

**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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* **STAFF’S BRIEF IN RESPONSE**
* **TO MOTION TO PRECLUDE**
* **IMPROPER RELIEF OR, IN**
* **THE ALTERNATIVE, TO**
* **AMEND FINDINGS OF FACT**
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* **HP14-001**
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COMES NOW, Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this brief in response to the Motion to Preclude Improper Relief or, In the Alternative, to Amend Findings of Fact filed by Yankton Sioux Tribe and Indigenous Environmental Network (“Movants”). Staff will address the alternative requests for relief separately.

I. Request to Preclude Improper Relief

In its first request, Movants seek an order that the Commission refrain from altering the Findings of Fact in the Amended Final Decision and Order (“Permit”) issued by the Commission in HP09-001. While Staff does agree that it is improper for the Commission to amend the Findings of Fact, as discussed below, it is also improper for the Commission to issue an order precluding itself from issuing future orders of a certain nature. There is no law or precedent permitting a judicial body to preclude itself. The proper time and place for this request would appear to be in closing argument or post-hearing briefs, when parties have the opportunity to discuss the law as it applies to the facts of this proceeding. However, the relief sought by this request is simply not available in the manner with which it is sought.

A. The Tracking Table of Changes is not tantamount to a request for the Commission to amend its decision.

Keystone has not requested the Commission amend the Findings of Fact. It appears that Keystone has simply provided the Tracking Table of Changes to demonstrate that the project is essentially the same and that the project updates prove that Keystone can continue to meet the conditions upon which the permit was issued.

Movants make contradictory statements on page five of their Motion when they argue that

Because these “updates” which represent key elements of the decision to issue the permit were not taken into consideration in that decision, the Commission did not have the requisite information to reach a decision at the time the Final Decision was entered thus the permit should not have been issued.

By making these statements, Movants argue changes have occurred, but then take the Commission to task for making a decision without having that information at the time the permit was issued. Either these were changes, meaning by their very nature the information was not conceivable at the time, or they are not changes and the Commission could have had and considered the information.

Moreover, simply making updates to the project does not, per se, equate to an amendment of the permit. Some updates are actually expected of the company. For example, Condition 31 references compliance with the Special Permit “if issued.” The Special Permit was not issued. Therefore, Keystone included in its Tracking Table of Changes specifications that would bring the project into compliance with federal regulation absent the Special Permit. “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. It would be wholly unreasonable to

interpret SDCL § 49-41B-27 to require that a project make no changes, even if doing so would require them to operate contrary to federal law. When the Commission issued the permit, it required Keystone to construct and operate the pipeline in accordance with the PHMSA Special Permit, if issued. The Commission could not have been charged with knowing that the Special Permit would not have been issued, and, therefore, cannot be taken to task if it allows the project to be constructed and operate in compliance with federal regulations. Forcing the Commission to either predict the future as to federal regulations and make findings accordingly or deny certification of any project that attempts to make changes to remain in compliance with federal regulations would lead to an absurd result.

B. The Commission has already ruled on this issue.

The Commission has addressed this issue twice already. The Commission included review of Appendix C in the Order to Limit the Scope. In the Commission's discussion on December 9, 2014, Commissioner Nelson stated that "[w]hen the word 'conditions' is used, it is used in relation to those things that we, the Commission, attached to the permit when it was originally granted, not the circumstances under which the permit was originally granted." December 9 Transcript 15:3-7.

Furthermore, on January 6, 2015, the Commission heard oral arguments on Yankton Sioux Tribe's ("Yankton") Motion to Dismiss. On December 2, 2014, Yankton filed a Motion to Dismiss, arguing that Keystone failed to state a claim upon which relief can be granted. In its Motion, Yankton argued that "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 the permit."

Motion at ¶2. Yankton went on to state that the submission of the Tracking Table of Changes was a “veiled attempt to amend the Final decision...”

When the Commission took up this issue, ultimately denying the Motion to Dismiss, Commissioner Hanson stated that “[t]here would be no reason for a certification process if one change or a few changes or even many changes disqualified an Applicant. It just is totally contrary to what the entire purpose of the Docket is.” Motion Transcript 28:5.

Commissioner Nelson agreed, stating

I did look at the tracking table and the changes that are outline there to find [if there was] some material change to the South Dakota portion that really stuck out[,] and in my cursory review I didn't find that. ...I think we need to go through this process to find out what's there and have any of those changes impacted the conditions that we laid out a number of years ago.

Motion Transcript 29:9. The Commission then issued an Order finding that the [Petition for Certification] does not on its face demonstrate that the Project no longer meets the permit conditions.

II. Request to Amend Findings of Fact

Staff agrees with Movants that the Commission lacks the authority to amend Findings of Fact in the Permit. Any application for rehearing or reconsideration would need to be made in Docket HP09-001, not Docket HP14-001, by a party to Docket HP09-001, within thirty days of the issuance of the permit, pursuant to ARSD 20:10:01:30.01. Therefore, the alternative relief sought by Movants is not available in this docket and should be denied.

CONCLUSION

For the forgoing reasons, Staff recommends the Commission deny the Motion to Preclude Improper Relief or, In the Alternative, to Amend Findings of Fact.

Dated this 2nd day of June, 2015.



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