

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE SOUTH DAKOTA ) BRIEF IN OPPOSITION TO  
PUBLIC UTILITIES COMMISSION STAFF'S ) BLACK HILLS POWER INC'S  
COMPLAINT AGAINST BLACK HILLS ) MOTION TO DISMISS  
POWER INC ) ANSWER TO COMPLAINT  
 )  
 ) PS25-003  
 )**

COMES NOW, the Staff of the South Dakota Public Utilities Commission (Staff) and hereby files this Brief in Opposition to Black Hills Power Inc.'s (BHP) Motion to Dismiss Answer to Complaint.

## **INTRODUCTION/STATEMENT OF THE CASE**

On November 4, 2025, Staff filed a Complaint against BHP alleging violations of ARSD § 20:10:37:18 and SDCL § 49-41B-4. Staff filed a Certificate of Service on November 5, 2025. A Notice of Complaint, Deadline for Answer was also filed on November 5, 2025, which, pursuant to ARSD § 20:10:01:09, set an answer deadline of November 25, 2025. On November 25, 2025, BHP filed a Motion to Dismiss Answer to the Complaint (“BHP’s Motion” or “Motion”). The Motion requests the South Dakota Public Utilities Commission (Commission) dismiss Staff’s Complaint for reasons of due process violations and estoppel. Based on the reasoning and arguments contained herein, the Commission must deny BHP’s Motion.

## **LEGAL STANDARD FOR MOTION TO DISMISS**

Contested cases before the Commission are guided by the rules of civil procedure. ARSD § 20:10:01:01.02. One of the Commission’s rules addresses “Withdrawal and dismissal of pleading prior to final order.” ARSD § 20:10:01:02.04. This rule provides that the Commission may “dismiss a pleading at the request of an interested party or on its own motion,

stating the reasons in its order.” *Id.* The Commission’s decision in this regard must be based on the standards set forth in South Dakota Codified Law and the applicable caselaw.

BHP’s Motion is based on SDCL § 15-6-12(b). This statute allows for the following defenses to be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Insufficiency of process;
- (4) Insufficiency of service of process;
- (5) Failure to state a claim upon which relief can be granted;
- (6) Failure to join a party under § 15-6-19.

*Id.* “A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader.” *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496. These motions are “viewed with disfavor and [are] rarely granted.” *Id.* (quoting *Thompson v. Summers*, 1997 SD 103, ¶ 5, 567 N.W.2d 387, 390). “Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action as this is a matter of proof, not pleadings.” *Thompson*, 1997 SD 103, ¶ 7, 567 N.W.2d 387, at 390.

## **ARGUMENT**

BHP, in its Motion, does not assert that any of the six defenses found in SDCL § 15-6-12(b) require the Commission to grant its Motion. From this fact, the Commission should conclude: (1) it has jurisdiction over the subject matter of Staff’s Complaint; (2) it has jurisdiction over BHP; (3) no insufficiency of process exists; (4) no insufficiency of service of process exists; (5) Staff has stated claims upon which relief can be granted; and (6) no failure to join a party under § 15-6-19 exists.

Instead of basing its Motion on SDCL 15-6-12(b), BHP requests the Commission dismiss Staff's Complaint based on the overbroad and unexplained legal doctrines of due process and estoppel. BHP's arguments are not based in the law and should be rejected.

### **1. Staff has committed no due process violations.**

BHP's Motion argues that, according to the doctrine of due process, the Commission should dismiss the portion of Staff's Complaint relating to the Lange I pipeline permit requirement, the 2023 plant facility relocation notification requirement ("Ben French"), and the Lange II pipeline permit and notification requirements. BHP's due process arguments are based on ARSD § 20:10:37:08,<sup>1</sup> which provides requirements for pipeline safety staff regarding probable non-compliance inspection results. BHP's due process argument towards all the violations is essentially the same: pipeline safety staff did not issue a notice of probable violation, warning, or notice of concern regarding the alleged violations. Rather, Staff simply filed a Complaint with the Commission. By not issuing notices or warnings pursuant to ARSD § 20:10:37:08, BHP argues, Staff's Complaint violates BHP's procedural and substantive due

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<sup>1</sup> **20:10:37:08. Probable non-compliance inspection results.** The inspector shall categorize potential noncompliance in one of the following three categories to be specified in the inspection report:

(1) A notice of probable violation may be issued if the inspector has good cause to believe a serious or repeat violation of applicable pipeline safety standards has occurred. The written notice of violation shall include a statement of the statute, rule, or regulation allegedly violated by the pipeline operator and a description of the factual basis on which the allegation is based. If a civil penalty is proposed, the report shall state the amount of the proposed civil penalty. A warning in subdivision (2) may be elevated to a notice of probable violation by the pipeline safety program manager if warning items are not remedied in a timely fashion;

(2) A warning may be issued for a probable violation of a less serious nature or a first time violation. The warning may include specific corrective actions that must be taken to correct the situation and the time frame within which such actions shall be completed; and

(3) A notice of concern may be used to inform the pipeline operator where best industry practices are not being followed but no direct code violation exists. The notice of concern designation shall be used for informational purposes only to aid the pipeline operator in managing as safe and effective pipeline as possible. No pipeline operator action is required.

process rights. *See generally* BHP’s Motion, p. 1-4 (arguing that Staff failed to follow necessary requirements and thus violated BHP’s rights to due process).

BHP’s Motion does not provide definitions for procedural due process or substantive due process. By not providing any legal authority to back up its claims, BHP has failed to meet its burden and the Commission must reject BHP’s arguments regarding due process. Nonetheless, Staff provides the following:

Procedural due process ensures that “certain substantial rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” Substantive due process, on the other hand, “provides that certain types of governmental acts violate the Due Process Clause regardless of the procedures used to implement them.” “Fundamentally, [procedural] due process requires notice and an opportunity to be heard.” Procedural due process is a flexible standard that “requires only such procedural protections as the particular situation demands.”

*State v. Longchase*, 2025 SD 61, ¶¶ 33-34, 2025 WL 3098866, \*744 (internal citations omitted).

BHP’s Motion does not explain what substantive due process violations have occurred by Staff’s filing of a complaint. Therefore, Staff simply asserts that BHP has not met its burden here and request the Commission reject BHP’s claim that substantive due process violations have occurred.

Staff also has not violated any principles of procedural due process. Staff’s Complaint has followed constitutionally adequate procedures. Per *Hollander v. Douglas County*, procedural due process “requires notice and an opportunity to be heard.” *Hollander*, 2000 SD 159, ¶ 17, 620 N.W.2d 181, 186. BHP does not dispute that Staff’s Complaint was properly served. BHP has, and will continue to have, a full opportunity to be heard in these proceedings.

However, BHP argues that ARSD Chapter 20:10:37 places additional requirements on Staff before Staff can file a Complaint with the Commission. This argument relies on a strained

interpretation of ARSD § 20:10:37:08 and the broader purposes of ARSD Chapter 20:10:37.

Staff provides the following context to show why BHP's arguments regarding ARSD § 20:10:37:08 must be rejected.

SDPUC Pipeline Safety Staff Inspectors are responsible for ensuring “pipeline safety” in South Dakota. Zanter Affidavit, p. 1, ¶¶ 2, 4. Importantly, pipeline safety is a legal term mentioned frequently in ARSD Chapter 20:10:37. ARSD § 20:10:37:02 provides:

**Scope and application.** This chapter sets forth the procedures and standards to be used for *pipeline safety* inspections, the enforcement of *pipeline safety* standards, and the imposition of civil penalties on pipeline operators for failing to meet the *federal pipeline safety standards* adopted by SDCL chapter 49-34B. These rules only apply to those pipelines within the jurisdiction of the commission pursuant to SDCL chapter 49-34B.

(emphasis added). ARSD § 20:10:37:01(4) defines “inspection” as “a review of the books, files, records, reports, supplemental data, other documents and information, and an examination of the plant, property, and facilities of a pipeline operator to ensure compliance with *applicable pipeline safety standards.*” (emphasis added). Administrative rule guiding inspections provides, “An inspector shall conduct periodic inspections and spot checks of records and property in the possession, custody, or control of the pipeline operator to determine compliance with *applicable pipeline safety standards.*” ARSD § 20:10:37:04 (emphasis added). ARSD § 20:10:37:08, the rule upon which BHP’s Motion relies, specifically mentions “violation[s] of applicable pipeline safety standards.”

It is evident by the language in ARSD Chapter 20:10:37 and affidavit of SDPUC Staff that inspections are conducted for the purpose of inspecting adherence to pipeline safety standards established by federal code. Zanter Affidavit, p. 1, ¶ 4. Inspection reports made

following an inspection address probable violations or notices of concern that federal pipeline safety standards are not being met.

When conducting inspections, Pipeline Safety Staff are not inspecting whether a pipeline operator is compliant with every applicable state statute and rule. *Id.* at 4, ¶ 11. During the course of an inspection, Staff may observe violations of state law, which is what happened to bring about this matter. However, Staff do not, and realistically cannot, perform inspections on whether pipeline operators such as BHP have properly complied with the notice requirements of ARSD § 20:10:37:18,<sup>2</sup> or whether an operator has properly complied with the permitting

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<sup>2</sup> 20:10:37:18. **Notice requirements for transmission line construction.** Each transmission pipeline operator within the jurisdiction of the pipeline safety program shall, prior to the construction of a new transmission line, or a relocation or replacement of a transmission line as defined in 49 C.F.R. Part 192 (July 1, 2023):

- (1) Submit the information below to the commission's pipeline safety program no later than sixty days prior to the commencement of construction, relocation, or replacement:
  - (a) Pipeline operator's name and mailing address;
  - (b) Estimated dates construction is scheduled to begin and end;
  - (c) Map showing the location and proposed route of pipeline;
  - (d) Identified gas transmission Integrity Management Program high consequence area, if applicable;
  - (e) Proposed steel pipeline specifications, including size, weight, grade, wall thickness, and coating;
  - (f) Proposed plastic pipe specifications, including size and Standard Dimension Ratio;
  - (g) Proposed design and maximum allowable operating pressure of pipeline;
  - (h) Pressure test procedures and method of pressure test prior to operations;
  - (i) Proposed type of cathodic protection;
  - (j) Minimum burial depths of pipeline at time of construction;
  - (k) Proposed location and type of pipeline safety equipment;
  - (l) Proposed type of highway and water crossing, such as whether it will be bored and cased, bored only, or trenched;
  - (m) Written construction procedures;
  - (n) Name of construction company if known at the time of filing the Notice; and
  - (o) Pipeline operator's contact name and phone number;
- (2) In the event of an emergency, as defined in the pipeline operator's operations manual, give telephonic notice of emergency construction, relocation, or replacement to the commission's pipeline safety program;
- (3) Submit significant construction modifications to the pipeline safety program; and
- (4) Submit the information below to the commission's pipeline safety program no later than sixty days prior to the commencement of operation:
  - (a) Operation and maintenance manual;
  - (b) Emergency procedures;
  - (c) Anti-drug and alcohol plan;
  - (d) Public Awareness plan;
  - (e) Damage prevention program;
  - (f) Abnormal operations;
  - (g) Operator's qualification plan; and
  - (h) Integrity Management Plan.

requirements of SDCL Chapter 49-41B. Rather, those processes rely on pipeline operators and utilities, like BHP, to come to the Commission with information or applications as they are legally obligated to do. As ARSD § 20:10:37:08 states well, inspections are conducted for the purpose of “aid[ing] the pipeline operator in managing as safe and effective [a] pipeline as possible” in accordance with federal standards.

The allegations of Staff’s Complaint are not the kind of violations that are contemplated by the rule upon which BHP relies. Failure to obtain permits in accordance with SDCL Chapter 49-41B is not a “pipeline safety standard” that would be included in a pipeline safety inspector’s report pursuant to ARSD § 20:10:37:08. Failure to notify pursuant to ARSD § 20:10:37:18 is also not the kind of violation that would be included in an inspection report. Zanter Affidavit, p. 1-2, ¶ 7. This rule requires pipeline operators to provide notice, sixty days in advance, of construction, relocation, or replacement of a transmission line. As one can see by reading the rule, the purpose is to provide information to the Commission. A failure to notify pursuant to ARSD § 20:10:37:18 is not a violation of a pipeline safety standard that inspectors are looking for during an inspection, and, accordingly, would not appear in a post-inspection report.

Nothing in administrative rule, statute, or caselaw prevents Staff from filing a Complaint when Staff believes laws have been violated. The administrative rule upon which BHP relies guides the process for when inspections turn up issues relating to pipeline safety standards. Staff’s Complaint alleges violations of notification requirements and siting requirements, which are separate and distinct from the violations contemplated in ARSD § 20:10:37:08. For these reasons, the Commission must reject BHP’s claims regarding due process.

A final note is necessary regarding the separation of the SDCL Chapter 49-34B and Chapter 49-41B. BHP’s Motion incorrectly conflates the pipeline safety laws of SDCL Chapter

49-34B and the transmission facility siting laws of SDCL Chapter 49-41B. Specifically, BHP's Motion asks the Commission to accept the notion that Pipeline Safety Staff, who are established and instructed by SDCL Chapter 49-34B, must monitor and enforce the provisions of SDCL Chapter 49-41B in its inspection reports which, as established, pertain to pipeline safety standards. This is an untenable position that must be rejected. Pipeline Safety Staff are not responsible for monitoring and enforcing the provisions of SDCL 49-41B.

**2. The doctrine of ‘estoppel’ does not apply and the Commission must reject BHP’s request.**

BHP's Motion also argues that the Commission should dismiss the portion of Staff's Complaint relating to the Lange I transmission pipeline because of the doctrine of estoppel. BHP's Motion states that “at no time over the past twenty-three years has the Commission Staff issued a Notice of Probable Violation, a Warning, or Notice of Concern to Black Hills Power requiring a permit or other pre-construction information.” BHP Motion, p. 4. In addition, BHP states that the “Commission’s long-standing acceptance of the Lange I pipeline without a permit implies waiver or estoppel against retroactive enforcement.” *Id.* Therefore, BHP argues, the Commission should dismiss this portion of Staff's Complaint.

BHP's Motion does not provide any definition or legal authority by which the Commission should accept this argument. BHP has not established whether the Commission may properly exercise the function of estoppel. Therefore, BHP has not met its burden of proof and this request must be rejected. Nonetheless, Staff will address BHP's claims regarding estoppel.

Estoppel is a broad legal doctrine with many variants. Black's Law Dictionary provides a non-exhaustive list of six kinds of estoppel: equitable estoppel, estoppel by laches, estoppel by

silence, judicial estoppel, promissory estoppel, and quasi-estoppel. p. 247, 2d ed. (2001). BHP does not explain which type of estoppel it is claiming. Although it is unclear, BHP seems to be making an argument resembling judicial or equitable estoppel. Caselaw provides:

To create an estoppel, there must have been some act or conduct upon the part of the party to be estopped, which has in some manner misled the party in whose favor the estoppel is sought and has caused such party to part with something of value or do some other act relying upon the conduct of the party to be estopped, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be his legal rights.

*Wilcox v. Vermeulen*, 781 N.W.2d 464, 468 (S.D. 2010).

BHP's Motion provides no statement, act, or conduct where Staff misled BHP into a determination that the Lange I transmission pipeline does not need a permit in accordance with SDCL Chapter 49-41B. The Commission has not, as BHP's Motion states, "accept[ed]" the construction or continued operation of Lange I without a permit. BHP seems to be arguing that, because Staff never issued a Notice in accordance with ARSD § 20:10:37:08 regarding the Lange I pipeline, that Staff is estopped from pursuing violations for BHP's failure to obtain a permit for the Lange I transmission pipeline. Then, BHP's Motion pivots to a different kind of argument which is that it would be wasteful and serve no purpose for BHP to obtain a permit for the Lange I transmission pipeline.

All of these arguments fail. As stated, BHP has provided no evidence that would grant BHP the remedy of estoppel here. In fact, the following language is included on all inspection reports issued by Pipeline Safety Staff:

Please note the inspection conducted at your facility is limited to the specified code sections in the attached inspection checklist. The South Dakota Public Utilities Commission (SDPUC) did not examine overall system condition or operability and does not warrant the same under any condition. Other system or code compliance issues may exist. Failure to include such items in this

report does not prohibit future SDPUC action nor limit applicability in future inspections.

Zanter Affidavit, p. 2, ¶ 9. This language directly contradicts the notion that BHP is entitled to relief on the grounds of estoppel. It must also be repeated that whether or not the Lange I transmission pipeline requires a permit is a question of SDCL Chapter 49-41B and therefore would not be included in a pipeline safety inspection report.

BHP does not dispute that Lange I is a transmission pipeline. BHP does not claim that it ever obtained a permit. The fact that Lange I was constructed twenty-three years ago does not prevent Staff's pursuit of violations once it was discovered that BHP does not have a permit, and that fact also does not forego the need for a permit for the Lange I pipeline. Whether it would be wasteful or burdensome for BHP to obtain a permit for the Lange I pipeline, as BHP argues, is not relevant to the motion at hand.

For these reasons, BHP's argument that estoppel applies should be rejected, and the Commission must allow Staff's Complaint to move forward.

**3. Treating as true all facts pled in Staff's Complaint requires BHP's argument regarding the Lange II pipeline to fail.**

In the final section of BHP's Motion, BHP argues that the Lange II pipeline does not require a permit from the Commission and therefore would not be subject to the notification requirements alleged in Staff's Complaint. In this section, BHP's Motion disputes Staff's version of facts alleged in its Complaint relating to the planning and design of the Lange II pipeline. For this Motion, the Commission "must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496. For BHP to prevail in this Motion, BHP must prove that even if you accept that the facts pled in Staff's Complaint are true, Staff cannot win because the

law provides no relief for the matter at hand. Staff maintains that the facts pled in its Complaint are true, and the Commission must accept them as true in determining this Motion. Whether the Lange II pipeline is a transmission pipeline is a question of fact and law that requires testimony, briefing, and an ultimate decision from the Commission. BHP has not met its burden for the Commission to grant the Motion to dismiss on this point, and the Commission must reject the request.

### **CONCLUSION**

WHEREFORE, for all of the reasons listed above, BHP's Motion to Dismiss must fail. Staff respectfully requests the Commission deny BHP's Motion and allow the Complaint to proceed in full. If BHP makes new arguments not included in its Motion to Dismiss Answer to Complaint, filed on November 25, 2025, Staff reserves the right to respond.

Dated this 2<sup>nd</sup> day of January 2026.



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