

**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**

* **PROPOSAL FOR PROCEDURAL
* SCHEDULE AND RESPONSE TO
* KEYSTONE’S MOTION TO DEFINE
* SCOPE OF DISCOVERY UNDER SDCL
* § 49-41B-27
*
* **HP14-001**

COMES NOW Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this Proposal for Procedural Schedule and Response to Keystone’s Motion to Define Scope of Discovery Under SDCL § 49-41B-27.

I. Proposal for Procedural Schedule

On November 13, 2014, the parties participated in a Prehearing Scheduling Conference in an effort to determine the appropriate procedural schedule for this matter. The parties were unable to reach a consensus at that time. Therefore, the Commission is now asked to set a procedural schedule, with recommendations from the parties to be submitted no later than December 1, 2014. Staff recommends the following procedural schedule:

Final Discovery Due	February 6, 2015
Prefiled Testimony Due	February 19, 2015
Rebuttal Testimony Due	March 12, 2015
Evidentiary Hearing	March 24-27, 2015

II. Response to Keystone’s Motion to Define Scope of Discovery

On October 30, 2014, TransCanada Keystone Pipeline, LP (“Keystone”) filed a motion seeking to define the scope of discovery by limiting discovery to issues related to whether the

project continues to meeting the conditions on which the permit was granted, as provided by SDCL § 49-41B-27. While Staff does agree that this proceeding does not present an opportunity to relitigate the permit, Staff does not agree that limiting discovery is permissible under the applicable rules of discovery.

SDCL § 15-6-26(b) provides that

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The scope of pretrial discovery is, for the most part, broadly construed. *Bean v. Best*, 76S.D. 462, 80 N.W.2d 565 (1957). The South Dakota Supreme Court has held that “a broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Kaarup v. St. Paul Fire and Marine Insurance Co.* 436 N.W.2d 17, 19 (S.D. 1988). “All relevant matters are discoverable unless privileged.” *Id.* at 20. The Court has further held that “discovery [cannot] be denied on the ground that materials sought [cannot] legally become part of [the] action.” *Id.*

Therefore, while SDCL § 49-41B-27 limits the proceedings, it does not limit the scope of discovery. The fact that information is not admissible in the certification proceeding does not mean that it is not discoverable. “The purpose of discovery is to examine information that may

lead to admissible evidence at trial.” *Id.* quoting 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2008 (1970).

Throughout this proceeding, if a particular request for discovery is challenged, in order to obtain the information sought, the requesting party need only show that the information is “relevant to the subject matter of this action or will lead to the discovery of admissible evidence.” Because the status governing discovery has been broadly construed, the appropriate action would be to challenge individual discovery requests as they arise or to allow discovery and challenge any attempt to introduce inadmissible materials throughout the process, rather than to protect those materials altogether.

III. Conclusion

Staff requests the Commission adopt the procedural schedule proposed in this filing. Staff further requests the Commission deny Keystone’s Motion to Define the Scope of Discovery Under SDCL § 49-41B-27, for the above-mentioned reasons.

Dated this 1st day of December, 2014.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501