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

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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

**YANKTON SIOUX TRIBE'S  
POST-HEARING  
REPLY BRIEF**

**HP14-001**

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COMES NOW Yankton Sioux Tribe (“Yankton”), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits the following as its reply brief pursuant to the Public Utilities Commission’s order of August 12, 2015.

The Commission solicited post-hearing briefing on this matter, the initial round of which was due on October 1, 2015. Pursuant to the Commission’s August 12, 2015 Order, Public Utilities Commission Staff (“Staff”) and TransCanada Keystone Pipeline, LP (“Keystone”) filed their respective briefs with the Commission, both of which contain material flaws in both the legal analysis and the application of the burden of proof to the evidence presented.

**I. KEYSTONE HAS THE BURDEN TO PRESENT EVIDENCE SHOWING IT IS IN COMPLIANCE AND WILL BE IN COMPLIANCE WITH ALL 50 OF THE CONDITIONS AND THE ADDITIONAL BURDEN TO PROVE ALL OF THE FACTUAL ALLEGATIONS WHICH FORM THE BASIS OF ITS PETITION.**

In its post-hearing brief, one of the Yankton Sioux Tribe’s arguments was the following two-premise argument: 1) If Keystone has the burden of proof, it did not meet that burden and the Commission is required to deny Keystone’s petition; and 2) Keystone does have the burden of proof. Other intervenors made this same point. Conspicuously neither Keystone nor Staff contests the first premise of that argument. Instead Staff and Keystone each provide only one responsive argument and both those responsive arguments have at their core the assertion that although

Keystone is the petitioner, Keystone does not have the burden of proof. Because they are wrong on that legal issue, and because they present no other argument in the alternative, the Commission is required to deny Keystone's petition.

Staff's argument is that Keystone prevails because Keystone submitted a document entitled a "certification," which contains a conclusory assertion that the permit conditions are being met and will continue to be met. Staff claims that Keystone's "certification," even if false, creates an irrebuttable presumption in favor of Keystone. Staff Post-Hearing Brief at 18. That argument is so plainly unsupportable that not even Keystone agrees with Staff's position. Instead, Keystone provides a slightly more nuanced assertion that by the mere act of labeling a document a "certification" and then filing that document, even if the document is false, Keystone has created a rebuttable presumption in its favor, shifting both the burden of production and the burden of proof to intervenors. Keystone Post-Hearing Brief at 3.

As will be discussed in section IV, *infra*, even if we were to assume, arguendo, that filing a document entitled a "certification" shifts the burden of proof, the intervenors would have met their burden of proof. But the Commission cannot properly even reach that issue because, simply, Keystone cannot shift its burden to opposing parties by the mere filing of a conclusory document which it calls a "certification."

Other than in rare contexts not applicable here, each and every party seeking any sort of order or relief from an adjudicatory body has the burden to produce the evidence which supports its request and then the additional burden to prove its entitlement to the relief it requests. A plaintiff has the burden of proof in a civil case. *E.g., Mettler v. Williamson*, 424 N.W. 2d 670 (S.D. 1988). A prosecutor has the burden in a criminal case. *E.g., State v. Wilcox*, 204 N.W. 369, 48 S.D. 289 (1925) ("It is a cardinal rule in criminal prosecutions that the burden of proof rest with

the prosecutor.”). On nearly every motion, the movant-- whether plaintiff, petitioner, defendant, respondent, or third party-- has the burden of proof on that motion. *E.g.*, *Boylen v. Tyler*, 641 N.W. 2d 134 (S.D. 2002); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W. 2d 259 (S.D. 1985). This is a cornerstone of adjudication in countries which provide due process. There is absolutely no basis here to relieve the Petitioner of the burden of all petitioners—to prove that it is entitled to the relief it seeks from this adjudicatory body.

This obvious point is further established by the South Dakota statutes applicable to this body when this body is acting as an adjudicator. The burden is on the Petitioner. SDCL §49-41B-22. This legal rule is even more clearly stated in Administrative Rule of South Dakota 20:10:01:15.01. Rule 20:10:01:15.01 is one of the Commission’s General Rule of Practice, and it applies in every contested case proceeding. The rule requires:

In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

S.D. Admin. R. 20:10:01:15.01 (adopted under authority of SDCL §§49-1-11(2),(4), 49-34A-4, implementing SDCL §§49-1-11(2), (4); 49-34A-61) (emphasis added). This is the on-point rule, which the Commission is required to enforce, and it defeats the argument which Keystone and Staff make in their post-hearing briefs.

Rule 20:10:01:15.01 discusses both components of the burden of proof: the burden to produce evidence, and the ultimate burden to show that the weight of all evidence produced favors the petitioner. Under this rule, as is also generally the case, both components of the burden of proof lie with a petitioner. Here, Keystone attempts to shift both components of the burden to the intervenors. In its decision the Commission should clearly explain that Keystone has both burdens,

and that Keystone's failure to meet either burden provides an independent basis for denying Keystone's petition.

The burden of production must lie with Keystone. In order to reach the correct decision on issues before it and to meet its obligations to the people of South Dakota and the companies that come before the Commission, the Commission needs to be presented with the relevant facts. Nearly all of those facts are in the possession of the petitioning companies, and therefore the burden to produce evidence must be on the companies. *E.g.*, *Davis v. State*, 2011 S.D. 51, 804 N.W.2d 618, 628 (S.D. 2011); *Eite v. Rapid City Area School Dist. 51-4*, 739 N.W.2d 264 (S.D. 2007); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001) (in a civil suit for alleged unlawful arrest, because the information is in the possession of the police officer, the officer has the burden to produce evidence showing why he had probable cause to arrest). Here, Keystone did not produce any evidence on several key issues, yet it now asserts it should prevail on those issues because, it asserts (incorrectly, as discussed *infra*), the intervenors also did not produce evidence on those issues. The Commission must reject that argument, and must require a petitioning company to present evidence in support of all of its claims.

The burden of proof must also lie with Keystone. Contrary to Keystone's sole argument, even if the burden of production shifts in a case, the burden of proof always remains with the petitioner. The South Dakota Supreme Court has repeatedly and consistently held that even in the rare situations where the burden of production shifts as a case progresses, the burden of proof does not shift—it always remains with the petitioner.

For many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of

persuasion must lose. But it was also used to refer to what we now call the burden of production—a party's obligation to come forward with evidence to support its claim.

*Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255, 129 L.Ed.2d 221, 228 (1994). “ ‘It is generally said that the burden of production may pass from party to party as the case progresses while the burden of persuasion rests throughout on the party asserting the affirmative of an issue.’ ” *Hayes v. Luckey*, 33 F.Supp.2d 987, 990 (N.D.Ala.1997) (citation omitted).

*Davis v. State*, 804 N.W.2d at 628 (quoting *Gordon v. St. Mary's Healthcare Ctr.*, 617 N.W.2d 151, 157-58 (S.D. 2000)). *See also Eite*, 739 N.W.2d 264.

Even if it stood alone, without all of the other consistent authorities cited herein, Rule 20:10:01:15.01 would defeat Keystone and Staff's arguments. Surely if Keystone or Staff had any basis for arguing that Keystone does not have the burden clearly imposed upon it under Rule 20:10:01:15.01, they would have provided that argument to the Commission in their post-trial briefs. Glaringly, their post-trial briefs do not even cite this on-point rule, let alone provide an argument for their attempt to evade Keystone's burden.

The Commission's own prior precedent is in accord with all of the authorities discussed above. *In re Northern States Power Co. for Confirmation of Angus C. Anson Combustion Turbine Facility*, 2000 Westlaw 36322410 (S.D.P.U.C. March 20 2000) (hereinafter *In re NSP*). In *In Re NSP*, the Commission was interpreting SDCL §49-41B-27, the same statute that Keystone claims imposes the burden of proof on intervenors. Like Keystone, NSP had previously obtained a permit for regulated construction activities but then had not commenced that construction within four years of issuance. NSP submitted a “certification” and other information to the Commission and asked the Commission to accept that certification. The Commission determined that it had jurisdiction to decide whether or not to accept the certification. The Commission accepted the certification based upon a finding that the certification was acceptable. Contrary to Staff's new

interpretation of the SDCL 49-41B-27, the Commission, in *In re NSP*, based that finding upon the certification “and the information provided to it by NSP.”

The law imposing upon Keystone the burden of proof on the factual allegations in its petition is so clear that even Keystone, when it started this contested case, acknowledged its burden. In its own petition in this matter, Keystone set forth its factual allegations and then Keystone concluded its petition with a request that the Commission find that that Keystone still meets the conditions contained in the prior permit. Keystone petitioned for the following relief:

The attached Certification, together with this petition and the supporting appendices provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL §49-41B-27.

Petition for Order Accepting Certification Under SDCL §49-41B-27; Petition, §III (emphasis added). As is clear from Keystone’s own petition, Keystone understood that it was “necessary” for Keystone to provide facts supporting a finding that the project continues to meet the conditions, and it further understood that it could not meet its burden merely by submitting a conclusory “certification.” Keystone has, and has previously acknowledged that it has, the burdens of production and proof of the core factual assertion in its petition, i.e. its assertion that it continues to meet the conditions. ARSD 20:10:01:15.01; Petition, §III. Like every other petitioner, plaintiff, or movant, Keystone has the burden to show that it is entitled to the finding that it requested, and it has expressly acknowledged that such findings are a prerequisite for the relief that it has requested from the Commission—acceptance of its “certification.”

As discussed in section III, *infra*, Keystone unquestionably did not meet its burden of proof. Now that it has plainly failed to produce evidence or prove the factual allegations set forth in its petition, its only possible argument is its current desperate and bald assertion that it does not have the burden which every petitioner, plaintiff, or movant has. As a matter of law, Keystone is wrong.

As a matter of law, the Commission's staff is wrong. This body therefore must deny Keystone's petition.

Although the Yankton Sioux Tribe does not have to show where Keystone and Staff erred in their legal analysis, it will briefly address that topic in the remainder of this section of this brief. As discussed above, one of Staff's and Keystone's key errors or omissions is that they do not even discuss the applicable Administrative Rule, and both ignore the well-known general rule that every petitioner, plaintiff, or movant has the burden of proof. Instead of correctly asserting to the Commission that it should apply the same burden of proof that every other adjudicatory body applies, Staff invites the Commission to commit an obvious legal error based upon Staff's convoluted rationalization that all Keystone had to do was file a document in which Keystone claimed, in conclusory language, that it was "certifying" that it was in compliance and would continue to be in compliance with all 50 conditions which the Commission imposed. This is an odd argument coming from the Commission's own staff, as it appears to abdicate to the regulated entities this body's primary role under South Dakota law.

The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled.

SDCL §49-41B-1. But Staff now asserts that if someone files a conclusory "certification," even if that certification is wholly unsupported by evidence or is false (both of which are the case here) the Commission's hands are tied. As also discussed above, Keystone provides only a slightly varied argument that its labeling of a document as a "certification" shifts the burdens of production and proof to intervenors.

Where both of these parties err is that they incorrectly assume the core fact that Keystone is required to prove—that the document which it labeled a “certification” is in fact a certification as that term is used in SDCL §49-41B-27. Keystone is petitioning for the Commission to accept the document as a certification, and the central question that the Commission must decide is whether it must accept the document as such.

As Staff correctly notes, “certify” means to authenticate or verify in writing. But Staff and Keystone fail to analyze the next step in the legal analysis: what do “authenticate” or “verify” mean? Instead of analyzing that question, Keystone and Staff assumed an answer, and their assumed answer-- that Keystone is not required to prove anything to the Commission—is wrong. The central element in the definitions of both “authenticate” and “verify” is that the allegedly authenticating or verifying document must prove the allegations contained in the document. *Black’s Law Dictionary* defines “verify” as “to prove to be true; to confirm or establish the truth or truthfulness of, to authenticate.” *Black’s Law Dictionary* (14th ed. 2014). Black’s defines “authenticate” in the current context as “to show (something) to be true or real.” *Id.* Therefore Keystone and the Commission’s arguments circle back to the exact same question: has Keystone proven that the assertions in the document which is labeled a “certification”—that Keystone is in compliance and will remain in compliance with all 50 conditions—are true.<sup>1</sup> If Keystone had shown those assertions were true, then the document constitute the certification required by South

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<sup>1</sup> As discussed above, Keystone and Staff rely upon logically flawed “form over substance” arguments. If it were willing to use such arguments, the Yankton Sioux Tribe could rely upon a logically sound “form over substance” argument that the document labeled a certification must be rejected because, as is undisputable, the document, standing alone, does not prove that Keystone is in compliance or that it will remain in compliance. But the core purpose of the statutes at issue is to provide that this body determines, on the merits, based upon all of the evidence presented in the lengthy hearing in this matter, whether or not Keystone has met its burden of production and of proof that it is in compliance and will remain in compliance.



Dakota statute. But here, because Keystone failed to show the allegations to be true, the document cannot be accepted as a certification.

Keystone petitioned for this Court to accept the document which Keystone labeled as a “certification.” But Keystone failed to meet its burden to show that the document was true. Keystone’s petition therefore must be denied.

**II. THE ALLEGED LACK OF FACTUAL CHANGES AFFECTING KEYSTONE’S ABILITY TO MEET PERMIT CONDITIONS IS NOT DETERMINATIVE OF THE OUTCOME IN THIS PROCEEDING.**

As an initial matter, Keystone’s claim that “unless there has been some factual change that affects Keystone’s ability to meet a permit condition, Keystone is logically and necessarily as able to meet the conditions today as it was in 2010” (Keystone’s Brief p. 4) is misleading and misrepresents the issue before the Commission. Keystone’s statement implies that it was able to meet the conditions in 2010; however, the Commission made no such finding. Even assuming, *arguendo*, that Keystone’s ability to meet the conditions has not changed since 2010, we do not know what that ability is because the 2010 decision did not address the ability of Keystone to meet the conditions. It simply imposed the conditions.

Moreover, Keystone’s ability to meet the conditions is not proof that it actually meets the conditions. If that was the case, there would be no need for the conditions at all. Keystone’s ability to comply with the conditions is only part of the proof Keystone must demonstrate, and it is certainly not determinative of the outcome of this proceeding. Finally, to the extent that any finding speaks to whether Keystone will comply with one or more conditions, that finding is not beyond scrutiny by this Commission. Upon presentation of new evidence, it is possible and in fact it has happened that new information may come to light that was unavailable at the time of the 2010 Findings which could alter the Commission’s findings about the project. For example, testimony was given during the hearing that tribes were never engaged in discussions about the

proposed project with respect to various local governance issues by Keystone, thus their views could not have been given consideration. Tr. 1718 ln 20-21; 1722 ln 23 – 23 ln 6; 2038 ln 6 – 39 ln 2; 2088 ln 1; 2092 ln 4-16; 2134 ln 2-6. This information was not available to the Commission at the time of its 2010 order. While Yankton agrees with Keystone that “[t]his proceeding is not a retrial of the 2010 permit” (Keystone’s Brief p. 2), the Commission’s hands are not tied by the findings contained in that decision if new evidence is presented. The Commission can and should consider such new evidence with respect to whether Keystone met its burden of proof for certification under SDCL §49-41B-27.

**III. KEYSTONE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SHOW THAT IT CONTINUES TO MEET THE CONDITIONS ON WHICH THE PERMIT WAS GRANTED.**

As discussed above, Keystone bore the burden of proving that the project continues to meet the 50 conditions on which the 2010 permit was granted. Neither the “certification” by Corey Goulet nor the testimony presented at the evidentiary hearing surmounts Keystone’s evidentiary burden.

**A. THE “CERTIFICATION” DOES NOT CONSTITUTE EVIDENCE AND IS INSUFFICIENT TO PROVE CONTINUED COMPLIANCE WITH THE 50 CONDITIONS.**

In conjunction with its Petition, Keystone submitted a filing captioned “certification” with the Commission when it initiated this action. This document consists of a sworn statement by Corey Goulet, President of the Keystone Pipeline business unit, attesting that Keystone certifies that the conditions upon which the 2010 permit was granted continue to be satisfied. In addition to the flaws with relying on this statement to meet its burden which are cited above, this statement constitutes a legal conclusion rather than factual evidence. This Commission has previously precluded such statements from being offered as evidence (Tr. 643 ln 19 – 644 ln 13; 681 ln 19-20; 1297 ln 21– 1298 ln 1; 1721 ln 17-18; 2292 ln 8-13), and it must do so with respect to the certification document.

Furthermore, Mr. Goulet's statement is a broad, sweeping statement with respect to the conditions and it does not specifically address even one of the 50 conditions or how the project continues to comply with any of those conditions. This blanket statement is void of any substance and provides no probative value with respect to whether or not Keystone actually meets the conditions.

Finally, as he was forced to admit when cross-examined about his certification, Mr. Goulet lacks the personal knowledge necessary to be able to provide a credible opinion regarding each of the 50 conditions. As mentioned above, Corey Goulet, President of Keystone Projects, filed a two page "certification" document stating that "Keystone is in compliance with the conditions attached to the June 29, 2010 Amended Final Decisions and Order" and that "Keystone certifies that it will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project." Certification at 1. Mr. Goulet provided extensive testimony during the evidentiary hearing held in this case and was asked multiple questions regarding Keystone's ability to meet and comply with permit conditions.

Surprisingly, Mr. Goulet's sworn testimony reveals multiple instances of lack of person knowledge concerning Keystone's ability to meet and comply with permit conditions. For example, Mr. Goulet was asked questions concerning condition 1 and he answered that he was not personally familiar. Tr. 153 ln 17-18. He was asked about conditions 6, 7, and 34 and, similarly, Mr. Goulet stated he was not aware if Keystone did or did not take certain actions concerning those conditions. Tr. 155 ln 10-13; 156 ln 1-5; 156 ln 6-9; 170 ln 10-13; 170 ln 14-17; 170 ln 8-10. With respect to Condition No. 6, Mr. Goulet stated that he did not even know whether Keystone considers the Yankton Sioux Tribe to be a local unit of government – so how could he possibly know that Condition No. 6 was met? For many of these questions Mr. Goulet deferred to someone

else. *Id.*; Tr. 201 ln 13-24; 204 ln 4-13; 253 ln 3-8; 262 ln 25; 263 ln 6. When asked about Condition No. 10, Mr. Goulet responded that he “do[es] not have personal knowledge of [whether Keystone has contacted Yankton Law enforcement.” Tr. 176 ln 1-5. When asked specifically about portions of Keystone’s “Tracking Table of Changes,” Mr. Goulet could not answer questions concerning the Bakken Marketlink Pipeline. Tr. 184 ln 17 – 185 ln 1; 240 ln 7-8; 243 ln 17-18. When questions about the process Keystone undertakes for its permitting from the Army Corp of Engineers and concerning high consequence areas, Mr. Goulet could not answer the question and states that another witness “may” know. Tr. 253 ln 3-8. In response to a question concerning Condition No. 35, Mr. Goulet stated that he did not know what Keystone is doing to comply with that condition. Tr. 262 ln 25 - 263 ln 6. Mr. Goulet’s own sworn testimony is inconsistent with the “certification” filed by Keystone in this case. His testimony also reveals deficiencies in Keystone’s ability to rely on the “certification” as grounds to shift the burden of proof or production in this case which preclude such a shift. Mr. Goulet’s “certification” is a broad, inaccurate legal conclusion for which he admittedly lacks sufficient knowledge. It is neither sufficient to meet Keystone’s burden of proof nor to shift the burden of proof in this case to the intervenors.

**B. KEYSTONE FAILED TO PROFFER SUFFICIENT EVIDENCE THROUGH TESTIMONY AT THE EVIDENTIARY HEARING.**

The evidence proffered by Keystone at the evidentiary hearing failed to address many of the 50 conditions contained in the 2010 permit, and those that were addressed were addressed inadequately or were rebutted by testimony of the intervenors. Keystone’s testimony is therefore insufficient to meet its burden of proof to show that it continues to comply with all 50 of the permit conditions.

Keystone either entirely failed to address Condition Nos. 2-4, 7, 9-11, 14, 17-23, 25, 28, 33, 37-40, 45, and 46 or failed to address them in their entirety. The record is void of any reference to most of these conditions. Without providing evidence as to all aspects of each condition, Keystone has failed to meet its burden of proof. In addition, some conditions such as Nos. 1-3, 5, 7, 23, 34, 42, and 43 may have been touched on by Keystone's witnesses but their testimony was rebutted by intervenor testimony on those conditions refuting the testimony of Keystone.

For example, Condition No. 1 requires compliance with all applicable laws and regulations in its construction and operation of the Project. Such laws include property laws and laws relating to water rights. Intervenors provided testimony as to *Winters* rights, which are water rights retained by tribes, and which would be violated if the project is constructed. Tr. 2024 In 24– 2025 In 4; 2039 In 20-23; SRST Ex. 8025. As testified to by Doug Crow Ghost, no federal or state agency has taken into account potential impacts of the pipeline on tribal water rights. *Id.*; *see* SRST Ex. 8025. Even if it has not yet been determined how these legally protected rights will be violated, that does not support Keystone's assertion that this means that Keystone is in compliance. Nor does it mean Keystone is exempt from complying with the tribes' water rights. By not taking into account the tribes' water rights and by not being able to show whether or not it is or will be violating those rights, Keystone fails to comply with Condition No. 1.

Condition No. 2 requires, in part, that Keystone comply with all applicable federal, state and local permits, including the Presidential Permit. That condition further requires that Keystone comply with the Final Environmental Impact Statement ("FEIS") Recommendations, as does Condition No. 3. If Keystone is to comply with the Presidential Permit (if granted), it will almost certainly be required to comply with the Final *Supplemental* Environmental Impact Statement ("FSEIS") Recommendations. Keystone failed to provide testimony as to which recommendations

– those from the FEIS or those from the FSEIS – it will comply with. However, to the extent these recommendations differ, Keystone will necessarily be in violation of Condition Nos. 2 and 3. In addition, the Programmatic Agreement that is part of the FEIS and the Amended Programmatic Agreement that is part of the FSEIS are both binding documents under the respective environmental impact statements, yet they too differ. Keystone has given no indication of whether it will comply with the Programmatic Agreement or the Amended Programmatic Agreement, but it cannot comply with both simultaneously. Even if Keystone identified which document it would comply with, it would either violate of the current Amended Programmatic Agreement by complying with the FEIS or it would violate the FEIS by complying with the Amended Programmatic Agreement.

Condition No. 5 requires Keystone to undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application. This includes construction of the pipeline on the route committed to by Keystone. By deviating from the route presented in its Application, Keystone will not undertake and complete all actions it committed to in its Application. Keystone provided no testimony showing that it will construct the pipeline as presented in its Application, thus it failed to comply with Condition No. 5. It further failed to provide testimony as to each of the actions it committed to in its Application, thus it failed to meet its burden of proof with respect to Condition No. 5.

Keystone also unquestionably did not comply with, and cannot comply with, the portion of Condition No. 5 which imposed upon Keystone the duty to “undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its application as amended, in its testimony and exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing” in one other key way. Keystone’s core

commitment at that time was that construction would “commence in May of 2011 and be completed by 2012.” Amended Final Decision and Order at Finding of Fact 17. As Keystone acknowledges, it did not meet that requirement. To attempt to get around this failure, Keystone asserts that its permit is perpetual. That is either incorrect or incomplete: while the permit itself might still exist, it is no longer of any use or effect where Keystone cannot comply with a condition contained in the permit. Here, Keystone cannot comply: it cannot begin construction in May 2011 or complete construction by 2012.

Under Condition No. 7, Keystone is bound to provide contact information for its public liaison officer to law enforcement agencies and local governments in the vicinity of the project. However, Keystone’s testimony failed to show that such information was provided to tribal governments or law enforcement agencies. In addition, SDCL §42-41B-22 is a South Dakota law with which Keystone must comply pursuant to Condition No. 1. §42-41B-22(4) requires a permit applicant to give due consideration to the views of governing bodies of affected local units of government. Keystone’s testimony failed to show that such consideration was given. As the record shows, Keystone failed to present adequate evidence to meet its burden of proof with respect to many of the 50 conditions, every one of which it has the duty to meet. Furthermore, even if the Commission finds that the burden of proof could shift, Keystone failed to submit sufficient evidence to shift the burden as shown above.

**IV. EVEN IF THE BURDEN OF PRODUCTION DID SHIFT, INTERVENORS MET THEIR BURDEN TO SHIFT IT BACK AND KEYSTONE DID NOT THEN MEET ITS ULTIMATE BURDEN.**

Yankton reasserts its position stated in Section I, *infra*, that it is improper for the Commission to even consider whether the intervenors provided sufficient evidence to overcome a shifting of the burden of production based on Keystone’s “certification.” However, should the Commission find that the burden did shift based on the “certification” or otherwise, the intervenors

have clearly presented sufficient rebuttal evidence to shift the burden of production back to Keystone. If the “certification” statement from Corey Goulet is found sufficient to shift the burden, then comparable statements from the intervenors must hold equal weight and therefore shift the burden back to Keystone. On October 30, 2015, Yankton filed a “certification,” attached hereto as “Exhibit 1,” much like that filed by Keystone. Yankton’s “certification” consists of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that Keystone does not meet all 50 permit conditions. If a sworn statement from the Keystone president is adequate evidence to shift the burden to intervenors, then a sworn statement from the chairman of an intervening tribe must as a matter of equal protection be adequate to shift the burden back to Keystone. This is dictated by logic and fairness. In addition, at least one of intervenors’ witnesses pointed out while under oath that Keystone failed to comply with one or more conditions. Tr. 2133, citing Condition Nos. 2 and 3; Prefiled Rebuttal Testimony of Paula Antoine p. 7, citing Condition Nos. 1 and 3. This testimony must be given equal evidentiary weight to Keystone’s “certification” and would likewise shift the burden back to Keystone.

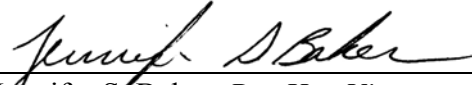
In addition to the “certification” provided by Yankton and the under-oath statements of Ms. Antoine, intervenors provided adequate testimony evidencing Keystone’s non-compliance with conditions to shift the burden back to Keystone. With respect to Condition No. 1, intervenors presented significant testimony about Keystone’s failure to comply with SDCL §49-41B-22(4) by failing to engage local tribal governments and consider their views as discussed previously herein. Tr. 1818, 1722-23, 1863, 2038-39, 2088, 2092, 2134. As stated in section III(B), *infra*, Keystone must comply with SDCL §49-41B-22 pursuant to Condition No. 1. §49-41B-22(4) requires a permit applicant to give due consideration to the views of governing bodies of affected local units of government. Nearly if not all of the witnesses for the tribal intervenors proffered testimony



about how they, as tribal governments, would be affected by the proposed project. Despite the fact that these tribes would clearly be affected, many of their witnesses further testified that their respective tribal governments were never even contacted – let alone engaged in such a way as to provide their views – by Keystone. Tr. 1718 ln 20-21; 1722 ln 23 – 23 ln 6; 2038 ln 6 – 39 ln 2; 2088 ln 1; 2092 ln 4-16; 2134 ln 2-6. Any burden on the intervenors was thus shifted back to Keystone by this testimony. The intervenors further presented testimony that local tribal law enforcement agencies and local tribal governments have not been contacted by Keystone as required by Condition No. 7. Tr. 2038 ln 6-9; 2094 ln 4-7; 2134 ln 2-6. This is despite extensive testimony from intervenors’ witnesses about concerns due to the increased population and “man camps” in their communities (Tr. 1850 ln 15 – 1855 ln 7; 1858 ln 6 – 1859 ln 5; 2135-39).

For the foregoing reasons, Keystone has failed to meet its burden of proof to certify that the proposed project continues to meet the conditions on which the 2010 permit was granted. The Commission must not be led astray by the convoluted interpretations of the law put forth in the briefs submitted by Keystone and Staff. The burden of proof rests solely and squarely on Keystone. This burden cannot be met by the mere production of a sworn statement of a Keystone official. Such an interpretation would defy the purpose of the statute governing this proceeding as well as the purpose of holding a contested case evidentiary hearing. Keystone’s statement is simply a formality; the actual certification in this case must come through proof by Keystone of its continued compliance. On that burden, Keystone has failed. As the Commission is surely aware, Keystone did not even offer evidence pertaining to many of the conditions at the evidentiary hearing. Without solid evidence supporting continued compliance with each condition, Keystone has failed to meet its burden of proof for certification. Keystone’s petition must therefore be denied.

Dated this 30<sup>th</sup> day of October, 2015.



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