IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

* * * *

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001,
IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR AN ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

* * * *

CIV16-33 (32CIV16-000033)

* * * *

REPLY BRIEF TO INTERTRIBAL COUNCIL ON UTILITY POLICY'S BRIEF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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PRELIMINARY STATEMENT

Appellant Intertribal Council On Utility Policy will be referred to as "COUP," or Appellant." Appellee, the South Dakota Public Utilities Commission, will be referred to as the "Commission." Appellee, TransCanada Keystone Pipeline, LP, will be referred to as "Keystone." The 39 persons who were granted intervention in the case and did not withdraw as parties will be referred to collectively as "Intervenors." The Petition for Order Accepting Certification under SDCL § 49-41B-27 filed by Keystone on September 15, 2014, will be referred to as the "Petition." The Keystone XL Pipeline project will be referred to as the "Project" or "Keystone XL." The Appendix to this brief will be referred to as "Apx" with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as "AR" followed by the appropriate page number(s). The transcript of the administrative evidentiary hearing held before the Commission on July 27-31, 2015, and continuing August 1 and 3-4, 2015, will be referred to as "TR" followed by the page number(s). Exhibits offered into evidence at the evidentiary hearing will be referred to as "Ex" followed by the exhibit number and page number(s) where appropriate. The Final Decision and Order; Notice of Entry issued by the Commission in Docket HP14-001 on January 21, 2016, will be referred to as the "Decision." Apx A41-A68. The Amended Final Decision and Order; Notice of Entry issued by the Commission in Docket HP09-001on June 29, 2010, will be referred to as the "KXL Decision." Apx A2-A39. The 50 conditions set forth by the Commission in Exhibit A to the KXL Decision will be referred to as the "KXL Conditions" followed by the Condition number(s) when a specific condition or conditions are referenced. Apx A26-A39. References to the United States Department of State's Final Supplemental Environmental Impact Statement will be referred to as

"FSEIS" followed by the appropriate Volume and Chapter number or Appendix letter followed by the section and/or page number where appropriate. The entirety of the administrative record for Docket CIV16-33, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Civil Dockets, 2016 Civil Dockets, CIV16-33 at the following link: http://puc.sd.gov/Dockets/Civil/2016/civ16-33.aspx. The entirety of the administrative record for Docket HP14-001, except for confidential documents and certain transcripts, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Hydrocarbon Pipeline Dockets, 2014 Hydrocarbon Pipeline Dockets, Docket HP14-001 at the following link: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx . The entirety of the administrative record for Docket HP09-001, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Hydrocarbon Pipeline Dockets, 2009 Hydrocarbon Pipeline Dockets, Docket HP09-001 at the following link: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2009/hp09-001.aspx. The entirety of the FSEIS may be accessed electronically on the U.S. Department of State's website at: https://keystonepipeline-xl.state.gov/documents/organization/221244.pdf. The Appendix to this brief includes the following documents: (1) HP09-001 Amended Final Decision and Order; Notice of Entry, Apx A2-A40, (2) HP14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry, Apx A41-A68, (3) SDCL 1-26-36, SDCL 49-41B-24 and SDCL 49-41B-27.

JURISDICTIONAL STATEMENT

Appellant appealed to this Court from the Commission's Final Decision and Order; Notice of Entry in Docket HP14-001, issued January 21, 2016. Apx A41-A68. This appeal is taken pursuant to SDCL 1-26-30 and 1-26-30.2. The Circuit Court has jurisdiction over this case pursuant to SDCL 1-26-30.2 and 1-26-30.4. The venue of this action properly lies in Hughes County pursuant to SDCL 1-26-31.1.

STATEMENT OF ISSUES

I. Whether the Commission's construction of the term "conditions" in SDCL 49-41B-27 in *pari materia* with SDCL 49-41B-24 was arbitrary and capricious because it was based on personal, selfish, or fraudulent motives, or on false information, and whether the Commission employed well established principles of statutory construction and correctly concluded that the conditions addressed by SDCL 49-41B-27 are the 50 conditions set forth in the KXL Decision?

The Commission properly construed SDCL 49-41B-27 *in pari materia* with SDCL 49-41B-24 and therefore correctly concluded that the conditions addressed by SDCL 49-41B-27 are the 50 conditions set forth in the KXL Decision.

II. Whether the Commission's interpretation of SDCL 49-41B-27 was arbitrary and capricious and renders the statute meaningless or creates a permit that is never-ending and lasts in perpetuity?

The Commission's interpretation of SDCL 49-41B-27 comports with judicially recognized principles of statutory construction, and does not render the statute meaningless or create a permit that exists in perpetuity.

III. Whether the Commission correctly applied the burden of proof and whether sufficient evidence was presented by Keystone to support the Commission's Decision?

The Commission properly concluded that the instant proceeding is not a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001, and the Commission correctly applied the burden of proof.

IV. Whether sufficient evidence was presented at hearing to support the Commission's Decision?

The Commission's Decision to accept Keystone's Certification as conforming to the requirements of SDCL 49-41B-27 was based on substantial evidence introduced at a hearing lasting nine days resulting in a transcript consisting of 2,507 pages and a record containing dozens of exhibits.

V. Whether in its Decision accepting Keystone's certification, the Commission correctly concluded that Keystone continues to comply with all permit conditions, or in the case of prospective conditions, has the capability and intent to comply with such conditions, although the federal presidential permit was denied by the U.S. Department of State?

The Commission determined that Keystone is either currently compliant with non-prospective conditions, is in the process of complying to the extent possible at this time with partially prospective conditions, and has the capability to comply with prospective conditions, including Condition 2, by making another application for a Presidential Permit in the future as it has already done once previously.

VI. Whether the South Dakota licensure of Keystone's engineering witness to seal and certify certain drawings of crossings received in evidence in docket HP09-001 is at issue in this proceeding and whether such drawings violate SDCL Chapter 36-18A?

Preliminary design evidence admitted by the Commission in Docket HP09-001 as sufficient for purposes of the permitting proceeding is not at issue in this proceeding due to the *res judicata* principle and the statutory language and intent of SDCL 49-41B-27 since it has no bearing on Keystone's current compliance with the KXL Conditions. Further, the Commission's expertise does not involve the oversight of engineering licensure and enforcement and although the Commission's expertise does not involve the oversight of engineering licensure and enforcement, it would appear to the Commission that the activities performed by Keystone's witnesses in either this proceeding or in Docket HP09-001 did not constitute violations of SDCL Chapter 36-18A.

VII. Whether the Commission's preclusion of evidence regarding climate change constituted reversible error?

The Commission correctly precluded evidence of climate change. None of the 50 KXL Conditions deals with climate change. None of the Findings of Fact in the KXL Decision deal with climate change. No evidence was introduced by any party in the Docket HP09-001 proceedings concerning climate change.

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Intervenor Intertribal Council On Utility Policy on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled "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." The Commission granted intervention to all forty-two persons and organizations that applied for intervention, three of whom subsequently withdrew. The Commission heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, Apx A41-A68, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

"[Q]uestions of law, including statutory interpretation, are reviewed de novo." *Pesall v. Montana Dakota Util. Co., et al.*, 2015 S.D. 81, ¶ 6, 871 N.W.2d 649.

The Commission's "findings of fact are reviewed under the clearly erroneous standard . . . A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on factual questions. *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228-229. "Factual findings can be overturned only if we find them to be 'clearly erroneous' after considering all the evidence. SDCL 1-26-36; *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987). Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them." *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. On factual issues, courts "give great weight to the findings and inferences made by the agency on factual questions." *Woodcock v. City of Lake Preston*, 2005 SD 95, ¶ 8, 704 N.W.2d

32, 34. The requirement in SDCL 1-26-36(5) that the Court is to look at the whole record, does not, however, allow the Court to substitute its judgment for the Commission's judgment as to the weight of evidence on questions of fact. *City of Brookings v. Department of Environmental Protection*, 274 N.W.2d 887, 890 (S.D. 1979).

I.

THE COMMISSION'S CONSTRUCTION OF THE TERM "CONDITIONS" IN SDCL 49-41B-27 *IN PARI MATERIA* WITH SDCL 49-41B-24 WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE IT WAS NOT BASED ON PERSONAL, SELFISH, OR FRAUDULENT MOTIVES, OR ON FALSE INFORMATION, BUT RATHER EMPLOYED WELL ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION AND CORRECTLY CONCLUDED THAT THE CONDITIONS ADDRESSED BY SDCL 49-41B-27 ARE THE 50 CONDITIONS SET FORTH IN THE KXL DECISION.

The record in this case simply does not support COUP's contention that the Commission's Decision in this case was arbitrary and capricious. The South Dakota Supreme Court has set forth the standard for concluding that an agency's action was arbitrary and capricious as follows:

> "'An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.'" *Huth v. Beresford Sch. Dist. # 61–2*, 2013 S.D. 39, ¶ 14, 832 N.W.2d 62, 65 (quoting *Hicks v. Gayville–Volin Sch. Dist.*, 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73).

In re Jarman, 2015 S.D. 8, 860 N.W. 2d 1. In its brief, COUP did not point to any record evidence of "personal, selfish, or fraudulent motives," or "false information" that it's basing its claim of arbitrary and capricious decision-making on. The reason is simple. It doesn't exist.

The record in this case clearly demonstrates the opposite, i.e., that the Commission entertained a very large number of Intervenor procedural and discovery motions over a many month period, which required the Commission to hold a very large number of motion hearings

and required Keystone to produce an enormous quantity of documents. The Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages. The Commissioners' questions and comments during the evidentiary hearing and at the decision action meeting on January 5, 2016, clearly show that the Commissioners took this process very seriously and did their utmost to afford Intervenors the opportunity to participate fully and fairly and to ensure that the Decision was based on sound evidence and legal principles. See e.g. TR 1286-1296 (AR 025765-025775); Decision meeting transcript (AR031653-031663). The fact that the Decision doesn't deliver the outcome that COUP desires doesn't render the Commission's process and Decision arbitrary and capricious.

In terms of statutory construction, the South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "Further, the Legislature has commanded that '[w]ords used [in the South Dakota Codified Laws] are to be understood in their ordinary sense [.]'" SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. The South Dakota Supreme Court has further held that: "[s]tatutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of persons or

things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683.

The Commission's construction of SDCL 49-41B-27 is in accord with these South Dakota statutes and case law precedent. First, in terms of the plain meaning principle, the statute at issue, SDCL 49-41B-27 states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." The phrase "conditions upon which the permit was issued" would appear to mean the 50 KXL Conditions attached as Exhibit A to the KXL Decision.

In terms of the *in pari materia* principle, it seems clear to the Commission which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

> Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

> 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. (emphasis supplied)

In this case "the same . . . thing, the same class of . . . things, or . . . the same purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly

authorized in SDCL 49-41B-24 in the group of related statutes located together in SDCL Chapter 49-41B. The Commission believes it properly construed the term "conditions" as employed in SDCL 49-41B-27 as the 50 KXL Conditions which the Commission imposed in granting Keystone the permit to construct the Keystone XL Project in Docket HP09-001.

II.

THE COMMISSION'S INTERPRETATION OF SDCL 49-41B-27 WAS NOT ARBITRARY AND CAPRICIOUS AND DOES NOT RENDER THE STATUTE MEANINGLESS OR CREATE A PERMIT THAT IS NEVER-ENDING AND LASTS IN PERPETUITY.

As set forth above, the Commission's construction and interpretation of SDCL 49-41B-27 was not arbitrary and capricious. There is nothing in the record supporting a finding of arbitrary and capricious conduct by the Commission or any Commissioner.

As far as rendering the statute meaningless, the fact that the Commission determined that under the plain language of SDCL 49-41B-27, a proceeding under such statute does not require a re-adjudication of the permitting proceeding under SDCL 49-41B-22 does not render the statute meaningless. In terms of statutory construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to establish that:

(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will 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.

SDCL 49-41B-22. If the Legislature had intended for that to be required it would have said so or would have stated that after four years, the facility permit holder must reapply for a new permit under SDCL 49-41B-22. As discussed above, the clear *in pari materia* construction of SDCL 49-41B-27 is that the "conditions" referred to are the "conditions" to which the permit was made subject under the KXL Decision.

This proceeding is not, however, a retrial of the permit proceeding conducted in 2009 and 2010 in Docket HP09-001. The Commission's Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

> An unappealed administrative decision becomes final and should be accorded res judicata effect. See *Joelson v. City of Casper, Wyo.*, 676 P.2d 570, 572 (Wy 1984) (if judicial review is granted by statute and no appeal is taken, the decision of an administrative board is final and conclusive); *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (final adjudicatory decision of administrative agency is regarded as res judicata).

Jundt v. Fuller, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. Apx A2-A39.

Does this render SDCL 49-41B-27 and the Commission's proceedings thereunder meaningless? It does not. The purpose of the statute is to require the permit holder to "certify" that it continues to meet the conditions applicable to the permit, or with respect to prospective conditions, has the capability and intention to meet such conditions. This provides the Commission with assurance that the KXL Conditions under which the permit was issued are not being violated.

As far as COUP's assertion that this creates a permit that is never-ending and lasts in perpetuity, such is not the case. At such time as the Commission were to determine that Keystone

will not be able to obtain the necessary permits required for construction under KXL Condition 2, Apx A26, #2, that would enable it to undertake the construction and operation of the Project, the Commission could take action under SDCL 49-41B-33(2) to revoke the permit.

III.

THE COMMISSION CORRECTLY APPLIED THE BURDEN OF PROOF AND SUFFICIENT EVIDENCE WAS PRESENTED BY KEYSTONE TO SUPPORT THE COMMISSION'S DECISION.

The statute at issue in this proceeding, SDCL 49-41B-27, states:

> 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. (emphasis supplied)

The statute states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." In terms of statutory construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to establish that:

(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will 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.

SDCL 49-41B-22. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word "establish," the word "prove," or the word "demonstrate." The language

of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute. The Legislature would certainly also have known how to state "the permit holder must reapply for a permit under SDCL 49-41B-11 and meet the criteria set forth in SDCL49-41B-22."

As previously stated, the South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "Further, the Legislature has commanded that '[w]ords used [in the South Dakota Codified Laws] are to be understood in their ordinary sense [.]'" SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621.

The word "certify" is a precise and narrow verb. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Black's Law Dictionary (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." *Id.*; *Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d at 480 ("Words and phrases in a statute must be given their plain meaning and effect."). Thus,

under the plain meaning of the language of the statute, Keystone's obligation under SDCL 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50 KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. COUP's statement that "TransCanada's burden was to certify . . . with substantial evidence" is simply utter nonsense.

On September 15, 2014, Keystone submitted a Certification to the Commission signed by Corey Goulet, the president of Keystone Projects, the corporate entity in charge of constructing the Keystone XL Pipeline project under the permit issued in Docket HP09-001 for which the Certification was made. Based on the language of SDCL 49-41B-27, it is certainly arguable that nothing more needed to be done, absent the initiation of a proceeding by action of the Commission or the complaint of another person. SDCL 49-41B-27 does not even explicitly require the Commission to open a docket proceeding to consider whether to "accept" the certification as compliant with the statute.

Although the Certification standing alone would seem to have met the "must certify" requirement set forth in SDCL 49-41B-27, Keystone also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with a Quarterly Report of the status of Keystone's activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8, Apx 27 and 26, #8, and a tracking table of minor factual changes that had occurred since the Commission's issuance of the KXL Decision attached as Appendices B and C, respectively. Due to Keystone's simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission's prior history of

handling the receipt of certifications, the Commission opened a docket to consider Keystone's Petition and Certification.

In terms of burden of proof, since Keystone's obligation under SDCL 49-41B-27 is to "certify" means that Keystone met its burden under the statute by filing with the Commission a certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must "certify," Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. As the Federal Communications Commission stated in a certification proceeding before it:

> Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17 Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a

case involving the validity or accuracy of the certification lies with the parties challenging the certification.

IV.

SUFFICIENT EVIDENCE WAS PRESENTED AT HEARING TO SUPPORT THE COMMISSION'S DECISION

If the Court determines that the Certification standing on its own is insufficient to shift the burden of production to Intervenors, however, the Commission believes that sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. Keystone did not rest on its Certification standing alone. Along with its Certification, Keystone submitted the Petition and the accompanying three informational appendices at the time of initial filing, fourteen sets of pre-filed direct, rebuttal, and surrebuttal testimony for eight witnesses, nine of which were admitted in evidence as exhibits, and the evidentiary hearing testimony of seven witnesses lasting nearly six days.

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision and Order entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." Substantial evidence '"does not mean a large or considerable amount of evidence ...,' *Pierce*, 487 U.S. at 564-65, 108 S.Ct. at 2549, 101 L.Ed.2d at 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. at 217, 83 L.Ed. at 140." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775

(S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

Corey Goulet, the certifying officer for Keystone, spent approximately eight hours on the witness stand and testified that Keystone continues to meet, or with respect to prospective conditions will be able to meet, and has made a commitment to meet, the 50 KXL Conditions. Since the vast majority of the KXL Conditions are prospective and cannot be performed until the construction and operational phases of the Project, Mr. Goulet testified that Keystone intended to fully comply and "meet" such prospective conditions at the appropriate time. TR 151 (AR 024109); TR 512-514 (AR 024643 – 024645); Ex 2001, #15 (AR 020505). With respect to conditions that don't come into action until the future, there is really no more that the permit holder can produce to demonstrate that its intention is to fully comply with all such permit conditions at the time they come into being as active conditions. As to Intervenors' argument that the Decision should be overturned because Keystone did not produce substantial evidence specific to each prospective condition that it will be able to meet such prospective conditions in the future at the appropriate time for each such condition, such an argument is tantamount to an interpretation that a certification is essentially a retrial of the original permit proceeding. If the Legislature had intended such a construction, it would not have employed in SDCL 49-41B-27 the phrase "certify that it continues to meet the conditions upon which the permit was issued," but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4, Apx A26, #4, is not at issue because there is no evidence in the record, or knowledge of the Commission, of a

proposed transfer of the permit. Conditions 7 through 9, Apx 27-28, #7, 8, and 9, require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Keystone XL appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone's appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed five annual reports and twenty-three quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

With respect to the remaining conditions that are not prospective, or at least not fully prospective, the record demonstrates that Keystone has taken steps to comply with such conditions to the extent feasible at this stage of the process. Condition 10, Apx A28, #10, requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that, despite the fact that it is likely significantly more than six months before construction will commence, it has already started making some of those contacts and will continue. TR 662 (AR 024793), 827 (AR 025248), 1292 (AR 025771), 2395 (AR 027282), 2405 (AR 027292), 2409 (AR 027296), 2447 (AR 027334); Petition, Appendix B, Condition 10. Apx A28, #10. Intervenors presented no evidence indicating this wasn't the case.

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting

Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, #15.

Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees will be done as part of the process of acquiring easements. TR 151 (AR 024109); Petition, Appendix B, Condition 19; Apx A31, #19. There is no evidence that Keystone has failed to comply with this condition or is unable or unwilling to comply with this condition.

Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662 (AR 024793), 670 (AR 024801), 699 (AR 024830), 718 (AR 024849)); Apx A35, #34. Intervenors produced no evidence that this process is not ongoing or will not continue to be so, but rather focused on whether Keystone had sought out local knowledge from tribes, particularly the Cheyenne River Sioux Tribe.

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks. Keystone presented evidence that this process is ongoing. TR 630 (AR 024761), 637 (AR 024768); Petition, Appendix B, Condition 41; Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains

evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965; Ex 1003. Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978. She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307. Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306-307, 1975-1976 (AR 024304-024305, 026779-026780). There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the

complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. It is the Commission, as the adjudicatory fact finder under SDCL 1-26-36, who is to determine what credibility and weight to give the evidence in this case. It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its decision, that the Commission took this matter seriously. Intervenors simply did not provide any evidence indicating that Keystone does not currently comply with Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

V.

IN ITS DECISION ACCEPTING KEYSTONE'S CERTIFICATION, THE COMMISSION CORRECTLY CONCLUDED THAT KEYSTONE CONTINUES TO COMPLY WITH ALL PERMIT CONDITIONS, OR IN THE CASE OF PROSPECTIVE CONDITIONS, HAS THE CAPABILITY AND INTENT TO COMPLY WITH SUCH CONDITIONS, ALTHOUGH THE FEDERAL PRESIDENTIAL PERMIT WAS DENIED BY THE U.S. DEPARTMENT OF STATE.

The Commission does not believe its responsibilities under SDCL 49-41B-27 involve an exercise of discretion but rather a factual and legal determination of whether the applicant has met the standard set forth in SDCL 49-41B-27 which states:

> 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. (emphasis supplied)

This is a case of first impression regarding this statute. No previous filing under this statute has been contested before the Commission or appealed to the Circuit Court. The term "discretion" is typically characterized by specific language conferring discretion, see e.g. SDCL 49-41B-20, or by the use of the word "may" in terms of the decision-making authority delegated to the agency. *In re Application of Benton*, 691 N.W. 2d 598, ¶ 20, (2005 S.D. 2) (citing *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 625 (S.D. 1993)). There is nothing in the language of SDCL 49-41B-27 indicating that the Commission has discretionary authority to disallow or reject a certification submitted by an existing facility permit holder[1]; rather, the Commission's role is to determine, based on the certification itself and other evidence presented in a case where the certification is contested, whether the certification should be accepted as valid and accurate.

Keystone submitted a Certification to the Commission signed by Corey Goulet, the president of Keystone Projects, the corporate entity in charge of constructing the Keystone XL Pipeline project under the permit issued in Docket HP09-001 for which the Certification was

[1] The Legislature has specifically delegated discretion to the Commission in several of the statutes found within SDCL Chapter 49-41B. See e.g. 49-41B-3(4): "Any other relevant information as may be requested by the commission."; 49-41B-12: "If the commission determines that an environmental impact statement should be prepared"; 49-41B-13: "at the discretion of the Public Utilities Commission"; 49-41B-14; "The Public Utilities Commission may require" and "The commission . . . may also request"; 49-41B-20: "at the discretion of the commission"; 49-41B-22.2: "the Public Utilities Commission may in its discretion decide"; 49-41B-23: "The Public Utilities Commission may waive"; 49-41B-24: "as the commission may deem appropriate"; 49-41B-25: "as the commission may deem appropriate"; 49-41B-33; "A permit may be revoked or suspended by the Public Utilities Commission"; and 49-41B-35: "Rules may be adopted by the commission."

made. Keystone also submitted a Petition for Order Accepting Certification under SDCL § 49-41B-27 in support of the Certification and supporting Appendices. Based on the language of SDCL 49-41B-27, it is certainly arguable that nothing more needed to be done, absent the initiation of a proceeding by action of the Commission or the complaint of another person. The Commission, however, opened a docket for consideration of the certification, and ultimately, after the Certification was contested by Intervenors, Keystone presented testimony from seven witnesses and introduced a number of exhibits at the evidentiary hearing in support of the validity of the Certification.

With respect to the denial of Keystone's outstanding Presidential Permit application by the Department of State, the Commission determined that this does not demonstrate that the Project fails to continue to meet Condition 2 of the KXL Decision. Apx A26, #2. Condition 2 states that "Keystone shall obtain . . . all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State . . ." It does not state that Keystone "has obtained" a Presidential Permit. It is a prospective condition, and there is no evidence in the record demonstrating that Keystone will be unable to apply for and obtain a Presidential Permit in the future.

All major siting projects permitted by the Commission have required additional permits beyond those issued by the Commission, and the Commission has approved permits to construct for all recent siting dockets before all other jurisdictional permits/approvals were obtained. See e.g. Dockets HP09-001, HP07-001, EL13-020, EL13-028, EL14-061, and EL15-020. Permit applicants must be afforded the opportunity to seek permits and approvals from multiple jurisdictions and governmental agencies sequentially in order to avoid the impractical reality of

having the dozens of permits and approvals required to construct and operate a project such as Keystone XL conducted simultaneously or in some form of multi-jurisdictional proceeding. Prospective conditions make sense. An absurd result would inevitably occur otherwise.

Keystone has previously had an application for a Presidential Permit denied, and this did not prevent Keystone from reapplying, which it did. If Keystone does not apply for and obtain a Presidential Permit in the future, it will not be able to construct the Project under the permit issued in Docket HP09-001, provided the Executive Orders cited in Condition 2 remain in force.

Lastly, the South Dakota Legislature considered Senate Bill 134 in the 2016 Legislative Session which would have amended SDCL 49-41B-24 to require that an applicant seeking a facility permit that requires a Presidential Permit must obtain such Presidential Permit before the Commission could grant such facility a permit to construct. The bill was defeated before the Senate Commerce and Energy Committee.[2]

The Commission's Decision in this matter did not involve an exercise of discretion, but rather a decision based on the Certification filed by Keystone and the evidence introduced into the record by Keystone and the other parties. If the Court determines that an exercise of discretion was involved, the Commission did not abuse such exercise of discretion. The Commission's Decision validating and accepting Keystone's Certification should not be overturned because Keystone has not yet obtained a governmental permit that Condition 2 requires it to obtain in the future before commencing construction. Apx A26, #2.

VI.

[2] See: http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=134&Session=2016

THE SOUTH DAKOTA LICENSURE OF KEYSTONE'S ENGINEERING WITNESS TO SEAL AND CERTIFY CERTAIN DRAWINGS OF CROSSINGS RECEIVED IN EVIDENCE IN DOCKET HP09-001 IS NOT AT ISSUE IN THIS PROCEEDING AND SUCH DRAWINGS DID NOT VIOLATE SDCL CHAPTER 36-18A

First, as discussed previously, this proceeding is not a re-adjudication of Docket HP09-001 which is the proceeding in which the drawings referred to by COUP where introduced in evidence.

Second, although the Commission's expertise does not involve the oversight of engineering licensure and enforcement, it would appear to the Commission that the activities performed by Keystone's witnesses in either this proceeding or in Docket HP09-001 did not constitute violations of SDCL Chapter 36-18A. First of all, SDCL 36-18A-9 explicitly states:

> This chapter does not apply to:
>
> (5) Any full-time employee of a corporation, partnership, firm, business entity, or public utility while exclusively doing work for the corporation, partnership, firm, business entity, or public utility, if the work performed is in connection with the property, products, and services utilized by the employer and not for any corporation, partnership, firm, or business entity practicing or offering to practice architectural, engineering, landscape architecture, or land surveying services to the public.

Furthermore, in terms of the seal on the crossing drawing referenced by Chairman Nelson at hearing and concerning which COUP questioned Keystone witnesses King and Kothari at hearing, such drawings were preliminary maps, not final design phase maps. Docket HP09-001 Exhibits TC-1 and TC-14. The Keystone XL Conditions explicitly recognize the preliminary stage of design prior to route finalization. KXL Condition 6. Apx A27, #6. SDCL 36-18A-45 requires a licensee signature, seal, and date as follows:

> The seal, signature, and date shall be placed in such a manner that can be legibly reproduced on the following:

(1) All originals, copies, tracings, electronic submittals, or other reproductions of all final drawings, specifications, reports, plats, plans, land surveys, design information, and calculations prepared by the licensee or under the licensee's responsible charge when presented to a client or any public or governmental agency. (emphasis supplied)

As Keystone's witness Kothari testified, the final actual detail construction designs are done by special engineers under contract. TR 1372 (AR 025929). The Commission would also note that the drawing to which the parties were referring states on it "Trow Engineering Consultants Inc." who would appear to be the firm that actually prepared the drawing and would also note that the more detailed drawing introduced as Exhibit TC-14, Waterbody Crossings, and was produced in response to Staff's Data Request No. 1 appears to have had additional refinement done on it and also states "Trow Engineering Consultants Inc." as the preparing entity. The admission into evidence in Docket HP09-001 of preliminary design drawings does not constitute reversible error by the Commission in its Decision in Docket HP14-001.

VII.

THE COMMISSION'S PRECLUSION OF EVIDENCE REGARDING CLIMATE CHANGE DID NOT CONSTITUTE REVERSIBLE ERROR

On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses precluding COUP from offering the testimony of COUP's proposed witnesses Dr. James Hansen, Dr. George Seielstad, and Dr. Robert Oglesby. The basis for the Commission's decision to grant the motion was that the testimony of these witnesses dealt with climate and climate change and that this evidence was beyond the scope of this certification proceeding.

None of the 50 KXL Conditions deals with climate change. None of the Findings of Fact in the KXL Decision deal with climate change. No evidence was introduced by any party in the Docket HP09-001 proceedings concerning climate change. Although KXL Condition 25, Apx A34, #25, requires Keystone to develop any adverse weather plan to minimize construction effects from adverse weather conditions, this condition does not in any way address or point to climate change. Since none of the KXL Conditions deal at all with climate change, the Commission's disallowance of the proffered evidence on relevancy grounds was not an erroneous ruling by the Commission. As addressed several times already in this brief, this proceeding is not a re-adjudication of the permit issuance in Docket HP0-001.

Does this mean that climate change will not have any effect on the KXL Project's ability to commence construction and operation under the permit issued in Docket HP0-001? No, it does not. As has already occurred, the Presidential Permit currently required by KXL Condition 2 was denied by the U.S. Department of State due to concerns about climate change. The issue of CO2 emissions and their effect on climate may affect other agency policies and permit proceedings, required by KXL Condition 2, such as DENR permits. These policy decisions are not, however, within the province of this proceeding which deals with Keystone's Certification that it continues to meet the 50 KXL Conditions.

VIII. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Decision and adopt the Commission's Findings of Fact and Conclusions of Law as this Court's findings of fact and conclusions of law.

Dated this 19th day of July, 2016

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