

**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
BRIEF IN OPPOSITION TO TRANSCANADA’S AMENDED MOTION
TO PRECLUDE CERTAIN INTERVENORS FROM OFFERING EVIDENCE**

TransCanada’s *Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses* should be denied because: (1) TransCanada itself has violated South Dakota’s discovery rules and the Commission’s *Order Granting Motion to Define Issues and Setting Procedural Schedule* (December 17, 2014), and (2) TransCanada suffers no injury from the intervenors’ conduct in any event.

**I. TransCanada’s Violations of Law and the PUC Order Mandate
Denial of TransCanada’s Amended Motion**

South Dakota law requires litigants to attempt to resolve discovery disputes through negotiation prior to filing a motion to compel discovery or sanction other parties. SDCL §15-6-37(a)(2). This section requires a showing that “the movant has in good faith conferred or attempted to confer with the person... or party... in an effort to secure the information or material without court action.” *Id.*

The record includes no evidence that TransCanada complied with this requirement. The demand letter sent to various intervenors on February 12, 2015 is a threat to file a motion, but is not a good faith effort to resolve any dispute through negotiation, as required by the statute. *See e.g. Kirschenman v. Auto-Owners Ins.*, 280 F.R.D. 474 (D.S.D. 2012) (repeated efforts over 17 months deemed sufficient).

Consequently, TransCanada has violated the procedures prescribed by South Dakota law for the relief requested, and its amended motion must be denied.

TransCanada's discovery requests violated the Commission's *Order Granting Motion to Define Issues and Setting Procedural Schedule*. With respect to discovery requests, the order states "the parties shall identify by number and letter the specific Condition or Finding of Fact addressed." *Id.* TransCanada's discovery requests to the very intervenors it now seeks to exclude failed to identify conditions or findings of fact, in violation of the Commission's order.

In its Amended Motion, TransCanada argued that this requirement in the order "is contrary to a basic understanding of procedure." *Amended Motion*, p. 6. The order exists because TransCanada itself asked for it, in its prior *Motion to Define the Scope of Discovery*. Nevertheless, TransCanada's belief that the Commission acted contrary to proper procedure does not give it license to violate the Commission's order. TransCanada's discovery requests violated the letter of the order and for this reason its request to exclude intervenors' evidence should be denied.

The intervenors' objections to TransCanada's discovery requests on the ground that they violated the Commission's order are not "boilerplate" objections, as characterized on page 6 of the *Staff's Brief in Response to Keystone's Amended Motion*. The term "boilerplate" refers to "Ready-made or all-purpose language" used routinely. BLACK'S LAW DICTIONARY, p. 209. By definition, an objection referring to a violation of a specific order of the Commission is not boilerplate. It is specific to this situation. So the portrayal of the intervenors objection as somehow disfavored is inaccurate. TransCanada interrogatories failed to comply with an order it requested by motion, and there should be consequences for its violation – the denial of its Amended Motion.

Moreover, TransCanada itself violated the substantive discovery rules, with respect to the Standing Rock Sioux Tribe. It has refused to make reasonable efforts to identify, locate and produce relevant documents as required by law. SDCL §15-6-34(a)(1); *see R & R Sails Inc. v. Ins. Co. of Pennsylvania*, 251 F.R.D. 520 (S.D. Cal. 2007) (rule requires a "reasonable inquiry"). As set out in Standing Rock's *Motion for Sanctions* on file herein, TransCanada produced no documents whatsoever in response to 15 of 16 document requests, in violation of SDCL §15-6-33(a)(1). *See Motion for*

Sanctions, Exhibits A, C. TransCanada provided substantive and complete answers to perhaps five of fifty-four interrogatories, in violation of SDCL §15-6-34(a).

“A litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest... as to the controversy in issue.” *Goben v. Barry*, 676 P.2d 90, 97 (Kan. 1984) *quoting* 27 Am.Jur.2d Equity §136, p. 667. As stated above, TransCanada’s own discovery requests violated the Commission’s discovery order, and in its responses it violated South Dakota law. SDCL §§15-6-33(a)(1), 15-6-34(a). For these reasons, TransCanada is entitled no equitable relief against any intervenors with respect to discovery.

II. TransCanada Suffers No Injury

This proceeding is about the Keystone XL Pipeline. TransCanada is the party possessing information relevant to the disposition of this case, not the intervenors. The possibility that a South Dakota ranching family, a Nebraska care-giver or a South Dakota Indian Tribe will present some bombshell expert information that will catch TransCanada off-guard at the hearing and prejudice its case is so remote that it warrants no further consideration by the Commission. In any event, the proper remedy to Keystone’s Amended Motion would be to compel discovery and afford time for the intervenors to respond, and not to exclude their testimony as requested by TransCanada.

To that extent, the Amended Motion is the act of a bully. It is a brazen litigation tactic designed to divert attention from the real issues before the Commission in this proceeding – whether Keystone XL continues to comply with the permit Amended Conditions in light of tar sands oil spills, the long-term drought facing the northern plains, the federal environmental reviews of Keystone XL and other recent developments. The Commission should deny Keystone’s Amended Motion and reconsider its approach in this proceeding in light of TransCanada’s scurrilous litigation tactics.

RESPECTFULLY SUBMITTED this 7th day of April 7, 2015

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Certificate of Service

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The undersigned further certifies that, on this day, I served the afore Application for Party Status via U.S. mail with adequate postage affixed to –

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Dated this 7th day of April, 2015

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