STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

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IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	32CIV16-33 **APPEAL BRIEF OF TRANSCANADA KEYSTONE PIPELINE, LP, IN RESPONSE TO YANKTON SIOUX TRIBE**

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Appellee TransCanada Keystone Pipeline, LP ("Keystone") offers this brief in response to the arguments raised by Appellant Yankton Sioux Tribe. Keystone replied to Article IV of the Yankton Sioux Tribe's opening brief on the burden of proof in its common brief on the subject. This brief is a response to the remaining issues raised by Yankton.

Statement of the Issues

1. Did the Commission err in denying Yankton's early motion to dismiss, its later Motion to Preclude Improper Relief, and its motion *in limine*, all of which asserted that the project Keystone presented through its certification petition was inherently different than the project that the Commission permitted in Docket HP09-001?

   The Commission denied Yankton's early motion by order dated January 8, 2015, and later denied Yankton's Motion to Preclude Improper Relief by order dated June 15, 2015, and its motion *in limine* by order dated July 22, 2015.

2. Did the Commission abuse its discretion by requiring prefiled testimony under ARSD 20:10:01:22:06, and later precluding testimony that was not prefiled?

   On its own motion, the Commission voted at the outset of the proceedings to require prefiled testimony, as authorized by its longstanding administrative rule, and later ruled that witnesses whose testimony was not prefiled in contravention of its order would not be allowed to testify.

3. Is Finding 57 clearly erroneous in stating that the Department of State consulted with the Standing Rock Sioux Tribe as stated in Appendix E of the Final Supplemental Environmental Impact Statement, and does Yankton have standing to assert this argument, given that Standing Rock is not a party to the appeal?

Yankton's standing on this issue was not presented to the Commission, but the issue does not affect any substantial right of the Yankton Sioux Tribe.

4. Did the Commission err in refusing to consider arguments based on aboriginal land claims, treaty rights, and asserted usufructuary rights?

   The Commission concluded that arguments based on aboriginal land claims, treaty rights, and usufructuary rights were outside of its jurisdiction and beyond the scope of SDCL § 49-41B-27.

5. Did the Commission err in concluding that Keystone had no obligation to consult with the Yankton Sioux Tribe under Permit Conditions 6, 10, and 34, because the Tribe is not a "local unit of government?"

   The Commission concluded that as a sovereign nation, the Tribe was not a "local unit of government" as used in the Permit Conditions.

Statement of the Case and Facts

Keystone relies on the facts and procedural history stated in its separate brief responding to common arguments raised by several Appellants, including Yankton. Facts relevant to the issues addressed in this brief are included in the argument.

Argument

1. The Commission did not err in denying Yankton's procedural motion to dismiss and related motions arguing that the project presented in the certification petition was inherently different than the project permitted in HP09-001.

On December 1, 2014, early in the proceedings, the Yankton Sioux Tribe made a motion to dismiss, (Record at 1362-1365) arguing in effect that the pipeline construction project proposed in the 2014 certification proceeding was an inherently different project than the project proposed and permitted in Public Utilities Commission docket HP 09-001, the docket that resulted in the 2010 permit allowing Keystone to construct the XL Pipeline. The motion was heard and denied on January 6, 2015, the Commission noting in its order of January 8, 2015, the Petition for Certification "does not on its face demonstrate that the Project no longer meets the permit conditions . . . a decision on the merits should only be made after discovery and a

thorough opportunity to investigate the facts and proceed to evidentiary hearing." (Record at 1697-98.)

On May 26, 2015, Yankton made a Motion to Preclude Improper Relief (Record at 6823-6880), arguing essentially the same theory, but this time couching it in the argument that the Commission could not amend the findings it made in 2010 to fit Yankton's perception of the 2015 iteration of the pipeline under the 2010 permit. The motion was heard and denied on June 11, the Commission noting in its order filed June 15, 2015, that "TransCanada does not seek to amend the Findings of Fact in the [2010] Amended Decision." (Record at 7377-78.)

Finally, on July 10, Yankton and other interveners made a Motion *In Limine* (Record at 9481-9620) seeking to prevent testimony at the hearing relating to items contained in the Tracking Table of Changes, asserting again that the Tracking Table of Changes is a veiled attempt to modify the 2010 permit. The motion was heard and denied July 21, the Commission noting in its order entered July 22, 2015, "amending the findings of fact in [the 2010 permit docket] is not requested." (Record at 20312-20313.)

All three pre-trial motions, in one form or another, and Yankton's argument on appeal, advance the same theory, that the Tracking Table of Changes, submitted as Appendix C to Keystone's September 2014 Certification Petition (Record at 45-209) demonstrates conclusively that there are thirty changes to the project permitted in 2010, accordingly it is a different project, and the entire proceeding is nothing more than a veiled attempt to amend the 2010 order to allow a new project. The Commission ruled correctly three times that the theory was ill conceived.

Keystone's September 15, 2014, Petition for Order Accepting Certification, the filing that started this case, (Record at 45-209) contained several appendices. The Tracking Table, Appendix C, the central focus of the three Yankton motions, was described in the September

2014 Petition as "Appendix C hereto presents those finding of fact from the Commission's Amended Final Decision and Order that have changed since 2010 and describes the nature of those changes. As Appendix C makes clear, to the extent there have been changes in the underlying facts, those changes are either neutral or positive to the Commission's concerns." (*See* Petition at 5, Record at 45.)

The Commission made 115 Findings of Fact in its June 29, 2010, decision. Petition Appendix C identifies circumstances that changed in the four years since 2010, affecting 30 of the 115 findings. Most are minor or technical in nature. None change the fundamentals of the project, and none, as Yankton contends, create a new project requiring a new permit.

SDCL § 49-41B-27 is the statute that requires certification four years after a permit is granted, and was the genesis of this proceeding. The statute presumes that there can be changes to a project or to the circumstances related to a project between the date of a permit and the date construction begins. The logic of SDCL § 49-41B-27 is that because some things might have changed in four years, a permit holder must certify that despite changes in circumstance, the project can still be constructed in conformity with the conditions on which the permit was granted. If any change related to the project were sufficient to require a new permit, then the only circumstance in which SDCL § 49-41B-27 would apply would be if there had been no change of any kind in four years related to the project. That is not consistent with the plain language of the statute. Rather, the statute anticipates changes to the project, but is meant to ensure that changes do not prevent the project from meeting the conditions on which the original permit was granted.

Many of the permit conditions themselves presume that there will be changes between the date of the permit and the date of the project's construction. For instance:

- Condition No. 6 recognizes that "Keystone will continue to develop route adjustments throughout the pre-construction design phase" and requires that Keystone "will file new aerial route maps that incorporate any such route adjustments prior to construction."
- Condition No. 8 requires period reporting to the Commission until construction is completed, including notice of "design changes of a substantive nature."
- Condition No. 12 requires that Keystone report to the Commission "the date construction will commence," recognizing that a specific starting date was not a condition of the permit when it was granted.
- Condition No. 13 recognizes that Keystone may modify its Construction Mitigation and Reclamation Plan, and that "the CMR Plan as so modified shall be filed with the Commission."
- Condition No. 15 requires that "[p]rior to construction," Keystone must develop construction/reclamation units, and Condition No. 16(e) requires that "Keystone shall draft specific crop monitoring protocols for agricultural lands."
- Condition No. No. 28 requires that "Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads" and a "description of methods used by Keystone to reclaim those access roads."
- Condition No. 34 requires that Keystone continue to evaluate high consequence areas and before commencing operation, must identify and add to the Emergency Response Plan and Integrity Management Plan HCAs "whether currently marked on DOT's HCA maps or not."
- Condition No. 36 requires that before beginning operation Keystone prepare and file with PHMSA an emergency response plan and an integrity management program.

Those permit conditions acknowledge that there will be changes and that there are things that Keystone must do in compliance with the permit that were not clearly defined or specified when the permit was issued. Compliance with those conditions does not create a new project.

Some of the Tracking Table comments reflect that portions of what originally was part of the 2009 project had been constructed in the intervening four years. (Tracking Table, Finding Nos. 15-16.) In South Dakota, however, the project remains essentially unchanged, although the South Dakota portion of the pipeline is now 315 rather than 314 miles, and the maximum operating pressure will be 1,307 psig instead of 1,440 psig. (*Id.* Nos. 16, 18.) The pipeline passes through the same counties and has the same number of pump stations, although there will now be 20 valve sites in South Dakota instead of 16, and there will be three to five pumps initially installed at each pump station, instead of three with the prospect of five if future demand warrants, as stated in the original application. (*Id.* No. 20.)

A significant number of the changes relate to the fact that Keystone is no longer seeking a federal Pipeline and Hazardous Materials Safety Administration (PHMSA) Special Permit.[1] Keystone withdrew its request to PHMSA for a Special Permit, and instead must comply with the special conditions developed by PHMSA as set forth in the Department of State 2014 Final Supplemental Environmental Impact Statement, Appendix Z. (*Id.* Nos. 22, 60-62, 90, 107.) These changes do not create a different project than the one that was permitted.

The Tracking Table comments regarding Finding Nos. 24-29 indicate that there have been global changes in demand for crude oil since 2009, but market demand for the project

[1] In HP14-001, Keystone advised that it intended to ask its federal regulator, the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a Special Permit allowing it to operate the pipeline at 1440 psig. PHMSA requires the company to meet certain criteria before increased pressures are allowed. Between 2010 and 2014 Keystone decided not to request the Special Permit from PHMSA.

remains strong, and the changes in demand do not affect Keystone's ability to meet the permit conditions. The changes in market conditions do not in any way establish that the proposed Keystone XL Pipeline constitutes a different project than was permitted.

With respect to environmental findings, Keystone has updated its CMR Plan (*id.* No. 32) as specifically contemplated in the permit conditions. (Condition No. 13.) Similarly, Keystone will update the soil type maps and aerial photograph maps as required by Condition No. 6. (Finding No. 33.) The pipeline will not cross any additional streams or rivers, but two additional rivers, the Bad River and Bridger Creek, will be crossed utilizing horizontal directional drilling rather than an open-cut crossing. (*Id.* Nos. 41, 83.) The total length of pipe with the potential to affect a High Consequence Area has decreased from 34.3 miles to 19.9 miles. (*Id.* No. 50.) These changes do not establish a different project than the one that was permitted.

Nothing in the Tracking Table of Changes, which Yankton does not address in any detail in its brief, establishes that Keystone is attempting some sort of "bait and switch," substituting a different project for the one that was permitted. Rather, the factual basis for Yankton's argument is directly contradicted by the Tracking Table itself. Yankton tried three times to convince the Commission that the certification hearing was a ruse for a new project, tried three times to convince the Commission Keystone was trying to amend the 2010 findings to conceal a new project, and is making the same argument in its brief. The plain facts are that the certification statute anticipates some change, requiring certification that the project can still be built in accord with the permit conditions. That is exactly what Keystone proved, essentially unchallenged, in the certification proceeding.

Yankton's final contention is "Remarkably, the Commission issued 78 **new** findings of fact on January 21, 2016, despite previously recognizing that the commission has no authority to

amend the Findings of Fact issued in the 09-001 docket." Yankton misses the fact that SDCL § 1-26-25 *requires* the Commission to make findings of fact and conclusions of law *in every case.* The 78 findings made in January 2016 simply memorialized what the Commission decided – that Keystone proved each and every element required to certify that the project could still be constructed in accord with the 2010 permit.

Yankton's argument that the Commission erred in not ruling that the certification petition and supporting documents demonstrates a new project is simply incorrect. The Commission so found three times, correctly. This Court should affirm the Commission's rulings.

2. The Commission did not err in requiring pre-filed testimony.

a. The commission has the right to require pre-filed testimony

The Yankton Sioux Tribe asserts the Public Utilities Commission committed reversible error by, early in the proceedings, requiring the parties to file written witness testimony ("pre-filed testimony"), by requiring that pre-filed testimony of case-in-chief witnesses be filed 12 days before discovery was completed, and by precluding those parties who failed to submit pre-filed testimony from calling witnesses at the hearing.

The Commission met in December of 2014, debated requiring pre-filed testimony, ultimately deciding it was required. It set March 10 as the close of discovery, April 2, 2015, as the date to pre-file case in chief testimony, April 23 to pre-file rebuttal testimony, hearing to commence May 5. (Record at 1528-29.) A discovery dispute broke out in late March, resolved in a hearing on April 14. (Record at 4708-09, 4710-11, 4712-13, 4714-15.) Thereafter several parties, including Yankton, moved for a continuance of the hearing date. The Commission moved the date to July 29. (Record at 5137-38.)

Yankton participated in the December hearing in which the Commission debated the pre-filing requirement and did not voice an objection. Yankton timely submitted pre-filed testimony, without objection on April 2. Finally, the hearing was continued for three and a half months after it submitted its pre-filed testimony, but Yankton never asked for leave to file additional or amended testimony. Yankton simply failed to preserve any of its objections now voiced on appeal.

The Commission, by statute, is entitled to make rules governing conduct of its hearings. SDCL § 49-1-11 provides "The Public Utilities Commission may promulgate rules pursuant to chapter 1-26 concerning . . . (4) Regulation of proceedings before the commission." Under the authority of the statute, the Commission adopted ARSD 20:10:01:22:06 more than thirty years ago. The regulation provides "When ordered by the commission . . . testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties . . . on such dates as the commission prescribes by order." The Commission has routinely required pre-filed testimony over the years.

Pre-filed testimony, under prevailing PUC practice, is not a substitute for witness testimony. As the record in this appeal demonstrates, it is an unsworn statement of proposed testimony from a witness. Once the hearing commences, the witness is called, sworn, and asked under oath to adopt the written statement of pre-filed testimony as direct testimony. The testimony is supplemented or corrected on direct exam, and then the witness is surrendered for cross-examination. That is exactly how this hearing was conducted.

The Commission has the authority to require pre-filing of a statement of witness testimony, by statute and regulation. It followed that practice in this hearing in its normal and

customary manner. Yankton followed the process itself, without objection. To argue that requiring pre-filed testimony is somehow reversible error is simply untenable.

b. Yankton failed to preserve the prefiled-testimony issues for appeal.

The procedural history of the case demonstrates Yankton failed to preserve its assertions about pre-filed testimony for appeal.

On November 14, 2014, the Commission, *sua sponte*, noticed a hearing for December 9, 2015, providing that it would "hear from the parties regarding an appropriate procedural schedule," that it might set a schedule at the hearing, and inviting parties to submit written suggestions for the schedule. (Record at 1125-1126.) At the hearing, Commissioner Nelson opined that pre-filed testimony was not necessary. After considerable discussion the Commission voted to require the parties to pre-file testimony. (*See* Transcript, December 9, 2014 hearing, pages 43-end, Record at 1432-1527.) The motion was made on page 61, vote recorded on page 83.

Following adjournment of the December hearing, the Commission's general counsel drafted an order memorializing the motions passed in the hearing. The order, filed December 17, 2014, directs that "pre-filed direct testimony [be] filed and served April 2, 2015," and "pre-filed rebuttal testimony [be] filed and served April 23, 2015." (Record at 1528-1529.)

Yankton's lawyer attended the December hearing and as the hearing transcript demonstrates, she participated in the scheduling discussions, including setting the dates for pre-filing testimony. She made no objection to submitting pre-filed testimony.

The December 17 order directed that discovery be concluded by March 10 and the parties file written testimony of their case in chief witnesses April 2, 2014, about three weeks after discovery closed, and set the hearing for May 5. (Record at 1528-1529.) On April 2, in

compliance with the December 17 order, Yankton filed a six-page statement of the written testimony of Faith Spotted Eagle, with a lengthy exhibit. (Record at 2955-2982.) The testimony was not filed under objection to the procedural schedule.

The parties engaged in extensive discovery, Keystone responded to more than 1,000 interrogatories and document requests. Beginning in late March, several parties, including Yankton and Keystone filed motions related to discovery compliance. Yankton filed a motion to compel discovery from Keystone on April 7. (Record at 3539-3621.) The motion did not seek delay in the proceedings, ask for leave to file late testimony, or to alter the procedural schedule in any manner.

On April 7 four parties moved the Commission to stay proceedings, but not for reasons related to discovery or pre-filed testimony, rather because no Presidential Permit had issued and because there was a proceeding pending before Canadian authorities. (Record at 3354-3388.) Yankton *did not* join in the motion, or for that matter *ever* file a motion asking for the procedural schedule to be altered or the filing of testimony be delayed.[2]

On April 14 the Commission conducted a marathon omnibus hearing on all pending motions. The hearing lasted twelve hours; the transcript is nearly 400 pages. (Record at 4183-4610.) The Commission ordered Keystone to produce a volume of documents on a variety of subjects by April 17, three days later. (Record at 4708-4713.) Keystone produced a large volume of documents on April 17.

On April 24, Yankton and other interveners moved the Commission to amend the procedural schedule and continue the date for hearing, arguing that the volume of documents

[2] Only Rosebud Sioux Tribe asked for a delay in pre-filing witness testimony. By agreement between Keystone and Rosebud's counsel, Rosebud's time to file testimony was extended to the end of April. See the transcript of the *ad hoc Hearing of the Public Utilities Commission of April 4, 2015*, filed April 27, 2016.

Keystone produced required a continuance. (Record at 5070-5095.) Notably, the motion did not ask for an extension of time to file witness testimony.

The Commission considered the motion three days later, and granted the continuance. (Record at 5137-38.) All remaining dates were rolled forward and the hearing was set for late July.

Importantly, Yankton, between the first scheduling hearing and the commencement of the hearing on July 27, never asked the Commission for more time to prepare and file witness testimony, or to add additional witnesses after discovery was finally completed, notwithstanding the continuance from April until July. Nonetheless, Yankton complains in this briefing that "Although the Commission amended the procedural schedule . . . it did not alter the dates on which pre-filed direct testimony and final discovery responses were due." (*See* Yankton Sioux Opening Brief, p. 7.) Of course the Commission didn't make that amendment. Neither Yankton nor any other intervenor asked for the dates to be adjusted!

A litigant may not raise issues on appeal for the first time and cannot be heard to complain about matters it failed to raise before the administrative tribunal. *First Nat. Bank of Ft. Pierre v. South Dakota State Banking Com'n*, 2008 S.D. 12, ¶ 25, 745 N.W.2d 674, 678. Objections which are not raised before the administrative agency at the hearing are not preserved for appeal. *Matter of State of S.D. Water Management Bd.*, 351 N.W. 2d 119, 122 (S.D. 1984). Where objections at an administrative hearing were made on behalf of parties who did not appeal, persons who did not join in those objections may not avail themselves of such objections on appeal. *Matter of State of S.D. Water Management Bd.*, 351 N.W. 2d at 123.

c. Prefiled testimony was not optional.

Yankton then argues that pre-filing testimony was optional, not mandatory. To contend that the order of December 17 offered a party *the option* of pre-filing testimony is preposterous. In the December 9 hearing, Commissioner Hansen, acting within the Commission's regulatory authority, moved to require pre-filed testimony, the issue was debated, and the motion carried, *requiring* pre-filed testimony (Record at 1432-1527, 1528-29.) The record is clear, certain and conclusive.

Even if Yankton preserved its claimed error for appeal, it fails to demonstrate how it was prejudiced. SDCL § 1-26-36 mandates a showing that "substantial rights of the appellant have been prejudiced because the administrative findings are . . . clearly erroneous in light of the entire evidence in the record." Yankton makes generalized statements about how the timeline made case preparation difficult, but offers neither an example particularized to the case nor citations to the record to demonstrate the points it tries to make.

d. Precluding testimony for failure to pre-file testimony was not error.

The Yankton Sioux Tribe contends that the Commission erred by requiring pre-filed testimony to be on file as a prerequisite to presenting testimony at the evidentiary hearing. But, Yankton pre-filed testimony, and was not precluded from presenting testimony at the evidentiary hearing. Accordingly, Yankton cannot, and in fact has not, shown how it is prejudiced in any manner, much less meets the reversible-error threshold under SDCL § 1-26-36 requiring a showing that "substantial rights of the appellant have been prejudiced because the administrative findings are . . . clearly erroneous in light of the entire evidence in the record."

As noted, the Commission is, by statute, entitled to make rules governing hearings before it and accordingly adopted a regulation authorizing it to require pre-filed testimony.

On March 25, 2015, Keystone filed a motion seeking to preclude certain interveners from offering testimony at the hearing as a sanction for failing to respond to its discovery requests, including Yankton. (Record at 2004-2016.) In the April 14 hearing, the Commission granted Keystone's motion in part, precluding about twenty interveners from offering witness testimony at the hearing, but denied the request as to Yankton. Accordingly, Yankton was not among those precluded from offering testimony. (Record at 4714-4715.)

On April 6, Keystone filed a motion to preclude witnesses whose testimony was not pre-filed from testifying at the hearing. (Record at 3101-3111.) The motion was filed in response to a motion filed by Dakota Rural Action and COUP challenging the Commission's authority to require pre-filed testimony. Yankton did not join in the DRA/COUP motion. In the April 14 hearing, the Commission heard arguments on the DRA/COUP motion and Keystone counter motion, and ruled that witnesses who failed to pre-file testimony would be precluded from testifying at the hearing. (Record at 4857-4858.)

Yankton today argues that the Commission "curtailed" the parties' cases "by excluding relevant evidence without legal grounds." Yankton doesn't point to a specific order, doesn't identify whose rights were violated, doesn't explain how its rights were violated, which of course it cannot, because it was not precluded from offering witnesses at the hearing, nor does it explain whose case was curtailed, or demonstrate how the alleged Commission error substantially prejudiced its rights, as required by SDCL § 1-26-27.

The facts are that the Commission excluded about twenty intervenors from calling witnesses, a sanction for failing to comply with discovery, not for failing to pre-file testimony. The Commission then ordered that if testimony of a given witness was not pre-filed per its December decision, that witness would not be allowed to testify at the hearing.

The rules of civil procedure applicable in state court apply before the Commission. ARSD 20:10:01:01.02; ARSD 20:10:01:22.01. The Commission has broad discretion to address discovery issues, including precluding parties who entirely failed to respond to discovery from offering testimony or evidence at the hearing. *See, e.g., Veblen District v. Multi-Community Coop. Dairy*, 2012 S.D. 26, ¶ 21, 813 N.W.2d 161, 166 (" 'The authority of the trial court concerning sanctions is flexible and allows the court "broad discretion with regard to sanctions imposed thereunder for failure to comply with discovery orders." ' (quoting *Schwartz v. Palachuk*, 1999 S.D. 100, ¶ 23, 597 N.W.2d 442, 447)). By statute, if a party fails to answer discovery, a court may "make such orders in regard to the failure as are just," including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." SDCL §§ 15-6-37(d) and 15-6-37(b)(2)(B). Our Supreme Court has held that it is within a court's discretion to exclude testimony that was not disclosed in response to written interrogatories. *Delzer Const. Co. v. South Dakota State Bd. of Transp.*, 275 N.W.2d 352, 356 (S.D. 1979).

Yankton timely identified its case-in-chief witness and pre-filed her testimony, and accordingly was not affected by either sanction. Yankton today makes no showing, or for that matter even an argument, how the orders substantially prejudiced its rights, a statutorily required precursor to reversal of the Commission's final order. The Commission has the absolute right to sanction parties for discovery violations or to preclude testimony that was not pre-filed. Yankton was not among those sanctioned or precluded, and accordingly has no basis to challenge sanctions applied to other parties.

The Commission correctly ordered pre-filing of testimony pursuant to its own rules after notice and hearing, in which Yankton participated. Later, after notice and hearing the

Commission forbade certain interveners from calling witnesses, but Yankton was not among them. Yankton made no objection prior to or during the hearing, made no showing how it would be prejudiced by the Commission's ruling, and now fails to make a showing how the Commission's orders substantially prejudiced its rights. Yankton's contentions fail on all counts, and the Court should so order.

3. Yankton was not prejudiced by the Commission's finding that the Standing Rock Sioux Tribe was consulted by the Department of State.

The Yankton Sioux Tribe charges that the Commission erred in finding that the evidence shows the Department of State consulted with the Standing Rock Sioux Tribe. Yankton fails to explain how the finding can be clearly erroneous, and even if it is, how Yankton's "substantial rights . . . [are] . . . prejudiced . . . ," as required by SDCL § 1-26-36, the standard of review statute.

First, the challenged portion of Finding 57 deals with the Standing Rock Sioux, not Yankton. Finding 57 provides

> Appendix E to the FSEIS, which is a matter of public record of which the Commission has taken judicial notice, contains the record of consultation between the Department of State and various Tribes under Section 106 of the National Historic Preservation Act. On page 11 of the record of consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.[3]

Standing Rock is not a party to this appeal. SDCL § 1-26-36, after noting that the reviewing court must give "great weight" to the Commissions factual findings, requires that "substantial rights of the *appellant*" be prejudiced by a clearly-erroneous finding. Yankton has

[3] The Commission took judicial notice of the Final Supplemental Environmental Impact Statement (FSEIS), thousands of pages in length, at the hearing. The reference in Finding 57 to the FSEIS is to that document.

no standing to complain about whether or not a finding concerning Standing Rock is accurate or inaccurate. Accordingly, Yankton's contention is inappropriate to this appeal.

Even so, what the Department of State does or does not due in the course of investigating Keystone's application for a Presidential Permit has nothing to do with whether Keystone can still meet the fifty conditions imposed in the 2010 permit. If Yankton, or more properly Standing Rock, wishes to challenge the Department of State's determinations, there is a federal process for so doing that is wholly unrelated and immaterial to any issue in this appeal.

In conclusion, Yankton's contention fails on all fronts. Yankton fails to explain how its substantial rights are affected by the finding, and even so, how the finding is clearly erroneous, or how the allegedly erroneous finding demonstrates that Keystone cannot still meet the conditions in the 2010 permit. The Court should rule accordingly.

4. The Commission was correct in holding that it lacked jurisdiction to consider aboriginal land claims, claims based on treaty and usufructuary rights.

Despite the fact that the route of the XL pipeline does not cross reservation land, tribally-owned land or land held in trust for any tribe, throughout the proceedings, Yankton Sioux, Standing Rock, Cheyenne River and Rosebud Sioux Tribes contended that their historical interests in land crossed by the route merited Commission consideration.

In its brief, Yankton Sioux argues that the Commission has the authority to *consider* Indian usufructuary and aboriginal land claims in its certification process. Yankton's argument misses the mark at several levels. First, as noted in Keystone's common brief on the burden of proof, Docket HP14-001 was a proceeding to determine, per SDCL § 49-41B-27, whether or not Keystone could still construct the pipeline in compliance with the conditions imposed in the 2010 permit. It was not a retrial of the underlying permit proceeding, a notion that has been

thoroughly debunked in this briefing. As noted in Keystone's main brief, the 2010 permit is final.

Second, despite the contentions in Yankton's brief, the route of the pipeline, whether in the initial permit proceeding, the certification proceeding or now, is not an issue within the PUC's jurisdiction. SDCL § 49-41B-36 directs that the provisions of SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission recognized that direction in the 2010 decision and order, holding in Conclusion of Law 13 that it "lacks the authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision . . . on whether the selected route is the route the Commission might itself select." In the 2009 permit proceeding, perhaps the PUC could have rejected the permit application because it found fault with the route, but given the limits of the certification statute, there is no basis for contending the original permit conditions cannot be fulfilled based on a route that met the PUC's muster four years earlier.

Yankton contends that *In re Nebraska Public Power Distr.*, 354 N.W.2d 713 (S.D. 1984) stands for the proposition that "the PUC [has] the authority to disapprove permit applications, including the proposed route." By statute, SDCL Ch. 49-41B is not construed as "a delegation to the commission of the authority to route a transmission facility, AC/DC conversion facility, or wind energy facility, or to designate or mandate location of an energy conversion facility." SDCL § 49-41B-36. *In re Nebraska Public Power* the Supreme Court did not consider the terms of SDCL § 49-41B-36 and did not cite the statute, because a power line and a pipeline are treated differently in the Act. Finally, the statutes cited in the opinion, SDCL §§ 49-41B-22.1 through 49-41B-22.2, are not particular to routing and address instead the applicant's burden of proof in a

second proceeding after a permit has been denied. *Nebraska Public Power* cannot be read contrary to the terms of SDCL § 49-41B-36, and simply does not stand for what Yankton claims.

Aboriginal title is grounded in the idea that western South Dakota was occupied by Indian tribes before the United States asserted its dominion in the 1800s, and that occupancy created aboriginal title rights in favor of the tribes. Usufructuary rights arguably are remnants of the abrogated Fort Laramie Treaties of 1851 and 1868. No court has ever declared that Yankton, or for that matter any other South Dakota tribe, has usufructuary rights or aboriginal title to South Dakota west of the Missouri River.[4] In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court considered so-called Indian or aboriginal title to lands over which the United States had taken dominion and control. Noting that aboriginal title is a concept grounded in Indian occupancy of land prior the United States asserting its dominion over the territory, the Court held that aboriginal title "is not a property right, but amounts to a right of occupancy which the sovereign grants . . . but which right . . . may be terminated and such lands fully disposed of by the sovereign itself." *Tee-Hit-Ton Indians,* 348 U.S. at 279 (citing *Johnson v. McIntosh,* 21 U.S. 543 (1823) and *Beecher v Weatherby,* 95 U.S. 17 (1941)). Extinguishment of Indian title based on aboriginal possession is subject to the will of the United States. "The power of Congress in that regard is supreme." *Id.* at 281. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344 (7th Circ. 1983) the court held "The United States could . . . extinguish aboriginal title at any time and by any means."

Usufructuary rights are defined in *Black's Law Dictionary*, 1544 (6th Edition 1990) as "[a] real right of limited duration on the property of another." Yankton infers it holds

[4] Yankton, interestingly, can assert no claim to anything in the West River. In *Yankton Sioux Tribe v United States*, 24 Ind. Cl. Com. 208 (1970) the Indian Claims Commission decided the Yankton Sioux aboriginal territory was entirely *east* of the Missouri River. The XL Pipeline route is entirely *west* of the river.

usufructuary rights granted by the Fort Laramie treaties of 1851, and presumably, 1868. The Fort Laramie Treaty of September 17, 1851, 11 Stat. 252, and the Treaty of April 29, 1868, 15 Stat. 635, defined the boundaries of the Sioux Nation's territory. The Fort Laramie Treaty of 1851 affirmed the signatory tribes the right to occupy considerable territory, including all of South Dakota, but did not create a reservation. The Fort Laramie Treaty of 1868 shrank the lands considered in the 1851 treaty territory in South Dakota to area west of the Missouri River and created the Great Sioux Reservation.

In the Act of March 2, 1889, ch. 405, 25 Stat. 888, Congress divided the Great Sioux Reservation into individual tribal reservations. Per the Congressional act, each tribe gave up its interest in lands formerly part of the Great Sioux Reservation. The statute provides, at section 21, "That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain." *See also Oglala Sioux Tribe v. United States,* 21 Cl. Ct. 176 (1990). Subsequent acts of Congress reduced the South Dakota reservations to today's boundaries.[5] In *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903) the Supreme Court held

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress.

[5]The various treaties and Congressional Acts resulting in modern reservation boundaries are described in *USA v. Sioux Nation of Indians, supra.* and *Montana v. United States,* 450 U.S. 544 (1981). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *South Dakota v. Bourland,* 508 U.S. 679 (1993), and *Oglala Sioux Tribe v. United States, supra.*

Per the teaching of *Tee-Hit-Ton, La Courte* and *Lone Wolf, supra,* Congress had the legal right to enact statutes modifying the reservations and extinguishing tribal interests in ceded lands, whether the interests were aboriginal or usufructuary. Congress terminated aboriginal and usufructuary interests with respect to the lands outside the boundaries of the current South Dakota reservations in the Act of March 2, 1889, in subsequent statutes. When Congress restored the lands outside of the reservations to the public domain, it obviously intended all tribal interests, including aboriginal title and usufructuary rights be extinguished. See *Oregon Fish and Wildlife Dept. v Klamath Tribe,* 473 U.S. 753 (1983).

No one seriously contends the Public Utilities Commission is the forum to decide tribal aboriginal and usufructuary matters. The Commission is a quasi-judicial agency with limited jurisdiction. The South Dakota Supreme Court has said the PUC has no authority to define or interpret South Dakota's real property law. In *Petition of West River Electric,* 675 N.W.2d 222, 230 (S.D. 2004), the Court held "The PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a judicial function."

In conclusion, Yankton's contention that the Commission committed reversible error for not considering unrecognized and perhaps non-existent tribal land claims to western South Dakota property ceded to the public domain more than a century ago is untenable. The Commission does not have routing authority over pipelines, issues with the route were not raised in the 2009 permit proceedings, and are not at issue in this certification proceeding. Keystone respectfully requests the Court so rule.

5. The Tribes are not affected units of local government

Yankton contends the Commission should have considered its views as a unit of local government affected by the pipeline proposal, citing SDCL § 49-41B-4.2, the statute that

governs the findings the Public Utilities Commission must make before issuing a permit for the project. Yankton doesn't differentiate between the original 2009 proceeding and this 2015 certification proceeding, or not that the statute on which it grounds its argument applies to the original permit proceedings, instead arguing the general proposition that "Keystone failed to consult with the tribes."

First, whether the Yankton Sioux Tribe even qualifies geographically as "affected" is questionable. Yankton is headquartered at Marty, SD, in Charles Mix County, east of the Missouri River. The entire Yankton Sioux Reservation is east of the river. The closest point on the Reservation to the XL right of way is more than 45 miles, as the crow flies, 60 miles in an automobile, and on the other side of the Missouri River.

In its original October 14 application to be a party to these proceedings, Yankton (and its lawyer, in the cover letter) describes itself as a "sovereign government." (Record at 320-323.) Throughout the proceedings it referred to itself as a "sovereign nation." Indian tribes are " 'domestic dependent nations' " that exercise inherent sovereign authority. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). As dependents, the tribes are subject to plenary control by Congress. *United States v. Lara*, 541 U.S. 193 (2004), but they remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Under the circumstances, it is hard to envision Yankton now claiming to be a "unit of local government."

The Yankton Sioux Tribe is clearly not an agency of the state, which is the common understanding of local government. *See, e.g., Pennington County v. State*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 130 ("The states have created local government entities, such as counties,

townships and cities to do the states' work at the local level. These subordinate arms of the state have only the authority specifically given by the state legislature.").

Bearing in mind that the subject proceeding was to certify the conditions of the 2010 could still be met, it is noteworthy that Yankton cites no condition it claims was not or could not be met. No permit condition requires that Keystone conduct a general consultation with the tribes in South Dakota. Three conditions, 6, 10, and 34, arguably require local government interaction, but all three are limited. Condition 6 provides that Keystone should notify "local governmental units" of material route deviations, but as Keystone's witnesses all affirmed, there have been no material route deviations since the 2009 hearing. Condition 10 requires that Keystone contact local emergency responders not later than six months before construction. Since the obligation is not yet ripe, Keystone cannot have violated that condition with respect to anyone, much less the Yankton Sioux Tribe. Finally, Condition 34 provides that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas.

Every party Tribe adopted resolutions opposing the Keystone project. Multiple witnesses testified that the tribes in South Dakota passed resolutions opposing the Project, and that Keystone representatives were not welcome on tribal land. (Tr. at 1745-46, 1873, 2084, 1096-97, 2104-05.) Wayne Frederick, a Rosebud Sioux Tribe Council member testified that the Rosebud Sioux Tribe passed 13 different resolutions in opposition to the proposed XL pipeline. (Tr. at 2084.) Phyliss Young testified that the Standing Rock Sioux Tribe had passed two or three resolutions opposing the Keystone or Keystone XL Pipelines. (Tr. at 1745-46.) Faith Spotted Eagle testified the Yankton Sioux Tribe had adopted a number of resolutions opposed to the XL pipeline and that the Cheyenne River Sioux Tribe adopted resolutions forbidding

Keystone personnel from being on the reservation. (Tr. at 1873 and 1875.) In the face of resolutions banning Keystone personnel from being on the reservations, and resolutions opposing the project, it is unlikely that even if meaningful contacts between Keystone and the tribes were required by the permit that the contacts would be of any value.

In conclusion, no permit condition requires Keystone to consult with the South Dakota tribes. The statute cited by Yankton in support of its argument does not apply to the certification proceedings. Neither Yankton nor any other tribe chose to participate in the underlying 2009 proceedings, to which the statute applies. The Yankton local government argument is inopposite and the Court should so rule.

Conclusion

Yankton raises no issues that warrant reversal. Keystone respectfully requests that the Commission's order be affirmed.

Request for Oral Argument

Keystone respectfully requests oral argument to address the issues briefed by the parties.

Dated this 20th day of July, 2016.

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Certificate of Service

I hereby certify that on the 20th day of July, 2016, I served electronically and by United States first-class mail, postage prepaid, a true and correct copy of Appeal Brief of TransCanada Keystone Pipeline, LP, in Response to Yankton Sioux Tribe, to the following:

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