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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

**JOINT MOTION IN LIMINE TO  
EXCLUDE EVIDENCE  
PERTAINING TO KEYSTONE'S  
PROPOSED CHANGES TO  
FINDINGS OF FACT**

**HP14-001**

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COME NOW Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Bold Nebraska, Rosebud Sioux Tribe, Indigenous Environmental Network, and Dakota Rural Action (collectively, "Movants"), by and through counsel, and hereby move the Public Utilities Commission ("Commission") for an order excluding all evidence offered by Keystone in support of its Tracking Table of Changes attached to its Petition as an appendix. In support of this motion, Movants state as follows:

**I. RELEVANT FACTS**

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Keystone") filed an application with the Commission in Docket HP09-001 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 the information provided by Keystone at that time. The *Final Decision* is attached hereto as **Exhibit A**. As a part of its *Final Decision*, the Commission issued a detailed list of its findings

of fact that led to the decision. See **Exhibit A**. Those findings of fact are the basis for the Commission’s decision to issue that permit, therefore the permit issued in 2010 is inextricably tied to those findings of fact. Through the *Final Decision*, the Commission issued a permit authorizing construction of the project.

On September 15, 2014, after more than four years had passed since the issuance of the permit, Keystone filed its *Petition* with the Commission in Docket HP14-001 seeking to certify to the Commission that it continues to meet the conditions upon which the permit was granted pursuant to SDCL 49-41B-27. Keystone did not expressly request in the *Petition* that the Commission amend the findings of fact contained in the *Final Decision*. However, as an appendix to the *Petition*, Keystone submitted a “Tracking Table of Changes” that identifies thirty (30) findings of fact contained in the *Final Decision* and, for each finding, sets out a new, different, “update” finding. The “Tracking Table of Changes” is attached hereto as **Exhibit B**.

On May 26, 2015, the Yankton Sioux Tribe (“Yankton”) and Indigenous Environmental Network (“IEN”) filed a *Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact*, seeking to preclude the amendment of the Findings of Fact contained in the *Final Decision*. During oral argument, Keystone indicated that it had no intention of seeking an amendment to the Findings of Fact. Staff for the Commission agreed with Yankton and IEN that amendment of the Findings was not available because the Commission does not have authority to amend its previous *Final Decision*. The Commission found that it has no legal authority to amend the *Final Decision*, but because it also found that Keystone does not seek to amend the Findings of Fact, the Commission denied the motion.

On April 2, 2015, Keystone submitted prefiled testimony for five witnesses which is attached hereto as **Exhibit C**. Each of these testimonies contains responses to questions that

explicitly ask about the Tracking Table of Changes and the respective witness' responsibility for portions of the Tracking Table of Changes. Moreover, four of the testimonies themselves directly and expressly address the "updated information" with respect to those Findings for which the witness was responsible. The fifth testimony, that of Heidi Tillquist, states that she was not directly responsible for portions of the Tracking Table of Changes but that she is familiar with certain changes. She further describes updates to Finding No. 50.

## **II. ARGUMENT**

The burden of proof in this case rests on Keystone to show that the proposed project continues to meet the conditions on which it was granted. SDCL 49-41B-27. The statutory certification process neither requires nor permits the consideration of updates, changes, amendments, additions, or other alterations to findings of fact contained in a permit. Based on its prefiled testimony, Keystone's case appears to consist of little more than evidence about such updates and the say-so of five witnesses that they have no knowledge that Keystone cannot meet the original conditions.

Specifically, the following responses contained in Keystone's prefiled testimony must be excluded as they are offered in support of the proposed changes to the Findings of Fact:

- David Diakow's responses to Question Nos. 4-10.
- Meera Kothari's responses to Question Nos. 4-12.
- Jon Schmidt's responses to Question Nos. 4-11.
- Corey Goulet's responses to Question Nos. 4-14.
- Heidi Tillquist's response to Question No. 4.

Keystone cannot substitute its evidence about its Tracking Table of Changes for evidence that the permit conditions are and can still be met, and the introduction of such evidence serves no

purpose other than to murky the water in this proceeding. Given the sizeable scope of this proceeding (compliance with all 50 permit conditions), the introduction of extraneous evidence during the limited time of the trial would serve to prejudice the other parties. Moreover, such evidence is not relevant to this proceeding. As the Commission has found and Keystone has acknowledged, the Commission has no legal authority to amend the Findings of Fact.

“Motions in limine are heard in advance of trial and seek a court order requiring the parties not to discuss or disclose certain facts that the court deems to be prejudicial.” *Leon v. Anderson*, 692 N.W.2d 194, 197 (S.D. 2005). Furthermore, a motion in limine “can be an objection to the admissibility of evidence.” *State v. Johnson*, 771 N.W.2d 360, 367 (S.D. 2009). The Supreme Court of South Dakota has long favored such motions. *Leon*, 692 N.W.2d at 197. Because the parties would be prejudiced if Keystone presents the evidence described above, because such evidence is not relevant to the proceeding, and in the interest of judicial economy, the Commission should grant this motion in limine.

### **III. CONCLUSION**

Movants request only that the Commission exclude Keystone’s offered evidence, testimony, and exhibits used to support its Tracking Table of Changes, not that the Commission exclude evidence that allegedly supports Keystone’s position regarding certification. This request is in line with the Commission’s earlier findings that 1) Keystone does not seek changes to the Findings of Fact, and 2) the Commission lacks authority to amend the Findings of Fact. Because evidence to support the Tracking Table of Changes is not relevant to this proceeding and because the introduction of such evidence would be unduly prejudicial, Yankton requests that the Commission issue an order precluding Keystone from presenting any testimony, evidence, or exhibits to support the Tracking Table of Changes at the Evidentiary Hearing.

Dated this 10<sup>th</sup> day of July, 2015.



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