
**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
REPLY IN SUPPORT OF ITS
MOTION TO DISMISS**

HP14-001

COMES NOW Yankton Sioux Tribe, by and through Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits this *Reply* in support of its motion to dismiss the Petition filed by TransCanada Keystone Pipeline, LP (“Keystone”) and the pending action for failure to state a claim upon which relief can be granted pursuant to SDCL 15-6-12(b)(5).

Keystone’s Petition must be dismissed because the project for which the company seeks certification does not fall within the scope of the permit issued by the Public Utilities Commission (“Commission”) in its HP09-001 *Amended Final Decision and Order* (“*Final Decision*”) on June 29, 2010. The Yankton Sioux Tribe does not contend that any change in a project requires a new permit, or that the number of changes alone requires a new permit. Rather, the law mandates that if a project is not consistent with the findings of a particular permit, the permit does not authorize construction of that proposed project. When the Commission issues a permit, the Commission’s findings constitute the parameters of its decision and the scope of the authority granted to the applicant to construct a project. If any of the findings for a permit do not apply to a proposed project, that means the proposed project is not the same project authorized by the permit.

When the Commission issues an order granting a permit, it includes in that order its findings with respect to the proposed project. These findings are included in the order because

they are the basis for the Commission’s decision to approve the permit. They encompass the information deemed material by the Commission to its decision. The Commission is required to “make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms...as the commission deems appropriate.” SDCL 49-41B-27. Moreover, the *Final Decision* issued by the Commission on June 29, 2010 states: “Based on the foregoing Findings of Fact, the Commission hereby makes the following: CONCLUSIONS OF LAW.” Amended Final Decision and Order; Notice of Entry at p. 24. This language expressly confirms that its legal conclusions – the legal rationale for its decision to issue the permit – are derived from the findings of fact specifically listed in the *Final Decision*. The permit issued in HP-09-001 approves the project described in its findings of fact, and any proposed project inconsistent with those findings is a materially different project not authorized under the scope of that permit.

The fact that the Commission’s findings are material to the permit and operate to define the scope of authority granted by the permit is further supported by the fact that any other interpretation of South Dakota law governing such permits would render meaningless the requirement that the Commission issue complete findings in its decision to grant a permit. As a matter of statutory construction, laws are presumed to have some meaning and purpose. SDCL 49-41B-24 would serve no purpose if SDCL 49-41B-27 (regarding certification) is interpreted in such a way that the Commission’s findings have no bearing on the permit once the Commission issues the order approving the permit and adopting said findings. In order for SDCL 49-41B-27 to apply to a project, that project must be consistent with the basis for the Commission’s decision to issue a permit which means that changes to a project cannot be inconsistent with the Commission’s findings.

Keystone's interpretation of the statutes is in fact illogical. Keystone has previously argued that "a proceeding under SDCL § 49-41B-27 is not a substitute for an appeal, and it is not an opportunity for the Intervenors to ask the Commission to reopen the permit, including the 50 conditions, or to reconsider its decision granting Keystone a permit to construct and operate the Project." Keystone's Motion to Define the Scope of Discovery Under SDCL § 49-41B-27 at p. 2. However, that is precisely what Keystone itself seeks to do by asking the Commission to amend its findings included in the permit. Keystone would not ask for amendments to the findings if the project as it is now proposed was consistent with those findings. A proceeding under SDCL § 9-41B-27 is no more an opportunity for Keystone to ask the Commission to reopen its decision with respect to findings than it is for Intervenors to ask the Commission to reopen its decision with respect to conditions. Because the project now proposed by Keystone would require that the Commission amend its findings in the *Final Decision*, and because South Dakota law prohibits an agency from reconsidering a final decision in a contested case, there is no lawful basis for Keystone's Petition and this matter must be dismissed as a matter of law.

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. Appendix C to the *Petition*, which lists certain findings on which the Commission's decision to grant a permit was based as well as proposed changes necessary to make the findings consistent with the current project, shows that the project at issue is different from the project permitted in 2010. Because the currently proposed project is inconsistent with the basis for the Commission's decision to grant the permit, it falls outside the scope of 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.

WHEREFORE, Yankton Sioux Tribe respectfully requests that the Commission dismiss Keystone's *Petition* pursuant to SDCL 15-6-12(b)(5). Yankton Sioux Tribe further respectfully requests that the Commission permit oral argument on its *Motion to Dismiss* at the upcoming hearing consistent with the Parties' constitutional rights to due process.

Dated this 2nd day of January, 2015.



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