

**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**

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**STAFF'S BRIEF IN RESPONSE
TO JOINT MOTION TO
EXCLUDE EVIDENCE AND
TESTIMONY BY
TRANSCANADA**

HP14-001

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Motion to Exclude Evidence and Testimony by TransCanada Keystone Pipeline, LP ("Keystone"), filed jointly by Standing Rock ("Standing Rock"), Cheyenne River, and Yankton ("Yankton") Sioux Tribes, Dakota Rural Action ("DRA"), Indigenous Environmental Network ("IEN"), Intertribal Council on Utility Policy ("COUP"), and Bold Nebraska ("BOLD"), and joined by Gary Dorr (together "Movants").

I. Procedural Background

On December 17, 2014, the Commission issued a procedural schedule in its Order Granting Motion to Define Issues and Setting Procedural Schedule ("Procedural Schedule"). The Procedural Schedule established deadlines for discovery of January 6, and February 20, 2015, with response dates of February 6 and March 10, 2015, respectively. On April 14, 2015, the Commission considered motions to compel filed by Standing Rock, Rosebud Sioux Tribe, Gary Dorr, DRA, and Yankton. The Commission granted, or granted in part, the motions to compel filed by DRA, Standing Rock, and Yankton. Keystone was given until April 17, 2015, to

provide the compelled documents. On April 17, 2015, Keystone electronically provided thousands of documents in response to the Commission's Order(s).

On April 27, 2015, the Commission issued an Order continuing the evidentiary hearing in order to give the parties more time to evaluate newly-obtained discovery.

On April 27, 2015, the Commission received the Motion to Exclude Evidence and Testimony by TransCanada ("Motion"). In the Motion, Movants argue that Keystone failed to comply with discovery requests and Commission Orders compelling production of documents. The sanction sought by Movants is preclusion of evidence and testimony by Keystone at the evidentiary hearing.

II. Analysis

a. Did Keystone fail to comply with the Commission's orders compelling discovery?

Movants allege that Keystone failed to comply with discovery orders in the following ways: 1) failing to produce emails between Keystone and federal regulatory bodies; and 2) failing to provide existing background and support data for reports that were produced. Gary Dorr also argues that Keystone failed to produce information in relation to tribal consultation and the Oglala Sioux Rural Water Supply System.

Staff does not take a position on whether or not Keystone has failed to comply with Commission ordered production of documents, but does note that the Commission did not order Keystone to produce the documents Mr. Dorr references and, therefore, cannot be sanctioned for failure to produce such documents.

b. Is preclusion an appropriate sanction?

If the Commission finds that Keystone did, as Movants contend, fail to comply with the Commission's discovery orders, the next question is what, if any, is the appropriate sanction. Movants contend that the appropriate sanction is to exclude all evidence and testimony by Keystone.

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 thus 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).

As to the production of emails, Keystone has asserted that its failure to comply was based upon an inability, more specifically, the inability to survey and produce emails from thousands of

employees in a matter of days. See Movant's Exhibit A. Staff does find this argument to be reasonable to the extent that it supports the contention of a lack of bad faith. It is more likely that the emails were not produced out of an inability than out of bad faith. However, Staff does not possess the information to take a position on this issue.

As to the manner in which documents were produced, SDCL § 15-6-34(b) provides, in relevant part: "[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." Therefore, the burden is on Keystone to show that either the documents were produced as they are kept in the ordinary course of business or that the documents were organized and labeled. Keystone need not do the latter if the documents were produced as they are kept in the ordinary course of business. *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D.Wis. 2004) (Holding that "according to the plain language of [the rule], a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business.")

III. Conclusion

At this time, Staff offers the above analysis on what the controlling law is but takes no position as to its application to the facts underlying the current Motion, as we lack the requisite information to do so.

Dated this 18th day of May, 2015.



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

IN THE MATTER OF THE PETITION OF)	CERTIFICATE OF SERVICE
TRANSCANADA KEYSTONE PIPELINE, LP)	
FOR ORDER ACCEPTING CERTIFICATION)	HP14-001
OF PERMIT ISSUED IN DOCKET HP09-001)	
TO CONSTRUCT THE KEYSTONE XL)	
PIPELINE)	

I hereby certify that true and correct copies of Staff's Brief in Response to Joint Motion to Exclude Evidence and Testimony by TransCanada, and Certificate of Service were served electronically to the Parties listed below, on the 18th day of May, 2015, addressed to:

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