is twofold. First, is the information sought by Standing Rock discoverable, or is this information which is protected by privilege and, therefore, not subject to discovery? Second, if this information is subject to discovery, what is the appropriate sanction for failure to respond to Standing Rock's request for discovery?

#### **a. Was the information sought discoverable?**

The South Dakota Supreme Court has held that the statute concerning discovery should be liberally construed. *Bean v. Best*, 76 SD 462, 80 N.W.2d 565, 566. In addition, as per the Commission's December 17 Order, a party to this docket may discover any information

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.

Staff does not have enough information to take a position on whether Keystone has violated the rules of discovery.

**b. If Keystone did violate the rules of discovery, should the requested sanctions be imposed?**

The Commission has broad discretion in imposition of sanctions under the statute governing motions SDCL § 15-6-37(a). *Widdoss v. Donahue*, 331 NW2d 831, 835 (SD 1983) (citing, Wright & Miller, *Federal Practice & Procedure*, § 2284). The South Dakota Supreme Court has held that,

The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and this defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

*Haberer v. Radio Shack, a Div. of Tandy Corp.*, 555 N.W.2d 606, 611 (S.D. 1996) (citing, *Magbuhat v. Kovarik*, 382 N.E. 43 (S.D. 1986)). The Court further stated the

[p]rohibition of evidence offered by a party who has not complied with the discovery rules is designed to compel production of evidence and to promote, rather than stifle, the truth finding process. Imposing a sanction such as the exclusion of the testimony should result when failure to comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

*Id.* at 610 (quoting, *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D.1994) (internal citations and quotations omitted). The Court also has made it clear that it takes seriously deadlines for discovery and compliance with the discovery process. The Court has stated that "...order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in

this manner should not be heard to complain that a sanction was too severe.” *Schwartz v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999).

However, Court noted in *Magbuhat*, that SDCL 15-6-37(b) is:

designed to compel *production* of evidence and to promote, rather than stifle, the truth finding process. *See Chittenden, supra*. The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

*Magbuhat*, 382 N.W.2d at 45 (internal citations omitted). To grant the request to preclude would greatly stifle the truth finding process. This fact is no more clearly demonstrated than by Standing Rock's request to follow the requested sanction with a dismissal of the entire proceeding. No remedy could be more contrary to the Court's holding in *Magbuhat*. Therefore, Staff recommends the Commission not grant Standing Rock's motion to preclude. Instead, should the Commission determine Keystone has failed to properly conduct discovery, Staff recommends less drastic sanctions.

While Staff objects to the request for Commission to preclude Keystone from presenting evidence on compliance with state and federal law, Staff does not take a position on the motion to compel.

#### **IV. Conclusion**

While Staff does not take a position on whether Keystone has violated the rules of discovery, Staff does not believe that precluding Keystone from introducing evidence regarding compliance with state or federal law and dismissing this proceeding is an appropriate sanction.

Dated this 6<sup>th</sup> day of April, 2015.

  
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