

---

**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

**YANKTON SIOUX TRIBE'S  
MOTION TO DISMISS**

**HP14-001**

---

COMES NOW, Yankton Sioux Tribe, by and through Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby moves the Public Utilities Commission to dismiss the Petition filed by TransCanada Keystone Pipeline, LP and the pending action for failure to state a claim upon which relief can be granted pursuant to SDCL 15-6-12(b)(5).

**I. RELEVANT FACTS**

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Keystone") filed an application with the Public Utilities Commission ("Commission") in Docket HP-09-001 requesting a permit for a project to construct a pipeline through South Dakota to transport tar sands. Pursuant to South Dakota law, Keystone was required to provide key information including a description of the nature and location and the purpose of the proposed pipeline to the Commission in its permit application in order for the Commission to make an informed, sound decision on the project. SDCL 49-41B-11. The Commission issued its *Amended Final Decision and Order* ("Final Decision") on June 29, 2010, based on that information. As a part of its *Final Decision*, the Commission issued a detailed list of its findings of fact and conclusions of law that led to the decision. Thus, the permit issued in 2010 is inextricably tied to those findings of fact and conclusions of law as the basis for the Commission's decision to issue that permit. Through

the *Final Decision*, the Commission issued a permit authorizing construction of the project (“2009 Project”) as that project was described and defined in the findings of fact contained in the *Final Decision*.

On September 15, 2014, after more than four years had passed since the issuance of the permit for the 2009 Project described in the *Final Decision*, Keystone filed a new *Petition* with the Commission in Docket HP 14-001. The subject of the *Petition* is a project for a tar sands pipeline (“2014 Project”). In conjunction with this new *Petition*, Keystone submitted a *Certification* asserting that the conditions upon which the Commission granted the facility permit in Docket HP 09-001 continue to be satisfied. The *Petition* requests that the Commission issue an order accepting its *Certification* pursuant to SDCL 49-41B-27. As an appendix to the *Petition*, Keystone submitted a “Tracking Table of Changes” that identifies thirty (30) findings contained in the *Final Decision* and, for each finding, sets out a new, different finding. See *Petition for Order Accepting Certification, Appendix C*.

## **II. ARGUMENT**

This action must be dismissed for failure to state a claim upon which relief can be granted pursuant to SDCL 15-6-12(b)(5). 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 Commission. Such rules are found in SDCL Chapter 15-6. 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.

Keystone has never received a permit from the Commission for the project described in the *Petition*, the relief requested in the *Petition* cannot be granted, and Keystone has failed to state a claim upon which relief can be granted. Keystone has asked the Commission to accept its certification that the project described in the *Petition*, the 2014 Project, continues to meet the

conditions upon which a permit was issued in Docket No. 09-001. *Petition* at 1. Although the *Petition* might mislead the reader to believe that the project referenced therein is the same project that was permitted in Docket No. 09-001, Appendix C to the *Petition* clearly identifies thirty (30) differences between the two projects. This “Tracking Table of Changes” lists thirty (30) findings made by the Commission in Docket No. 09-001 regarding the 2009 Project that do not apply with respect to the 2014 Project and, in an adjacent column, presents an “update” containing new and revised language that does apply to the 2014 Project. The fact that the Commission went to the trouble to make each of these findings shows that each of these findings was key to the Commission’s decision and key to the 2009 Project itself. Deviation of a project from these findings therefore constitutes a new, separate project.

Although a court must treat the factual allegations made in a petition or complaint as true when ruling on a motion to dismiss for failure to state a claim, a court is “not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9<sup>th</sup> Cir. 1998). “When an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss.” *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7<sup>th</sup> Cir. 2013). Here, Keystone has submitted an appendix to its *Petition* that clearly demonstrates that the 2014 Project is not the same project as the 2009 Project. The Commission is not required to treat Keystone’s claim that its certification pertains to the already-permitted 2009 Project as true because that allegation is contradicted by Appendix C to the *Petition*.

Keystone’s veiled attempt to amend the *Final Decision* by interjecting “updates” to the Commission’s own findings in fact undermines and invalidates its claim. The contents of Appendix C, which illustrates the numerous ways in which the 2014 Project differs from the



2009 Project, contradicts Keystone's assertion that the 2014 Project can be certified pursuant to SDCL 49-41B-27. Certification under SDCL 49-41B-27 is only proper if the Commission has already issued a permit for the project that is the subject of the certification. The Commission has never issued a permit for the project described in Keystone's "updates" (the 2014 Project), therefore SDCL 49-41B-27 does not apply and Keystone has failed to state a claim upon which relief can be granted.

### III. CONCLUSION

Keystone's *Petition* must be dismissed because, based on the face of the *Petition* and its attachments, SDCL 47-41B-27 does not apply and the *Petition* contains no claim upon which relief can be granted. Because Appendix C directly contradicts Keystone's claim that it wishes to certify the project that was permitted in 2010, the Commission need not consider that claim to be true for purposes of this *Motion*. Moreover, because Appendix C shows that the project at issue is different from the project permitted in 2010, Appendix C invalidates any claim under SDCL 47-41B-27. Keystone's *Petition* must be dismissed pursuant to SDCL 15-6-12(b)(5) because it states no claim upon which relief can be granted.

Dated this 1<sup>st</sup> day of December, 2014.

Thomasina Real Bird

Thomasina Real Bird, SD Bar No. 4415  
FREDERICKS PEEBLES & MORGAN LLP  
1900 Plaza Drive  
Louisville, Colorado 80027  
Telephone: (303) 673-9600  
Facsimile: (303) 673-9155  
Email: [trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)  
Attorney for Yankton Sioux Tribe