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 REPLY IN SUPPORT OF 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") (collectively, "Movants"), by and through counsel, and hereby submit this *Reply in Support of Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact.* In reply to the responses submitted by TransCanada Keystone Pipeline, LP ("Keystone") and the Public Utilities Commission Staff ("Staff"), Movants assert the following.

1. It is Movants' position, as supported by law, that the Public Utilities Commission ("Commission") has no authority to amend the Findings of Fact contained in the *Amended Final Decision and Order* issued in HP09-001 ("Findings of Fact" or "Findings").

2. If, and only if, the Commission finds that it does have authority to amend the Findings of Fact, Movants assert that any right to seek amended Findings must lie with both the Applicant and the Interveners rather than resting exclusively with the Applicant, in which case Movants would request that Findings No. 113 and 114 be amended in accordance with Movants' *Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact* ("*Motion to Preclude*").

A. Reply to Keystone's Response

3. Keystone's *Opposition to Joint Motion to Preclude Improper Relief* ("*Keystone's Opposition*") raises no meritorious arguments as to why the *Motion to Preclude* should be denied and focuses primarily on irrelevant issues.

4. Rather than responding to the argument that the amendment of the Findings should be precluded, Keystone argues that it has not requested the Commission to amend the Findings. In *Keystone's Opposition*, Keystone asserts that it "has not asked the Commission to amend its findings and does not expect that any amendments are necessary" and that "[t]he motion argues a non-issue." *Keystone's Opposition* at ¶ 1. Keystone appears to interpret the *Motion to Preclude* as asking the Commission to deny a request by Keystone to amend the Findings. However, the *Motion to Preclude* plainly states that the relief requested is preclusion of amendment of the Findings, which was made an issue by both Keystone and the Commission early in this proceeding.

5. When Keystone filed its application with the Commission to initiate this matter, Keystone submitted an appendix containing its own proposed updates to certain Findings of Fact contained in the HP09-001 decision. *Amended Final Decision and Order; Notice of Entry* at Appendix C "Tracking Table of Changes." These changes are "proposed" because they were proffered by Keystone but Keystone does not itself have the authority to alter the Findings contained in the Commission's decision. In *Keystone's Reply in Support of its Motion to Define the Scope of Discovery* ("*Keystone's Discovery Reply*"), Keystone asked "that discovery be tailored to the scope of the proceeding" which Keystone alleged "includes changes that affect the findings of fact as identified by Keystone in its certification petition." *Keystone's Discovery Reply* at pp. 1, 4; *see also Keystone's Motion to Define the Scope of Discovery Under SDCL 49-41B-27* ("*Keystone's Discovery Motion*"). Keystone therefore views amending the Findings of Fact to be within the scope of this proceeding.

6. The Commission has also treated the amendment of the Findings of Fact as an issue in this proceeding. In its order which adopted Keystone's recommendation regarding scope, the Commission ordered that discovery be limited to "1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions...or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes." *Order Granting Motion to Define Issues and Setting Procedural Schedule*, December 17, 2014 (emphasis added). The Commission's characterization of Keystone's Tracking Table of Changes as "proposed changes" indicates that the Commission views the submission of that table as an implied request that the proposed changes be adopted. In addition, by allowing discovery of information relevant to the proposed changes to the Findings, the Commission itself has demonstrated that the proposed changes are at issue in this proceeding. Because both Keystone and the Commission have treated the amendment of the Findings of Fact as an issue in this proceeding, it is reasonable and appropriate for the Commission to issue a ruling on whether such amendments may be permitted. For the reasons identified in the *Motion to Preclude*, such amendments must be precluded as a matter of law.

7. In *Keystone's Opposition*, Keystone challenges the motion on the basis that a change in the underlying facts does not prevent certification under SDCL § 49-41B-27. *Keystone's Opposition* at ¶ 2. Regardless of its merits, this argument is irrelevant. This contention is outside the scope of the *Motion to Preclude*, which argues that Findings of Fact cannot be amended in this proceeding, not that the permit should not be certified.

8. In ¶ 3 of its response, Keystone suggests that the Commission has inherent authority to amend the permit conditions. It is unclear to Movants why Keystone has strayed into the conditions of the permit when the scope of the *Motion to Preclude* is limited on its face to the

Findings of Fact. It is further perplexing that Keystone now appears to take a stance in complete contradiction to its earlier position. As Keystone stated previously, this proceeding "is not an opportunity for the Intervenors to ask the Commission to reopen the permit, *including the 50 conditions.*" *Keystone's Discovery Motion* at ¶ 1. Yet reopening the permit conditions is precisely what Keystone is now suggesting that the Commission do. Regardless of Keystone's reasoning for reversing its position, amendment of the conditions has not been placed at issue in the *Motion to Preclude.*

9. Keystone indicated in ¶ 4 of its response that it considers Yankton to be a sovereign nation but it does not consider Yankton to be a local unit of government within the meaning of SDCL § 49-41B-22. Keystone fails to justify this position. The statuses of "sovereign nation" and "local unit government" are not mutually exclusive. Yankton is indeed a sovereign nation, but it is also a government which is located in South Dakota within close proximity to the route of the proposed project and whose population would be impacted if the project is constructed. There is no requirement that a local unit of government identify itself as such if and when it chooses to intervene in a Commission proceeding, and that status is not waived simply because it is not mentioned in an application for party status. Yankton is both a sovereign nation and a local unit of government for purposes of SDCL § 49-41B-22, and Keystone is required by South Dakota law to give "due consideration" to its views.

10. Keystone again ventured into issues not relevant to the *Motion to Preclude* in ¶ 5 of its response when it raised the issue of tribal consultation. While federal law does require that federal agencies consult with tribes when considering a federal undertaking, the *Motion to Preclude* has nothing to do with this federal duty or the fact that proper federal consultation has not yet occurred. Keystone appears to confuse federal consultation, which was not raised in the

Motion to Preclude, with the duty placed on Keystone under South Dakota law to give due consideration to the views of local governments described above. The *Motion to Preclude* discusses the duty under SDCL § 49-41B-22 as a basis for its alternative request for relief. It does not in any way address federal consultation.

11. Furthermore, nothing in the affidavit of Lou Thompson which was attached to *Keystone's Opposition* indicates that Keystone gave any consideration to Yankton's views as required by SDCL § 49-41B-22. In fact, when Keystone learned that Yankton adopted a resolution opposing construction of the proposed project, Keystone "ended its efforts to work with the Tribe." *Affidavit of Lou Thompson* ("*Affidavit*") at ¶ 9. Ignoring a government because it opposes a project is a far cry from giving that government's views due consideration.

12. The governing body of the Yankton Sioux Tribe is the General Council. Neither the General Council nor its views is mentioned even once in the *Affidavit of Lou Thompson* or in *Keystone's Opposition.* The *Affidavit* states that one individual attended an informational meeting on behalf of the Yankton Sioux Tribe. *Affidavit* at ¶ 3. One individual does not constitute the governing body, and a meeting to provide information to interested tribes in no way implies that the views of attending tribes were presented, let alone given due consideration. Keystone has failed to fulfill its legal obligations under SDCL § 49-41B-22.

13. In Paragraph 6 of *Keystone's Opposition*, Keystone engages in argument about the boundaries of Yankton's treaty territory and aboriginal lands. This is precisely what Keystone argued the Commission has no authority to consider or decide in the pending *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.*

14. Finally, Keystone denies that its Tracking Table of Changes indicates that key bases for the Commission's decision to issue the permit have been altered. Keystone is essentially

claiming that the Commission's decision was not based on its Findings of Fact. On the contrary, the purpose of the Findings of Fact is to serve as the basis for a decision which is why SDCL § 49-41B-24 expressly requires the Commission to "make complete findings in rendering a decision..."

15. Keystone's arguments are largely irrelevant to the motion at issue and entirely without merit.

B. Reply to Staff's Response

16. In its response to the *Motion to Preclude*, Staff asserts that it is improper for the Commission to preclude itself from issuing future orders of a certain nature. However, Staff cites no legal authority for this statement. *Staff's Brief in Response to Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact* ("*Staff's Response*") at p. 1. Neither the statutes and regulations governing the Commission, nor the Administrative Procedure and Rules statutes, nor the Rules of Civil Procedure in Circuit Courts places such a restriction on the authority of the Commission. It is within the Commission's discretion to issue an order precluding an improper form of relief, and to issue such an order under these circumstances is entirely appropriate.

17. Staff's response states that the Tracking Table of Changes ("Table of Changes") is not a request for the Commission to amend its decision. *Staff's Response* at p. 2. While Yankton agrees that the Table of Changes does not contain an express request to amend the Findings of Fact, it certainly appears to be an implied request to do so. Keystone has no authority to update the Findings itself, so providing updated findings can serve no purpose other than to suggest that the Commission adopt those updates. Even if Keystone has not requested that the Findings be amended, the relief requested in the *Motion to Preclude* is appropriate. The *Motion to Preclude* does not seek an order denying a request by Keystone; it seeks an order precluding a form of relief

that is not available by law. Such relief has been made an issue in this proceeding first by Keystone, through its motion to limit discovery but to include information relevant to the Findings, and then by the Commission, through its order granting Keystone's request and referring to the Table of Changes as "proposed changes." The use of the word "proposed" clearly indicates that they have been proffered by Keystone for consideration by the Commission. Because the adoption of changes to the Commission's Findings of Fact is prohibited by law, the Commission should grant the *Motion to Preclude.*

18. Staff's response also asserts that the Commission has already ruled on "this issue." However, the Commission has never ruled on whether or not amendment of the Findings of Fact is permissible in a proceeding under SDCL § 49-51B-27, which is the issue raised by the *Motion to Preclude.* To support its assertion, Staff cited Commission discussion regarding use of the word "conditions." However, conditions are not the subject of the *Motion to Preclude* and Commission discussion does not constitute a ruling. Staff further relied on the order denying Yankton's motion to dismiss as a ruling on this issue. As Staff's response states, "[t]he 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." *Staff's Response* at p. 4. The *Motion to Preclude* does not address whether or not the petition demonstrates that the proposed project no longer meets the permit conditions, and the order denying Yankton's motion to dismiss does not address whether or not the Commission's Findings of Fact can be amended as a matter of law.

19. The issue raised in the *Motion to Preclude* has not yet been considered or ruled on by the Commission. It is therefore appropriate at this time for the Commission to rule on this issue in favor of Movants because, as Staff has agreed, "the Commission lacks the authority to amend Findings of Fact in the Permit." *Staff's Response* at p. 4.

20. In the alternative, *if* the Commission finds that it does have authority to amend the Findings of Fact, which Movants contend it does not, then Movants asks that the Findings be amended as requested in the *Motion to Preclude* and that the Commission permit the parties to move for such other amendments to the Findings as they find necessary through the course of the Evidentiary Hearing and any post-hearing briefing.

Dated this 9th day of June, 2015.

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