

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

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

ROSEBUD SIOUX TRIBE'S
MOTION TO DISMISS AND
REQUEST FOR ORAL
ARGUMENT

HP14-001

COMES NOW, the Rosebud Sioux Tribe, by and through counsel, Matthew L. Rappold and Eric Antoine, pursuant to ARSD 20:10:01:01.02 and SDCL 15-6-12(b)(5) and hereby moves the Public Utilities Commission to dismiss TransCanada's Keystone Pipeline, LP., "Petition for Order Accepting Certification" under SDCL §49-41B-27 for failure to state a claim upon which relief can be granted. In support herein counsel states the following.

PROCERURAL HISTORY

The Public Utilities Commission (hereinafter the "Commission") issued an Amended Final Decision and Order for Permit for Construction on June 29, 2010 on Docket HP 09-001 which granted TransCanada permission to construct the KXL Pipeline through South Dakota. Pursuant to SDCL 49-41B-27 "that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." More than four years has elapsed since the issuance of the permit and TransCanada has not begun construction of the proposed pipeline. Accordingly, Keystone must seek recertification from the Commission prior to starting construction of the pipeline.

On September 15, 2014 TransCanada filed their Petition for Order Accepting Certification under SDCL §49-41B-27 regarding the permit on Docket HP 09-001. On September 18, 2014 the Commission transmitted notice of this filing and established an intervention deadline of October 15, 2014. The Rosebud Sioux Tribe and numerous other tribes, organizations and individuals filed for intervention and were granted party status by the Commission.

On October 30, 2014 TransCanada filed its Motion to Define the Scope of Discovery under SDCL §49-41B-27. By order dated November 5, 2014 the Commission issued a Prehearing Scheduling Conference Order whereby the Commission established November 25, 2014 as the date for a hearing on Keystone's Motion to Define the Scope of Discovery. On November 14, 2014, following the filing of numerous motions by the interveners to extend the hearing date and deadline to file responses, the Commission issued an order changing the motion hearing date to December 9, 2014. The November 14, 2014 Order also stated that the Commission will hear from the parties regarding an appropriate procedural schedule for this case and that the Commission may render a decision establishing the procedural schedule as well.

In the same Order, the Commission also ordered that interveners and staff file responses on or before December 1, 2014 and that Keystone file responses on or before December 5, 2014. Prior to the December 9, 2014 hearing no party had requested discovery in this matter pursuant to South Dakota Administrative Rules or the Rules of Civil Procedure and the Commission had not established a procedural schedule for the case.

By Order dated December 17, 2014 the Commission ordered that discovery would 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 50 permit conditions set forth in

Exhibit A to the Amended Final Decision and Order of June 29, 2010; 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. By the same Order the Commission also established a procedural schedule for the case.

The Yankton Sioux Tribe filed its Motion to Dismiss pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted on December 1, 2014. The Rosebud Sioux Tribe respectfully joins in the Yankton Sioux Tribe's Motion to Dismiss and now files its own Motion to Dismiss pursuant to SDCL 15-6-12(b)(6) for failure to state a claim upon which relief can be granted. The Commission also ordered that Yankton Sioux Tribe's Motion to Dismiss would be heard at the hearing on January 6, 2015.

RELEVANT FACTS

The South Dakota Public Utilities Commission granted TransCanada permission to construct the Keystone XL pipeline through the State of South Dakota pursuant to SDCL 49-41B-11 on June 29, 2010 through the issuance of its *Amended Final Decision and Order* ("*Final Decision*"). The *Final Order* includes 115 Findings of Fact along with 50 Amended Permit Conditions (Appendix A to the June 29, 2010 Final Order). The Findings of Fact addresses the following topics – Parties, Procedural Findings, Applicable Statutes and Regulations, The Project, Demand for the Facility, Environmental, Design and Construction, Operation and Maintenance, Rural Water Crossings, Alternative Routes, Socio-Economic Factors and General.

The 50 Amended Permit Conditions that are part of the *Final Order* address the following concerns – Compliance with Laws, Regulations, Permits, Standards and Commitments, Reporting and Relationships, Construction, Pipeline Operations, Detection and

Emergency Response, Environmental, Cultural and Paleontological Resources, and Enforcement and Liability for Damages and also contains a total of 51 sub-conditions.

SDCL 49-41B-27 provides that if a permit holder has not commenced construction within four years of the issuance of the permit, the applicant must certify to the PUC that the Project continues to meet the conditions upon which the permit was issued. To date, TransCanada has not commenced construction of the Keystone Pipeline and over four years have elapsed since TransCanada first obtained its permit. TransCanada filed its Petition for Certification under SDCL 49-41B-27 on September 15, 2014, alleging that the “Project continues to meet the conditions upon which the permit was issued.” (Keystone’s Petition for Order Accepting Certification under SDCL 49-41B-27 at p 1.) Along with its Petition for Certification, TransCanada submitted Appendix A “Project Overview Map”, Appendix B “Quarterly Report for Quarter Ending 6/30/14” and Appendix C “Tracking Table of Changes” dated September 15, 2014.

Of particular interest is Appendix C which identifies 30 findings from the June 29, 2010 *Final Decision* that have changed since the issuance of the original permit. For example, TransCanada acknowledges that “Since the Amended Final Decision and Order, the Bakken Marketlink Project has been made a part of the Project.” (Keystone’s Petition for Order Accepting Certification under SDCL 49-41B-27 at p 4). TransCanada further acknowledges that “the material aspects of the proposed construction and operation of the Project in South Dakota remain essentially unchanged since the Commission granted its approval in 2010.” (Keystone’s Petition for Order Accepting Certification under SDCL 49-41B-27 at p 4.) In fact, Appendix C directly conflicts with TransCanada’s assertion in their petition that “the project continues to meet the conditions upon which the permit was issued.” (Keystone’s Petition for Order

Accepting Certification under SDCL 49-41B-27 at p1.) Appendix C clearly identifies 30 findings and conditions that have changed since the original permit was granted on Docket No. 09-001.

ARGUMENT

Pursuant to SDCL 15-6-12(b)(5), TransCanada's Petition for Order Accepting Certification under SDCL 49-41B-27 must be dismissed for failure to state a claim upon which relief can be granted. Pursuant to ARSD 20:10:01:01.02 the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the PUC. SDCL 15-6-12(b)(5) permits a party to move to dismiss an action if the petition fails to state a claim upon which relief can be granted. "A motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it." *Stumes v. Bloomberg*, 1996 SD 93 ¶ 6, 551 N.W. 2d 590, 592; *Schlosser v. Norwest Bank South Dakota*, 506 N.W. 2d 416, 418 (S.D. 1993). Further, *Schlosser* directs the trial court to consider:

"The complaints allegations and any exhibits which are attached. The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. The motion may be directed to the whole complaint or only specified counts contained in it..."[In] appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 L.Ed.2d 80,84 (1957). The question is whether in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states any valid claim of relief. The court must go beyond the allegations for relief and "examine the complaint to determine if the allegations provide for relief on any possible theory." [quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 (1971)."

The applicable law in this case is SDCL 49-41B-27 which provides that:

"Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; ***provided, however, that if such***

construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.
(Emphasis added)

When evaluating a motion to dismiss, the court must assume that all facts in the Complaint are true and construe any reasonable inferences in the light most favorable to the plaintiff. *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). The complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

However, courts and the PUC are “not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.* 143 F3d. 1293, 1295-96 (9th Cir. 1998). Appendix C clearly contradicts the allegations made in the Petition for Certification. “When an exhibit incontrovertly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss.” *Bogie v. Rosenberg*, 705 F3d 603, 609 (7th Cir. 2013). Here, TransCanada has failed to state a claim for relief that is plausible on its face. If the PUC determines that the information contained in the pleadings along with Appendix C is true, then the PUC must reach the conclusion that numerous conditions have changed since the permit was issued in 2010 and further that TransCanada cannot certify that the conditions are the same as when the permit issued.

SDCL 49-41B-27 demands that Keystone certify that the facility continues to meet the “conditions upon which the permit was issued.” It does not provide for, nor does it allow for any “material aspects of the proposed construction and operations of the Project in South Dakota [to] remain essentially unchanged since the Commission granted its approval in 2010.” (Keystone’s

Petition for Order Accepting Certification under SDCL 49-41B-27 at p 4.) TransCanada's Petition and the documents on file with the PUC which are part of the record acknowledge that the current project is different from the permitted project. TransCanada has submitted 30 changes long with its Petition (Appendix C). The only logical conclusion that can be drawn is that based on the pleadings on file TransCanada cannot obtain the relief sought under the Petition under any possible theory.

CONCLUSION

The law simply does not permit the Commission to grant an order that certifies that TransCanada's Project continues to meet the conditions upon which the permit was issued. Accordingly, based on the above and foregoing, TransCanada's Petition for Certification must be dismissed for failing to state a complaint upon which relief may be granted.

Dated this 29th day of December, 2014.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF SERVICE

I certify that on this 29th day of December, 2014, the original of this MOTION TO DISMISS for Case Number HP-14-001 was filed on the Public Utilities Commission of the State of South Dakota e-filing website and also that on this day and a true and correct copy was sent via email and/or U.S. Mail first class postage prepaid to the following persons, as designated:

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