
**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 AND
INDIGENOUS ENVIRONMENTAL
NETWORK'S MOTION TO
PRECLUDE IMPROPER RELIEF
OR, IN THE ALTERNATIVE, TO
AMEND FINDINGS OF FACT**

HP14-001

COME NOW Yankton Sioux Tribe ("Yankton") and Indigenous Environmental Network ("IEN"), by and through counsel, and hereby move the Public Utilities Commission ("Commission") to preclude the amendment of findings of fact contained in the *Amended Final Decision and Order* ("*Final Decision*") issued in HP09-001 on the grounds that such relief is improper and not permitted under SDCL 49-41B-27. In the alternative, should the Commission find that it has authority at this stage to amend the findings of fact despite the absence of statutory or regulatory authority, Yankton and IEN move the Commission to amend Finding Numbers 113 and 114 in the *Final Decision* and to permit further amendments to the findings as appropriate based on the upcoming Evidentiary Hearing and any subsequent post-hearing briefs.

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 *Final Decision* on June 29, 2010, based on that information, containing specific findings of fact and conclusions of law. 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. Thus, the permit issued in 2010 is inextricably tied to those findings of fact. Those findings of fact are 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.

On September 15, 2014, after more than four years had passed since the issuance of the permit, Keystone filed a new *Petition* with the Commission in Docket HP 14-001 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. Although Keystone did not expressly request in the *Petition* that the Commission amend the findings of fact contained in the *Final Decision*, Keystone impliedly requested this relief through an attachment referenced in the *Petition*. 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.**” By proposing that the Commission adopt new findings, Keystone is asking the Commission to grant relief that is not available to it by law.

II. ARGUMENT

Because the laws of the State of South Dakota do not permit the Commission to amend its decision absent an application for rehearing or reconsideration, the Commission cannot now

amend its findings contained in the *Final Decision* to conform with the findings proposed by Keystone or to otherwise conform with any changed circumstances.

The *Petition* plainly states that the cause of action is for an order accepting certification under SDCL 49-41B-27. That statute provides that:

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

SDCL 49-41B-27 does not, however, permit an applicant to request that any part of the Commission's previous decision be amended or authorize the Commission to amend it. In fact, a decision of the Commission can be amended pursuant to ARSD 20:10:01:29, which permits a party to challenge a Commission decision by applying for rehearing or reconsideration.¹ The deadline to file an application for reconsideration was July 29, 2010. Keystone filed no such application and it cannot now, more than four years later, use SDCL 49-41B-27 as a tool to circumvent this deadline and seek reconsideration of the findings.

As Keystone has already pointed out to this Commission, the time for seeking an amendment to the *Final Decision* has passed. Moreover, the *Final Decision* itself is not up for reconsideration. That decision must remain as it stands, including all of the findings of facts contained therein. To now allow Keystone to request changes to the findings would be to allow Keystone to request amendments to the *Final Decision* and to place the *Final Decision* itself, including the conditions and the decision to grant the permit itself, at issue. Just as the conditions

¹ SDCL 49-41B-30 also provides for judicial review of a decision by filing a notice of appeal in the circuit court. However, Keystone has not filed any notice of appeal and the deadline to do so has passed as well.

contained in the decision cannot be amended through this proceeding, neither can the findings of fact.

While it is Movants' firm position that the *Final Decision* cannot be amended, should the Commission find that it has the authority to alter the findings of fact or to adopt the updates proposed by Keystone, that means that all of the findings contained in the *Final Decision* can be altered or amended. If the Commission reaches this conclusion, Movants request that the Commission amend Finding Number 113. This finding states:

The Commission finds that subject to the conditions of the Special Permit and the Conditions set forth in Exhibit A hereto, the Project will (i) comply with all applicable laws and rules; (ii) not pose an unacceptable threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; (iii) not substantially impair the health, safety or welfare of the inhabitants; and (iv) not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

This finding essentially states that Keystone fulfilled all four requirements for its burden of proof under SDCL 49-41B-22. However, Keystone failed to fulfill its statutory obligation to give due consideration to the views of governing bodies of *all* affected local units of government. The Reservation of the Yankton Sioux Tribe is located in close proximity to the proposed project route. In addition, its treaty territory and aboriginal lands would be directly crossed by the proposed route. As a sovereign nation, the Yankton Sioux Tribe no doubt constitutes a local unit of government. This is the very status under which Yankton intervened in this matter as a party. Yet, Keystone wholly failed to give any consideration at all to the views of the Yankton Sioux Tribe or of its Business and Claims Committee, the governing body of the Tribe. Yankton holds grave concerns about the threats to water, health, safety, and cultural resources that the proposed

project poses to its members. Keystone has made no good faith effort to learn and understand these concerns, and it clearly has in no way taken them into account in its actions or given them “due consideration” as required by law. SDCL 49-41B-20(4). It is therefore necessary and appropriate at this time to amend Finding Number 113 to accurately reflect Keystone’s failure to meet this burden.

Finding Number 114 states: “The Commission finds that a permit to construct the Project should be granted subject to the Conditions set forth in Exhibit A.” The permit in fact should not have been granted to Keystone because Keystone failed to meet its burden of proof as required by SDCL 49-41B-20, and Finding Number 114 must be amended to so reflect.

Finding Number 114 must also be amended on the grounds that the Commission’s decision was made based upon incomplete and inaccurate information. Keystone’s “Tracking Table of Changes” lists thirty (30) findings made by the Commission in Docket No. 09-001 which no longer apply to the proposed project. In an adjacent column, it proposes an “update” containing new and revised findings that do apply to the proposed project. The fact that the Commission went to the trouble to make each of the original findings shows that each of these findings was key to the Commission’s decision to approve the proposed project. Keystone’s own admission that those findings are no longer accurate as to the proposed project means that key bases for the Commission’s decision have been altered. 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. Finding Number 114 must therefore be amended to state that a permit to construct the proposed project should *not* be granted.

Movants reserve the right to propose additional amendments to the findings of fact as information and arguments are presented to the Commission through the course of the Evidentiary Hearing and through any post-hearing briefing and requests that the Commission consider and adopt such prospective amendments as appropriate to ensure that the findings conform with the new information and circumstances surrounding the proposed project.

III. CONCLUSION

The Commission lacks the statutory authority to amend the findings of fact contained in the *Final Decision*. Moreover, Keystone cannot be permitted to simply amend the findings of fact contained in the *Final Decision* because, as a party, Keystone has no authority to alter a Commission decision. Nothing in the statutes or regulations authorizes the amendment or “update” of a Commission decision in an action brought pursuant to SDCL 49-41B-27, and the time to apply for reconsideration or rehearing has long since expired. The Commission must therefore refrain from altering the findings of fact and the *Amended Final Decision and Order* must stand as issued. In the alternative, should the Commission find that it does have authority to amend the findings, Movants request that the Commission amend Finding Number 114 to state that the Commission finds that the permit should *not* be granted. Movants further request that the Commission amend Finding Number 113 to state that the Commission finds that due consideration had *not* been given to the views of governing bodies of affected local units of government. Movants reserve the right to propose additional amendments to the findings of fact as information and arguments are presented to the Commission through the course of the Evidentiary Hearing and through any post-hearing briefing

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