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

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP, FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	)	32 CIV. 16-33 **APPELLANT INTERTRIBAL COUNCIL ON UTILITY POLICY REPLY BRIEF**

ON APPEAL FROM THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-001

FOR INTERTRIBAL COUNCIL ON UTILITY POLICY

The Intertribal Council On Utility Policy submits this reply brief in response to the Reply Brief filed by the Appellees TransCanada Keystone Pipeline, LP ("TransCanada") following Intertribal COUP's appeal of the South Dakota Public Utilities Commission's Final Decision and Order Finding Certification Valid and Accepting Certification (the "Order") entered on January 21, 2016 in favor of TransCanada in Commission Docket No. HP14-001.

STANDARD OF REVIEW

Questions of fact are reviewed under a clearly erroneous standard. *Therkildsen v. Fisher Bev*., 1996 SD 39, P8; 545 N.W.2d 834, 836; *Lindquist v. Bisch*, 1996 SD 4, P16; 42 N.W.2d 138, 141. Questions of law, including statutory construction, are reviewed de novo. *West Two Rivers Ranch v. Pennington County*, 1996 SD 70, P6; 549 N.W.2d 683, 685. As the questions here are primarily matters of statutory interpretation, which are reviewed under the de novo standard. *Wharf Resources v. Farrier,* 1996 SD 110, P5; 552 N.W.2d 610, 612.

ARGUMENT

Shifting the Burden of Proof

The burden of proof in this PUC proceeding for certification under SDCL §41-49B-27 was clearly on TransCanada. ARSD §20:10:01:15.01. TransCanada has had the burden to certify that it continues to meet all conditions incorporated into the permit issued in HP 09-001 with substantial evidence. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816, 822 (SD. 2011); *Therkildsen v. Fisher Bev.*, 545 N.W.2d 834 (1996). Throughout the Appellees' Reply Brief, TransCanada continues its Keystone XL handstand maintaining with regard to their having met their burden of proof through the mere filing of a written 'certification' and thereby, magically, shifting that burden to the Intervenors.

> Under the statute (SDCL §41-49B-27), **we could have said we certify and at that moment the burden of proof shifts** to **anyone who wants to contest that certification** to come forward with affirmative proof that there are conditions in our permit issued in 2010 that we cannot meet. And **they have to provide permanent proof** of that. Tr. at 2467 (emphasis added).

TransCanada apparently only humored the Commission's hearing procedure with their parade of Canadian non-U.S. licensed or registered engineers and corporate representatives, who were to supposed to provide testimony and evidence in support of compliance, but in reality added precious little as to the contribution of substantial evidence beyond long-winded expressions of hope and their sincerest promises of pending 'capability and intent to comply' with "prospective", but currently unmet conditions sometime in an undetermined future. TransCanada Reply Brief at 4, 11, 17, 18, 21, 23,24.

While this TransCanada litany of 'partially' and 'fully prospective' conditions provided no substantial evidence of compliance, it is supported by the knotty mantra of "Intervenors presented no evidence indicating this wasn't the case." TransCanada Reply Brief at 18; "There was no evidence that Keystone has not complied or cannot comply …" TransCanada Reply Brief at 20;

"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." TransCanada Reply Brief at 21.

Prospective Conditions

No where do these hollow promises of prospective compliance ring louder than with their multiple attempts to comply with Condition #2, the Presidential Permit, which, has the only substantial evidence submitted with regard to any of the Condition, and the evidence demonstrated only their capacity to fail twice at attempted compliance. The fact that their permit applications have been twice denied and that there are no pending attempts at a third application in the eighth year out from their original South Dakota application – was hardly given sufficient weight by the Commission. *Johnson v. Lennox School Dist. No. 41-4*, 2002 S.D. 89 at ¶30, 649 N.W.2d at 625 ("the Board's decisions relies on factors not intended to be considered, fails to consider an important aspect of the problem, is counter to the evidence, (and) is… implausible. This renders the decision arbitrary and capricious, warranting reversal"); cf. *Matter of Solid Disposal, Etc.,* 295 N.W.2d at 331-332 (record included substantial evidence supporting all criteria for approval of permit).

TransCanada asserts its imagined compliance only through the press of the double negatives of shifted burdens, in that:

> 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. (Emphasis added)

The clear and simple fact is that the South Dakota PUC failed to properly confer evidentiary weight to the denial of the Presidential Permit, but instead found Condition #2 to be prospective, not requiring compliance. *Johnson v. Lennox School Dist. #41-4,* 2002 SD at ¶30, 649 N.W.2d at 625. This double talk only underscores the arbitrary and capricious nature of the Commission's decision to accept the certification, and warrants this Court to reverse that decision.

Unsigned Design Phase Maps

Appellees have characterized Appellant's objection to their gymnastic feat of standing TransCanada's burden on its head, as "tantamount to an interpretation that a certification is essentially a retrial of the original permit proceeding." TransCanada Reply Brief at 17.

The suggestion of "a retrial of the original permit proceeding" while not what COUP requested, is, in fact, not a bad idea, since that would allow the opportunity to address the fact that the unsigned, partial, preliminary, not final design phase maps and engineering designs wrongly submitted, accepted and approved in the original 2009 permit application might be brought into legal compliance. Relying on unsigned engineering drawings by unknown and unregistered professional engineers should invalidate the underlying permit under state law as a demonstrated lack of legal compliance with the underlying conditions as well as the certification of those conditions in this matter. The timing of the 'retrial' might be best set for a point in the future when TransCanada hold a valid federal Presidential Permit.

The 'Never Ending' Permit

TransCanada denies the 'never-ending' 'forever stamp' nature of the certification process under SDCL 49-41B under their reading of the law:

> 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. TransCanada Reply Brief at 11-12.

With the Commission's decision to accept and approve TransCanada's certification, the question remains open now: What happens when four more years expire and no construction is commenced? Is there a requirement for another round of certifications? The current law does not address that. This court can and must, but sending TransCanada back to the PUC with the burden of filing a new permit application when it holds a Presidential Permit.

CONCLUSION

Based upon the foregoing and TransCanada's arguments notwithstanding, this court should reverse the PUC decision and remand this matter back to the PUC for a denial of the certification.

Respectfully submitted this 29th day of February 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2016, the foregoing Appellant COUP's Reply Brief was filed with the Office of the Clerk of Hughes County Circuit Court, via the Odyssey system and that a true and correct copy of the same was served upon the following via email or first class US Mail, postage prepaid:

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