STATE OF SOUTH DAKOTA	**)**	**IN THE CIRCUIT COURT**
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COUNTY OF HUGHES	**)**	**SIXTH JUDICIAL CIRCUIT**

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	*	CIV NO. 16-33
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IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-001, TRANSCANADA KEYSTONE PIPELINE, LP	*	**BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL**
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COMES NOW the Yankton Sioux Tribe (the "Tribe"), by and through undersigned counsel, and hereby submits the following as its Brief in Opposition to Motion to Supplement the Record on Appeal submitted by Appellee TransCanada Keystone Pipeline, LP ("Keystone").

I. BACKGROUND

The South Dakota Public Utilities Commission ("Commission") granted Keystone a permit for the Keystone XL Pipeline in 2010. Because pipeline construction did not commence within four years, in 2014, Keystone filed with the Commission a certification stating that it continued to meet the original permit conditions and a petition requesting acceptance of its certification. On January 21, 2016, the Commission issued a Final Decision and Order accepting Keystone's certification. The Tribe appealed. On March 16, 2016, the Commission transmitted the entire record of the proceedings to this Court, as required by SDCL § 1-26-33. Briefing on the appeal was completed in August, 2016, and this Court held a hearing on the merits on March 8, 2017. A decision has not yet been issued.

On March 24, 2017, Keystone sought leave to supplement the administrative record with the Department of State's Record of Decision and National Interest Determination ("Record of Decision") and the accompanying Presidential Permit.

II. LEGAL ARGUMENT

Keystone requests that this Court supplement the administrative record with the Record of Decision and Presidential Permit, erroneously relying on this Court's authority to "require or permit subsequent corrections or additions to the record" pursuant to SDCL § 1-26-33. This request is improper for two reasons. First and foremost, additional evidence cannot be added to the administrative record after the reviewing court hears the appeal. SDCL § 1-26-34. Second, this Court cannot review evidence that was not previously considered by the agency. *Id.*

First, the Record of Decision and Presidential Permit cannot be added to the administrative record because this Court has already heard the appeal. SDCL § 1-26-34 expressly provides that parties can only seek leave to present additional evidence "*before the date set for hearing.*" SDCL § 1-26-34 (emphasis added); *Div. of Human Rights ex rel. Miller v. Miller*, 349 N.W.2d 42, 44 n.1 (SD 1984), citing SDCL § 1-26-34 ("The statute places no time limit on the application for additional evidence other than that it be made 'before the date set for hearing.'").

As Keystone acknowledges, this Court heard the appeal on March 8, 2017. Keystone sought leave to supplement the administrative record on March 24, 2017. By the plain language of SDCL § 1-26-34, Keystone's application was too late.

Keystone attempts to circumvent this clear limitation by asserting that SDCL § 1-26-33, not SDCL § 1-26-34, governs the addition of new evidence. Although SDCL § 1-26-33 authorizes the court to permit additions to the record, SDCL § 1-26-34 provides the process for adding new evidence to the record. It is undeniable that the Record of Decision and Presidential Permit are new evidence—Keystone itself calls these documents "new evidence." Brief in Support of Motion to Supplement the Record on Appeal at 3. As these documents are additional evidence, the evidence can only be added to the administrative record pursuant to SDCL § 1-26-34.

Second, even if new evidence could be added to the administrative record at this point in

time, the evidence would need to first be taken before the Commission for it to consider. SDCL § 1-26-34 provides the procedure for adding new evidence to the administrative record. If the court finds "that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that *the additional evidence be taken before the agency* upon conditions determined by the court." *Id*. (emphasis added). Once the information is before the agency, the agency may "modify its findings and decision by reason of the additional evidence and shall *file that evidence and any modifications, new findings, or decisions with the reviewing court*. *Id*. (emphasis added). From the plain language of SDCL § 1-26-34, the Commission must review any new evidence before this Court can.

Keystone asserts that this Court can grant its request to supplement the administrative record without remanding the case to the Commission because "[t]his Court can affirm the Commission's decision for any reason that supports it." This argument is patently wrong. Courts reviewing agency decisions are limited to the administrative record. SDCL § 1-26-35 ("The review shall be . . . confined to the record."); *Clarke v. S.D. Real Estate Comm'n*, 255 N.W.2d 67, 71 (S.D. 1977). The administrative record is "the entire record of the proceeding under review," i.e., all information an agency received, considered, and produced when making its decision. SDCL § 1-26-33; SDCL § 1-26-21 ("The record in a contested case shall include . . . *Evidence received and considered*" (emphasis added)). The case Keystone cites in support of its assertion, *BAC Home Loans Servicing v. Trancynger*, 2014 S.D. 22, 847 N.W.2d 137, is inapplicable; it does not involve an administrative appeal or even discuss whether a reviewing court can consider evidence not available to the lower court. Moreover, the South Dakota Supreme Court has expressly noted that it is a procedural error for a circuit court to receive evidence not considered by the agency. *Div. of Human Rights ex rel. Miller v. Miller*, 349 N.W.2d 42, 44 n.1 (S.D. 1984) ("In granting leave to introduce additional evidence pursuant to SDCL § 1-26-34 the circuit court

did not order the additional evidence to be taken before the agency. Instead the evidence was received in circuit court. Neither party, however, urges the procedural error," implying that this approach was, in fact, procedural error).

For the reasons described herein, even if new evidence could be added to the administrative record at this late stage of the proceedings, the Record of Decision and the Presidential Permit could not be added to the administrative record without first bringing these documents before the Commission for the Commission to review.

Conclusion

At this stage, it is too late for additional evidence to be added to the administrative record. Additionally, even if the new evidence could supplement the record, the evidence would first need to be taken before the Commission for its review. Therefore, the Tribe respectfully requests that Keystone's motion be denied.

DATED this 7th day of April, 2017

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