

**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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**COMMISSION STAFF'S RESPONSE
TO YANKTON SIOUX TRIBE'S
MOTION TO DISMISS

HP14-001**

COMES NOW, Staff (Staff) of the South Dakota Public Utilities Commission (Commission), by and through its undersigned counsel, and hereby files this Response to Yankton Sioux Tribe's Motion to Dismiss.

On December 2, 2014, Yankton Sioux Tribe filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(5), arguing the Applicant, TransCanada Keystone Pipeline, LP (Keystone) failed to state a claim upon which relief can be granted. In its Motion, Yankton Sioux Tribe alleges that the thirty differences described in Keystone's Appendix C render the subject of this proceeding a different project than was permitted in HP09-001 and, therefore, ineligible for certification.

While Staff does not take a position at this time on whether or not each of the individual updates described in Keystone's Appendix C constitute a change in conditions, Staff does take the position that it would not be appropriate to grant the Motion to Dismiss at this time.

ARGUMENT

The certification proceeding in question was brought pursuant to SDCL 49-41B-27, which requires the Applicant who has received a permit to certify that the project continues to meet the conditions upon which the permit was granted if construction has not commenced within four years of issuance of the permit. To dispose of the issue of whether the project continues to meet those conditions on a Motion to Dismiss would render meaningless the entire

process of certification by establishing that any changes to a project would prevent an Applicant from reaching the point of an evidentiary hearing. The appropriate time in which to address whether there have been material changes which would preclude the project from receiving certification of its permit is at the evidentiary hearing, following an opportunity for discovery.

Should the Commission choose to consider at this point whether any of the updates identified in Exhibit C constitute grounds for dismissal, Staff urges the Commission not take the position that every change constitutes an inability to meet the conditions upon which the permit was issued. Depending on the facts presented throughout the course of discovery and the evidentiary hearing, changes may be deemed immaterial. If that proves to be the case, a different project would not exist, as Yankton Sioux Tribe asserts. It is expected that changes will occur over a period of four years, and the Legislature must have known that at the time SDCL 49-41B-27 was passed. Surely the Legislature did not intend for a complete bar to certification by establishing a standard that no project could satisfy. For example, one such change that was noted by Keystone and would likely apply to any project that was dormant for four years was an increase in cost. While the Commission should consider this at the evidentiary hearing to determine whether the increase in cost constitutes an inability to meet the conditions upon which the permit was issued, it should not be a *per se* barrier to certification. In many cases, such as a case of increased cost, to interpret the statute so narrowly would lead to an absurd result by nullifying the statute, as likely no project could ever satisfy the requirement that absolutely nothing change, nor cost increase. “It is presumed that the Legislature [does] not intend for an absurd or unreasonable result.” *Krukow v. S.D. Bd. Of Pardons*, 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124.

Furthermore, while this Commission is not bound by precedent, it is noteworthy that in past certification dockets, some project updates were present. In Docket No. EL12-063, the Commission granted certification of an electric transmission line that was granted a construction permit in 2007. In the time between the granting of the permit and application for certification in that docket, certain aspects of the project and circumstances surrounding the project, such as the size and the presence of a federal nexus, had changed. However, the Commission found that the project nonetheless continued to meet the conditions upon which the permit was granted, and certification was approved.

CONCLUSION

For the above-mentioned reasons, Staff respectfully requests the Commission deny Yankton Sioux Tribe's Motion to Dismiss. This will allow the parties to conduct discovery to determine whether the project does continue to meet the conditions upon which the permit was granted.

Dated this 29th day of December, 2014.



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