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

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| IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE | * * * * * * * * * * * * | 32CIV. 16-000033<br><br>**CHEYENNE RIVER SIOUX TRIBE OPENING BRIEF** |

## I. JURISDICTIONAL STATEMENT

On September 15, 2014 TransCanada submitted Petition for Order Accepting Certification Under SDCL §49-41B-27 to the South Dakota Public Utilities Commission. The South Dakota Public Utilities Commission opened docket HP14-001 to consider TransCanada's Petition. The Cheyenne River Sioux Tribe filed for intervention in docket HP14-001 on October 15, 2014. The South Dakota Public Utilities Commission held a contested evidentiary hearing on the matter and on January 21, 2016 the Public Utilities Commission issued its Final Decision and Order Finding Certification Valid and Accepting Certification. Having exhausted all administrative remedies the Cheyenne River Sioux Tribe filed Notice of Appeal on February 19, 2016, filed Issues of Appeal on February 29, 2016, and now submits this Appellate Brief pursuant to its rights under SDCL § 1-26-30; SDCL § 1-26-30.2; and SDCL § 1-26-31.1.

## II. STATEMENT OF LEGAL ISSUES

The legal issues that the Cheyenne River Sioux Tribe raises on this appeal are as follows:

1. Whether the Public Utilities Commission's Final Decision and Order Finding Certification Valid and Accepting Certification is arbitrary and capricious because TransCanada Keystone XL Pipeline LP ("Keystone") failed to submit any substantive evidence during the evidentiary hearing upon which the Commission could base its decision to accept Keystone's Petition for Certification submitted pursuant to SDCL§ 49-41B-27;
2. Whether the Public Utilities Commission's rejection of Appellants' November 9, 2015 Motion to Dismiss is arbitrary and capricious because reasoning that condition number two in the Amended Final Decision and Order issued in Docket HP009-001, dated June 29, 2010, remains prospective in nature renders the condition meaningless; and
3. Whether the Public Utilities Commission's Order Granting Motion to Define Issues and Setting Procedural Schedule dated December 17, 2014 is arbitrary and capricious because the Commission's interpretation of SDCL § 49-41B-27 renders the statute meaningless and creates a permit that exists in perpetuity.

## III. STATEMENT OF THE CASE AND FACTS

On June 29, 2010 the South Dakota Public Utilities Commission ("PUC") issued a permit to TransCanada Keystone Pipeline, LP ("TransCanada") to build the Keystone XL Pipeline through Western South Dakota. The permit was accompanied by fifty separate requirements that TransCanada was obligated to abide by. TransCanada failed to begin construction within four years of the permit being issued. SDCL § 49-41B-27 requires permittees, such as TransCanada, to obtain a determination by the PUC that the project for

which an original permit was issued continues to "...meet the conditions on which the permit was issued." SDCL § 49-41B-27. On September 15, 2014 TransCanada submitted to the PUC a Petition for Order Accepting Certification Under SDCL §49-41B-27, which stated that "...the conditions upon which the [PUC] granted the facility permit in Docket HP09-001...continue to be satisfied" and that TransCanada "...certifies that it will meet and comply with all of the applicable permit conditions..." TransCanada's Pet. For Order Accepting Certification at 46-47.

The Cheyenne River Sioux Tribe ("CRST") filed for intervention in PUC docket HP14-001 on October 15, 2014. CRST Intervention at 305-07. On October 30, 2015 TransCanada submitted a Motion to Define the Scope of Discovery. TransCanada's Mot. to Define Disc. at 1000-05. TransCanada asserted in its motion that the scope of the proceedings in Docket HP14-001 were narrowly confined by SDCL §49-41B-27 to the fifty requirements listed in the original permit. Id. CRST opposed TransCanada's Motion to Define the Scope of Discovery and filed its response on December 1, 2014. CRST Resp. to Mot. to Define Disc. at 1249-61. The PUC subsequently granted TransCanada's Motion to Define the Scope of Discovery on December 17, 2014. PUC Order to Grant Mot. to Define Issues. at 1528-29.

Following discovery the PUC held an evidentiary hearing beginning on July 27, 2015. The hearing lasted nine days and TransCanada submitted prefiled direct testimony for its witnesses. TransCanada Pre-Filed Test. at 27465-917. At the conclusion of the evidentiary hearing CRST, along with other Appellants, made a joint Motion to Deny the Petition for Certification on the grounds that TransCanada failed to submit substantial evidence. HP14-001 Evidentiary Hr'g Tr. at 027338, 027345:7-11. The PUC denied the

joint motion to dismiss TransCanada's Petition for Order Accepting Certification. HP14-001 Evidentiary Hr'g Tr. at 027361:16-18; 027367:13-14.

Pursuant to the PUC's instructions CRST submitted its Post-Hearing Brief on October 1, 2015. CRST Post Hr'g Br. at 29538-559. In its Post-Hearing Brief CRST argued that the PUC must reject TransCanada's Petition for Order Accepting Certification on the grounds that TransCanada failed to submit substantive evidence upon which it could grant the petition. On November 6, 2015, after all post-hearing briefs had been submitted to the PUC, President Obama rejected TransCanada's application for a Presidential permit to cross the United States – Canada border. Requirement number two of the 2010 South Dakota permit explicitly requires TransCanada to obtain the Presidential permit. As such, on November 9, 2015 CRST and other Appellants filed a joint Motion to Dismiss the Petition for Certification and Revoke the 2010 Permit. Joint Mot. to Dismiss at 31347-355.

CRST and others argued that with the President's rejection it was now impossible for TransCanada to meet requirement number two in the underlying permit. Id. On December 22, 2015 the PUC held a hearing dismissing Appellants' joint motion, reasoning that it was still theoretically possible for TransCanada to eventually comply with the condition. December 21, 2015 PUC Mot. Hr'g. Tr. 031623:19-24 and 031625:1-14. On January 21, 2016 the PUC granted TransCanada's Petition for Order Accepting Certification and published its Final Decision and Order Finding Certification Valid and Accepting Certification. PUC Final Decision and Order at 31668-695.

On February 19, 2016 CRST filed Notice of Appeal with the Hughes County Court, TransCanada, and all interested parties in PUC Docket HP14-001. CRST filed a Statement of Issues and an Order for Transcripts on February 29, 2016. CRST and all other Appellants

from PUC Docket HP14-001 subsequently filed a Motion and Stipulation for Consolidation and Extension of time on April 13, 2016. The Court granted Appellants' motion on April 15, 2016, extending time to file opening briefs to May 16, 2016. Apr. 15 Ct. Order.

## IV. ARGUMENT

The PUC committed reversible error when it published its Final Decision and Order. Specifically, the PUC's decision to grant TransCanada's Petition for Order Accepting Certification under SDCL §49-41B-27 is arbitrary and capricious because (1) TransCanada failed to meet the minimum "substantial evidence" burden of proof, (2) the PUC's rejection of the November 9, 2015 Motion to Dismiss by reasoning that condition number two remains prospective in nature renders the condition meaningless, and (3) the PUC's interpretation of SDCL §49-41B-27 renders the statute meaningless and creates a permit that exists in perpetuity.

### A. The PUC's Decision to Grant TransCanada's Petition for Certification is Arbitrary and Capricious Because TransCanada Failed to Submit Substantive Evidence During the Evidentiary Hearing.

Regarding the issue of proof the Court must resolve the following: (1) which party carried the burden of proof in Docket HP14-001, (2) what was the burden of proof, and (3) was the burden of proof been met during the 2015 evidentiary hearing. With regard to the first question the law unequivocally places the burden of proof on the TransCanada. The law as it relates to the second question is also clearly defined. The South Dakota Supreme Court has, on numerous occasions, declared that all agency actions must meet the "substantive evidence" standard of review. Meaning the PUC is required to base its decision regarding TransCanada's Petition for Order Accepting Certification Under SDCL §49-41B-27 on at least *some* substantive evidence. Finally, because TransCanada failed to submit any

substantive evidence in the instant matter it has failed to meet the minimum burden of proof. As such, the PUC could not grant TransCanada's Petition for Order Accepting Certification.

1. Petitioners in Contested Hearings Carry the Initial Burden of Proof.

TransCanada carried the initial burden of proof during the HP14-001 proceedings. The PUC's Administrative Rules state that "[e]xcept to the extent a provision is not appropriately applied to an agency proceeding **or is in conflict with...the commission's rules**, the rules of civil procedure as used in the circuit courts of this state shall apply." S.D. Admin. R. 20:10:01:01.02 (2006) (emphasis added). Accordingly, matters of proof during PUC evidentiary hearings, such as the one held in the HP14-001 docket, are governed by PUC's administrative rules *unless no such rules exist*, in which case the rules of civil procedure for South Dakota circuit courts are to be applied.

With regard to the burden of proof, the PUC's rules *expressly* and *specifically* address the issue of which party carries the initial burden of proof during a contested case proceeding. The PUC rules state that "[i]n **any** contested case proceeding...**petitioner has the burden of proof** as to factual allegations which form the basis of the...application, or petition..." S.D. Admin. R. 20:10:01:15.01 (2006)(emphasis added). The rules are explicitly clear and dispositive in the instant matter. TransCanada was the petitioner in HP14-001. TransCanada submitted a Petition for Order Accepting Certification to the PUC pursuant to SDCL §49-41B-27. TransCanada's Petition asked the PUC to make a factual determination that TransCanada can continue to meet the conditions upon which the original permit was granted. Intervening parties opposed TransCanada's Petition. As a result the PUC held a contested evidentiary hearing on the matter. During such a proceeding the rules state that

TransCanada must carry the burden of proving that the proposed Keystone XL pipeline project continues to meet the conditions upon which the original permit was granted.

A careful review of the record reveals that, at least at the start of the evidentiary hearing, the PUC, TransCanada, and the Appellants all agreed that the initial burden of proof was on TransCanada and that TransCanada was required to prove at the evidentiary hearing that it can continue to meet each of the fifty requirements set forth in the original permit. For example, Commissioner Nelson stated at the beginning of the hearing that "**[i]t is the Petitioner, TransCanada, that has the burden of proof**. And under SDCL 49-41B-27 that burden of proof is to establish that the proposed facility continues to meet the 50 Conditions set forth in the Commission's Amended Final Decision." HP14-001 Evidentiary Hr'g Tr. at 023968:6-10 (emphasis added). In addition, Mr. Bill Taylor, counsel for Keystone, stated that

> "[w]e are here today to meet Keystone's burden of proof. That is, certifying that the project continues to meet the 50 Conditions on which the Permit was issued and that it can be constructed and operated accordingly. We'll offer the testimony of seven witnesses, five of whom are direct witnesses, two of whom are rebuttal. We will present exhibits that meet that burden of proof. The testimony of our witnesses, many of whom you've heard before, will conclusively demonstrate that the project will continue to meet the 50 Conditions on which the Permit was issued." HP14-001 Evidentiary Hr'g Tr. at 024025:17-25 and 024026:1-3.

Simply put, South Dakota law, the PUC's rules, PUC Chairman Nelson, and TransCanada itself all assert that TransCanada carried the burden of proof during the HP14-001 proceedings.

2. South Dakota Law Requires the PUC to Base its Decisions on the Submission of Substantial Evidence.

To survive judicial review the PUC's January 21, 2016 Final Order must have been based on "substantial evidence." In general, South Dakota courts are obligated to give broad

deference to the decisions of administrative agencies. More specifically, courts must "...give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36. Nonetheless, judicial deference to agency findings is not absolute. Courts may reverse or modify agency decisions if "...substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are**...(5) [c]learly erroneous in light of the entire evidence in the record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."** Id. (emphasis added).

When deciding whether an agency decision is "clearly erroneous" a court must look to see whether substantive evidence exists in the record upon which an agency could base its decision. Therkildsen v. Fisher Beverage, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834 (S.D. 1996); Helms v. Lynn's, Inc., 1996 S.D. 8, ¶ 10, 542 N.W.2d 764 (S.D. 1996)(stating '[t]he issue we must determine is whether the record contains substantial evidence to support the agency's determination.'); Abilb v. Gateway 2000, Inc., 1996 S.D. 50, 547 N.W.2d 556 (S.D. 1996)(stating '[t]he question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.'); see also Westergren v. Baptist Hosp. of Winner, 1996 S.D. 69, ¶ 32, 549 N.W.2d 390 (S.D. 1996); Zoss v. United Bldg. Centers, Inc., 1997 S.D. 93, ¶ 6, 566 N.W.2d 840 (S.D. 1997); Jackson v. Lee's Travelers Lodge, Inc., 1997 S.D. 63, P 46, 563 N.W.2d 858 (S.D. 1997)(each case cites and applies the substantive evidence test described in Therkildsen, Helms, and Abilb).

Also, before moving too far afield, it should be noted that the "arbitrary and capricious" provision of SDCL § 1-26-36(6) employs an identical substantive evidence standard. M.G. Oil Co. v. City of Rapid City, 2011 S.D. 3, ¶ 15, 793 N.W.2d 816 (S.D.

2011)(citing Therkildsen and Abilb as authority, the South Dakota Supreme Court upheld and endorsed a circuit court's substantial evidence analysis stating '[t]he use of the "substantial evidence" review was correct to determine whether there was substantial evidence to support the City Council's findings.'). In other words, the South Dakota Supreme Court's well established substantive evidence analysis must be applied in both a clearly erroneous argument and an arbitrary and capricious argument. Moreover, the Supreme Court has explicitly applied the substantive evidence standard to all state agency actions, including the Public Utilities Commission. In re Establishing Certain Territorial Elec. Boundaries., 318 N.W.2d 118, 121 (S.D. 1982). The practical implication in the instant matter is that, in order to grant TransCanada's Petition, the PUC must base such a decision on substantial evidence which proves that each of the fifty requirements contained in the original permit can continue to be met.

South Dakota law provides some guidance regarding what the term substantive evidence means. SDCL § 1-26-1(9) defines the term as "...such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9). However, this statutory definition is somewhat vague and must be read in light of the South Dakota Supreme Court's substantive evidence case law. Generally, there are two types of evidence which the South Dakota Supreme Court has accepted as substantive evidence: physical and testimonial. During the HP14-001 evidentiary hearing no physical evidence was submitted. Instead, TransCanada solely relied on the testimony of the witnesses that it submitted.

With regard to testimonial evidence, such testimony must be specific and substantive in order to be regarded as substantive evidence sufficient to base an administrative decision.

See In re Establishing Elec. Boundaries, 318 N.W.2d at 122. In the case In re Establishing Electric Boundaries, an expert witness testified that he used the criteria described in SDCL § 49-34A-44 when determining his boundaries recommendation to the PUC. In re Establishing Elec. Boundaries, 318 N.W.2d at 121. Essentially, the witness' testimony consisted of a summary of each of the criteria listed in SDCL § 49-34A-44 and specific testimony as to how he applied the criteria in his analysis. See Id. In making its decision the PUC essentially adopted the witness' recommendation. The appellant challenged the sufficiency of the testimonial evidence, arguing that it did not meet substantive evidence minimum. The Supreme Court disagreed, stating that substantive evidence existed due to the record being "...replete..." with specific and substantive testimony in which the witness explained how he applied the underlying statute to his analysis and recommendation. Id. at 122.

It is worth briefly mentioning here that at the time In re Establishing Elec. Boundaries was heard by the Supreme Court the language in SDCL § 1-26-36(5) was slightly different than it is today. Currently SDCL § 1-26-36(5) provides that "[t]he 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...**(5) [c]learly erroneous in light of the entire evidence in the record.**" SDCL § 1-26-36(5). (emphasis added). At the time SDCL § 1-26-36(5) stated that "[t]he 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...**(5) [u]nsupported by substantial evidence on the whole record.**" In re Establishing Elec. Boundaries, 318 N.W.2d at 121 (emphasis added). Nonetheless, the Court's subsequent case

law regarding the "clearly erroneous" language explicitly adopts the substantive evidence standard used in In Re Establishing Elec. Boundaries, making the Court's substantive evidence analysis in that case applicable in the instant matter.

As illustrated above, testimonial evidence may be sufficient to base an administrative decision in certain circumstances. In re Establishing Elec. Boundaries, 318 N.W.2d at 122. However, as stated before the testimony must be *specific* and *substantive*. See Id. Vague and/or conclusory testimony cannot be used to base a decision because such testimony is not substantive evidence. M.G. Oil Co., 2011, S.D. ¶ 18, 793 N.W.2d at 823. The Court's requirement for testimonial evidence to be substantive and specific is most apparent in the M.G. Oil Co. case. In M.G. Oil. Co. an applicant applied for a conditional use permit to operate a video lottery casino. Id. at ¶ 1, 817. Under the governing statute, the Rapid City Common Council ("City Council") could deny issuing such a permit if it concluded that issuing the permit would cause an undue concentration of similar uses, so as to cause blight, deterioration or substantially diminish or impair property value. Id. at ¶ 16, 822. During a series of public meetings several individuals made vague conclusory statements regarding the potential impact of granting the conditional permit. It was alleged by several individuals that an increase in crime would occur and a City Alderman stated that it was his belief that real estate values might depreciate as a consequence of issuing the permit. Id. at ¶ 20, 823-24. The City Council voted to deny the permit. The applicant appealed arguing that the City's decision was arbitrary and capricious and an abuse of discretion. Id. at ¶ 1, 817.

As mentioned earlier, in M.G. Oil Co. the South Dakota Supreme Court applied an identical substantive evidence analysis to the underlying arbitrary and capricious claim as it

does in clearly erroneous claims. Id. at ¶ 12-15, 821-22. Specifically, in its analysis the Court looked to see whether the testimony and comments submitted during the City Council meetings were substantial evidence upon which the Council could base its decision to deny the applicant's permit. Id. at ¶ 17-20, 822-23. The Court concluded that such testimonial statements were not substantive evidence. Id. In reaching its decision the Court reasoned that "[v]ague reservations expressed by [Council] members and nearby landowners are not sufficient to provide factual support for a Board decision." Id. at ¶ 18, 823 (citing Olson v. City of Deadwood, 480 N.W.2d 770, 775 (S.D. 1992)). The Court went on to assert that the City's failure to link specific and substantive testimonial evidence to the governing statute resulted in nothing more than simply repeating the language of the ordinance as a basis to deny the permit. Id. ¶ 20, 823-24. As such, the Court found that no substantive evidence existed to support the City's actions and stated that "[the City Council] renders a decision so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." Id. at 824 (citing Johnson v. Lennox Sch. Dist. #41-4, 2002 S.D. 89, 649 N.W.2d 617, 621 n. 2. In other words, testimony which merely recites the language of a governing statute cannot be considered substantive evidence.

The facts present in M.G. Oil Co. are startling similar to the facts present in the instant matter. In M.G. Oil Co. a series of witnesses made vague conclusory statements which largely parroted the language of the governing statute. In the instant matter TransCanada's witnesses did precisely the same. TransCanada's witnesses merely reference which changes that he or she was responsible for in the Tracking Table of Changes and then makes a statement that he or she is unaware of any reason why TransCanada cannot continue to meet the permit Conditions. See Direct Testimony of Corey Goulet at 027456-

027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512.

Such testimony merely recites the language of SDCL § 49-41B-27. Reciting the language of SDCL § 49-41B-27 followed by a vague statement of being unaware of any reason why Keystone cannot comply in the future is materially no different from the testimony proffered in M.G. Oil Co. TransCanada could have directed its witnesses submit specific and substantive prefiled testimony. It chose not to do so. TransCanada's witnesses could have submitted testimony which did not simply repeat the language of SDCL § 49-41B-27 followed by a vague statement of being unaware of any reason TransCanada cannot comply with permit conditions in the future. They did not. In light of M.G. Oil Co., such testimony cannot reasonably be construed as substantive evidence upon which the PUC could base its decision to grant TransCanada's Petition for Order Accepting Certification. It is not the responsibility of the PUC or the Court to rescue petitioners who fail to meet their evidentiary burdens. TransCanada's failure to submit specific and substantive testimonial evidence required the PUC to deny TransCanada's Petition. Instead the PUC arbitrarily and capriciously granted the Petition for Order Accepting Certification despite the fact that all of TransCanada's witnesses failed to submit specific and substantive testimony during the HP14-001 evidentiary hearing.

In yet another case the Court issued a similar reproach with regard to vague conclusory statements being passed off as substantive evidence. In that case, an employer asserted that two of its former employees were not entitled to unemployment benefits due to "misconduct." Abilb, 1996 S.D. 50, 547 N.W.2d at 557. Specifically, the employer accused the employees of intentionally inflating their sales statistics. Id. at 558. In Abilb South

Dakota law placed the burden of proving "misconduct" on the employer. Id. at 559-60. At the agency level the Department of Labor concluded that the employer had not met its burden of proof and awarded benefits to the two terminated employees. Id. at 557. On appeal, the South Dakota Supreme Court upheld the agency's decision. In reaching its decision the Supreme Court pointed out that the employer had merely alleged that the employees had been "dishonest" and therefore had committed misconduct. Id. at 559. The Court characterized this evidence as nothing more than a legal conclusion insufficient to base a conclusion that the Department's decision was clearly erroneous. Id.

Obviously the circumstances in Abilb are slightly different than the circumstances in the instant matter. Namely, in Abilb the burden was on the employer to show that the employees had not submitted substantial evidence. As such, the Court's statements regarding the employer's conclusory testimony was not analyzed in the same manner as an appellant challenging the sufficiency of evidence on which an agency has based a decision. Nonetheless, the Court's language regarding vague conclusory statements is helpful in the instant matter. More to the point, just as the employer in Abilb relied solely on a vague conclusory statement, so too did TransCanada during the HP14-001 proceedings. TransCanada failed to meet its evidentiary burden when it chose to rely solely on the vague testimony proffered by its witnesses. This evidentiary failure on the part of TransCanada required the PUC to deny the Petition for Order Accepting Certification, thereby making the PUC's subsequent decision to grant TransCanada's Petition arbitrary and capricious.

3. During the HP14-001 Proceedings TransCanada Failed to Submit Any Substantial Evidence, as Defined by SDCL § 1-26-1(9) and the South Dakota Supreme Court Case Law.

TransCanada failed to submit any substantial evidence whatsoever during the HP14-001 evidentiary hearing. TransCanada's failure to submit substantive evidence required the PUC to dismiss the Petition for Order Accepting Certification Under SDCL § 49-41B-27. See Therkildsen, 1996 S.D. 39, 545 N.W.2d 834; In re Establishing Certain Territorial Elec. Boundaries., 318 N.W.2d 118; Helms, 1996, S.D. 8, 542 N.W.2d 764.

None of TransCanada's witnesses provided specific and substantive testimony. Rather, all of the testimony offered by TransCanada's witnesses merely recited the language of SDCL § 49-41B-27 followed by brief conclusory remarks stating that the respective witness is unaware of any reasons why the fifty requirements cannot be met. See Direct Testimony of Corey Goulet at 027456-027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512. Such vague and conclusory testimony is precisely the same sort of testimony which was at issue in M.G. Oil Co. Because TransCanada offered no other evidence its burden of proof was not met, thereby making the PUC's Final Order granting certification arbitrary and capricious.

Instead of requiring TransCanada to submit substantive evidence, the PUC asserts that no substantive evidence is required and that TransCanada carried its burden of proof when Mr. Corey Goulet signed a certification on September 15, 2014 assuring the PUC can and will continue to meet the conditions upon which the underlying permit was granted. January 5, 2016 PUC Hr'g Tr. at 031660:15-18. The PUC's assertion that Mr. Goulet's conclusory assurance and promise that conditions are and will continue to be met is not substantive evidence. Indeed the PUC's assertion that it is sufficient arbitrarily and capriciously shifted the initial burden of proof to the Appellants. Instead of TransCanada

supplying substantial evidence that it has and will continue to meet the permit requirements, the PUC essentially required the Intervenors to disprove that TransCanada cannot meet the conditions. January 5, 2016 PUC Hr'g Tr. at 031661:4-18. Such unlawful burden shifting amounts to reversible error on the part of the PUC.

The original permit hearing in Docket HP09-001 required the PUC to make a factual determination as to whether TransCanada could safely construct and operate the proposed project pursuant to the fifty Conditions in 2010. The HP14-001 proceedings required the PUC to make a separate and distinct factual determination; namely, whether TransCanada is able construct and operate the proposed project in 2016 given present conditions. As such, Keystone cannot merely rely on the evidence which it submitted in the HP09-001 proceeding. Simply put, in HP14-001 TransCanada asked the PUC to make a second factual determination: that it can construct and operate the proposed project safely in 2016. TransCanada failed to supply the PUC with substantial evidence to make such a determination.

The burden of proof is low. Any substantial evidence whatsoever submitted by TransCanada during the HP14-001 evidentiary hearing would have sufficed; however, TransCanada chose not to submit any such evidence. Instead, it merely relied on a series of witnesses making vague conclusory statements which merely repeat the language contained in SDCL § 49-41B-27. No substantial evidence exists in the HP14-001 record upon which the PUC could base its decision to grant TransCanada's Petition pursuant to SDCL § 49-42B-27. The PUC's Final Order granting TransCanada's Petition pursuant to SDCL § 49-41B-27 was arbitrary and capricious because there exists no substantive evidence upon which the PUC can base such a decision. Though deference is generally afforded to

administrative agencies, such deference is not absolute. In the instant matter no deference is due by the Court with regard to HP14-001. Indeed the Court must reverse the PUC's Final Decision and Order Finding Certification Valid and Accepting Certification and remand with instructions to dismiss TransCanada's Petition for Order Accepting Certification.

**B. The PUC's rejection of the November 9, 2015 Motion to Dismiss was Arbitrary and Capricious Because Interpreting Condition Two as Remaining Prospective Renders the Condition Meaningless.**

The PUC's dismissal of the Appellants' joint Motion to Dismiss the Petition for Certification and Revoke the 2010 Permit was also arbitrary and capricious. Requirement number two of the underlying permit requires TransCanada to obtain a Presidential permit. On November 6, 2015 President Obama rejected TransCanada's Presidential permit application. In rejecting the Appellants' joint Motion to Dismiss the PUC reasoned that it was still theoretically possible for TransCanada to obtain a Presidential permit sometime in the future; thereby eventually complying with the second permit requirement. December 22, 205 PUC Hr'g Tr. at 031623:19-24 and 031625:1-14-18. The PUC's reasoning is especially egregious in light of its assertion that the burden of proof lies with the Appellants who must show that a requirement cannot be met. January 5, 2016 PUC Hr'g Tr. at 031661:4-18. In this instance Appellants did just that, yet the PUC arbitrarily and capriciously interpreted the condition to be prospective and therefore theoretically possible for TransCanada to comply with in the future. In other words, the PUC shifted the burden of proof to the Appellants, stated that it in order to prevail it Appellants had to prove that a requirement could not be complied with, and then made it impossible for the Applicants to ever prove that TransCanada was not in compliance with the second permit requirement.

SDCL §1-26-36 asserts that agencies, such as the PUC, cannot prejudice the substantial rights of CRST and other Appellants in the above captioned matter through its administrative findings, inferences, conclusions, or decisions which are characterized as an abuse of discretion or clearly unwarranted exercise of discretion. Simply put, the PUC's burden shifting and its reasoning that requirement number two to the underlying permit remains prospective renders the requirement meaningless and impossible for the Appellants to prove that TransCanada is not in compliance.

### C. The PUC's Interpretation of SDC §49-41B-27 Renders the Statute Meaningless and Creates a Permit That Exists in Perpetuity.

On October 31, 2014 TransCanada submitted its Motion to Define Scope of Discovery under SDCL § 49-41B-27. TransCanada's Mot. to Define Disc. at 1000-9. The PUC granted TransCanada's motion on December 17, 2014. In doing so the PUC adopted TransCanada's interpretation of the word "conditions" as used in SDCL §49-41B-27. December 9, 2014 PUC Hr'g Tr. 001444:23 – 002446:7. See also PUC's Order Granting Motion to Define Issues at 001528-9. The interpretation proffered by TransCanada and adopted by the PUC is extraordinarily narrow and violates a number of rules of normal statutory construction. The PUC's impermissibly narrow interpretation of the statute, in conjunction with its reasoning that many permit conditions remain prospective in nature, had the practical impact of creating a permit that exists forever with no ability on the part of the PUC to amend, add and/or rescind any of the permit requirements in order to address changed circumstances. Plainly stated, the PUC's interpretation of the word conditions in SDCL § 49-41B-27 is not only arbitrary and capricious, it is illogical and would lead to absurd outcomes in future cases. The Court should reverse the PUC's December 17, 2014 Order Granting Motion to Define Issues because (1) the case law relied upon by

TransCanada and the PUC in their interpretation of SDCL § 49-41B-27 is not applicable in the instant matter and (2) SDCL§ 49-41B-27 is broadly written.

1. The holding in Jundt v. Fuller is not applicable in the instant case.

The issue presented in Jundt v. Fuller, the case upon which TransCanada relied when arguing its interpretation to the PUC, is significantly dissimilar to the issues here. TransCanada correctly stated in its motion that "[o]nce an agency's adjudication has become final it is no longer subject to reconsideration." Jundt v. Fuller, 2007 S.D. 62, ¶ 12, 736 N.W.2d 508, 512. However, the PUC erroneously took an extra step by conflating SDCL § 49-41B-27 with the aforementioned holding in Jundt v. Fuller when it granted TransCanada's motion because the order that was challenged in Jundt did not involve a certification proceeding pursuant to SDCL § 49-41B-27. Rather, the issue in that case involved an entirely different factual scenario.

In Jundt the South Dakota Water Management Board ("the Board") issued a water permit on March 15, 2005. Id. ¶2, 736 N.W.2d at 510. No appeal to the permit decision was made at the time. See Id. Later, on December 6, 2006, less than two years after the permit was issued, the circuit court remanded an additional issue to the Board. Id. Essentially, the circuit court ordered the Board to relitigate the initial water permit proceeding. The South Dakota Supreme Court merely held that a circuit court cannot order an administrative agency to reconsider whether or not an initial permit should have been granted once the agency's decision to issue the permit is final. See Id. ¶ 12-13, 736 N.W.2d at 513. Critically, however, the issue in Jundt did not involve the certification proceeding detailed in SDCL § 49-41B-27.

The issue presented in the instant matter is substantively different than the issue in Jundt. Appellants did not ask the PUC to reconsider or otherwise challenge the initial permit proceeding. Rather, the Appellants merely sought to challenge certification of TransCanada's permit pursuant to the explicit provisions of SDCL § 49-41B-27. In pertinent part, SDCL § 49-41B-27 provides that "[u]tilities which have acquired a permit...may proceed to improve, expand, or construct...**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**. SDCL § 49-41B-27 (emphasis added). Simply put, SDCL § 49-41B-27 required TransCanada to submit to a certification proceeding before the PUC because it failed to complete construction on the proposed project within the statutorily required four-year time limit. In the HP14-001 proceeding Appellants sought to challenge TransCanada in the certification proceeding, not relitigate the PUC's initial permit decision. Essentially, by granting TransCanada's Motion to Define Scope of Discovery and adopting the reasoning proffered in the motion, the PUC seems to assert that it is handcuffed itself to its initial permit decision in perpetuity. If the PUC's interpretation stands and Jundt does indeed apply to SDCL § 49-41B-27 then there is nothing for the PUC to do except automatically accept certification from a petitioner. This is not only an illogical and unreasonable interpretation, it is dangerous precedent for future cases. Simply put, such an interpretation, should it stand, would eliminate the PUC's ability to amend, add, and/or rescind permit requirements to changed circumstances, thereby creating a permit that essentially exists in perpetuity.

2. SDCL § 49-41B-27 must be interpreted broadly.

The PUC's interpretation of SDCL § 49-41B-27 is overly narrow and in isolation of the rest of the statute. Whenever a permittee fails to initiate construction within the statutorily defined four-year time limit the permittee must submit to a certification proceeding before the PUC in order to ensure that the project continues to meet the conditions upon which the permit was issued. SDCL § 49-41B-27. Significantly, the PUC, nor TransCanada in its Motion to Define Scope of Discover, makes no attempt to apply any canon of statutory construction. See TransCanada's Mot. to Define Scope of Disc. at 1000-9 and PUC Order Granting Motion to Define Issues at 001528-9. Indeed, the PUC's adoption of TransCanada's interpretation of SDCL § 49-41B-27 in its Order Granting Motion to Define Issues seemingly defies (a) the plain meaning rule, (b) the rule against surplusage, and (3) the rule a provision in context of the entire statute.

*a. Plain Meaning Rule*

Interpreting SDCL § 49-41B-27 correctly depends entirely on the meaning of the word "conditions." As any first-year law student has learned, the first step in interpreting a statute requires an inquiry into the "plain meaning" of a word. Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean. Caminetti v. United States, 242 U.S. 470, 485 (1917). Although TransCanada did not attempt to employ any formal rules of statutory interpretation in a consistent form in its motion to the PUC, the motion seemed to use some weak form of the plain meaning rule to urge the PUC to adopt its reading of the word conditions. However, the plain meaning rule is not helpful in interpreting the meaning of the word conditions as used in SDCL § 49-41B-27 because a variety of definitions could be applied to that word.

An ordinary and/or reasonable reading of the word conditions reveals that the word may mean the fifty specific requirements contained in the initial permit, *or* it may mean the surrounding circumstances in which the permit was issued. It is not readily apparent on the face of the statute. The statute's definition of terms section does not provide a definition for the word conditions. SDCL § 49-41B-2. The administrative rules promulgated by the PUC also do not define the word "conditions." ARSD § 20:10:01:01.01. Finally, no case law exists that provides clarity to the meaning of the word conditions as used in SDCL § 49-41B-27. Neither does the legislative history offer any insight into what is meant by the term conditions in the context of the statute. The original 1977 House bill and the final session law contain identical language with regard to SDCL § 49-41B-27, and there are not any clarifying comments, amendments, or proposed alternative language by legislators during the drafting period. South Dakota Energy Facility Permit Act, ch. 390, 1977 S.D. Sess. Laws, 671 and H.B. 819, 52d Sess. (1977).

The plain meaning rule provides no guidance with regard to interpreting the word conditions in SDCL § 49-41B-27. Contrary to the PUC's apparent interpretation of the word, there is no simple, limited meaning to the word conditions in any of the statutory or regulatory framework. The word conditions as used in SDCL § 49-41B-27 is ambiguous, thereby necessitating the use of other rules of statutory interpretation.

*b. Rule to Avoid Surplusage*

The proceedings outlined in SDCL § 49-42B-27 cannot merely be a mechanism of ensuring that the fifty stipulated requirements accompanying an initial permit are being followed. Interpreting the statute in such a way would create surplusage in the statute. It is a well-settled principle of law that each word or phrase in a statute should be read as

meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless must be rejected. Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003); Nielson v. AT&T Corp, 1999 S.D. 99 ¶16, 597 N.W.2d 434, 439 ("[w]e presume the Legislature does not insert surplusage into its enactments"); Mid–Century Ins. Co. v. Lyon, 1997 SD 50, ¶ 9, 562 N.W.2d 888, 892 (citing National Farmers v. Universal, 534 N.W.2d 63, 65 (S.D.1995) (citing Revier v. School Bd. of Sioux Falls, 300 N.W.2d 55, 57 (S.D.1980); Delano v. Petteys, 520 N.W.2d 606, 609 (S.D.1994) ("[t]his court will not construe a statute in a way that renders parts to be duplicative and surplusage.") (citing Farmland Ins. Co. v. Heitmann, 498 N.W.2d 620 (S.D.1993); Revier, 300 N.W.2d at 57). see also Bailey v. United States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, non-superfluous meaning") (rejecting interpretation that would have made the statutory terms "uses" and "carries" redundant in a statute related to firearms offenses).

The PUC's interpretation that § 49-41B-27 must be limited to the fifty requirements that were specified during the initial permit proceeding renders the law toothless; creating a severely limited enforcement statute designed to ensure permittees comply with any original requirements attached to their initial permits. Such a reading is nonsensical. A separate provision in the statute provides the PUC with the discretionary power to revoke or suspend a permit whenever a permittee fails to comply with the terms or conditions of the permit. SDCL § 49-41B-33. Thus, if the PUC's interpretation of the scope of SDCL § 49-41B-27 stands there would exist two separate enforcement provisions which redundantly have identical functions. This, of course, is the very definition of surplusage.

The only coherent interpretation SDCL § 49-41B-27 is that it is a mechanism by which the PUC may review *all* relevant information and make a determination as to whether the surrounding conditions (i.e., circumstances) on which the original permit decision was made are more or less unchanged. Such an interpretation not only avoids surplusage, it is also a much more reasonable reading of the statute. In four years the conditions/circumstances upon which an original permitting decision was based can radically change. Local opinions about the project may have changed. Technological developments may have been realized that could make the project safer. New environmental or archaeological data that impacts the project may have come to light. It makes much more sense that the legislature intended to grant the PUC the flexibility to adjust to changed conditions.

Indeed other states have acknowledged this very issue and allow administrative agencies flexibility to alter final decisions. See Gulf Coast Electric Cooperative Inc. v. Johnson, 727 So.2d 259, 265 (Fla. 1999) (asserting that despite the doctrine of decisional finality state agencies may modify a final decision if there is a significant change in circumstances). Certainly interpreting SDCL § 49-41B-27 as the South Dakota Legislature's means of providing for similar agency flexibility to changed conditions is more reasonable than interpreting the certification provision as a superfluous reiteration of SDCL § 49-41B-33, as the PUC essentially held in its Order Granting Motion to Define Issues.

*c. SDCL § 49-41B-27 must be read in context of the entire statute.*

The PUC's interpretation of SDCL § 49-41B-27 is in isolation of every other provision and ignores the overarching context of the statute as a whole. "Since statutes must

be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject." Moss v. Guttormson, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17 (quoting U.S. West Communications, Inc. v. Public Utilities Comm'n, 505 N.W.2d 115, 122–23 (S.D.1993). "But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result." Id. The statute, when read as a whole, grants the PUC broad powers to regulate energy transmission facilities, especially with regard to matters involving permitting. As such, SDCL § 49-41B-27 cannot be read in isolation; rather, it must be read in context with the rest of the statute.

The statute is replete with language which grants the PUC broad authority, discretion, and responsibility. The PUC is tasked with protecting the welfare of South Dakota citizens, environmental quality, the location and growth of industry, and the use of the natural resources of the state. SDCL § 49-41B-1. The statute includes the following broad discretionary language: "...it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state..." Id; "[e]very utility which owns or operates...energy conversion facilities shall develop and submit a...plan to the Public Utilities Commission...[t]he plan shall contain**...[a]ny...relevant information as may be requested by the commission**." SDCL § 49-41B-3 (emphasis added); "...[a] local review committee shall meet to assess the extent of the potential social and economic effect to be generated by the proposed facility, to assess the affected area's capacity to absorb those effects at various stages of construction, and formulate mitigation measures..." SDCL § 49-41B-7; "...the local review committee **may** employ such persons **as determined by the Public Utilities Commission**..." 49-41B-8 (emphasis added); "[a]n application **may** be

denied, returned, or amended **at the discretion** of the Public Utilities Commission..." SDCL § 49-41B-13 (emphasis added); "...The Public Utilities Commission **may** require that further data be provided prior to the public hearings..." SDCL § 49-41B-14 (emphasis added); "[t]he Public Utilities Commission shall also hear and receive evidence presented by any state department, agency, or units of local government relative to the environmental, social, and economic conditions and projected changes therein. SDCL § 49-41B-19; "[t]he final report shall be heard by the Public Utilities Commission at the final hearing wherein the commission makes its decision on the application for a permit. The local review committee report *may* be adopted in whole or in part, **at the discretion of the commission**." SDCL § 49-41B-20 (emphasis added); "[p]rior to the issuance of a permit, the commission *may* prepare or require the preparation of an environmental impact statement..." SDCL § 49-41B-21 (emphasis added); "...the Public Utilities Commission **may in its discretion** decide if an applicant shall have the burden of proof to establish all criteria required in an original application." SDCL § 49-41B-22.2 (emphasis added); "[t]he Public Utilities Commission **may waive compliance with and provisions of this chapter** if...an immediate, urgent need...exists. The commission **may waive compliance with any of the provisions of this chapter** upon receipt of notice...that a facility...has been damaged or destroyed." SDCL § 49-41B-23 (emphasis added); "[a] permit may be transferred, **subject to the approval of the Public Utilities Commission**..." SDCL § 49-41B-29 (emphasis added).

Indeed, reading SDCL § 49-41B-27 in context with the entire statute it becomes readily apparent that the PUC must have the same broad discretionary authority during the certification proceeding as it does when carrying out every other aspect of its statutory

responsibility to protect the welfare of the state's citizenry, the state's environmental quality, the location and growth of industry, and the use of the natural resources of the state. By adopting TransCanada's narrow interpretation of §49-41B-27 the PUC has impermissibly limited itself to reviewing whether the fifty requirements contained in the original permit are being met, when it is clear that the structure of Ch. 49-41B is clearly designed to give the PUC as much discretion as necessary to protect many competing stakeholders' interests in the permitting process. By abdicating its power to broad discretionary power the PUC has, in essence, granted a permit that exists in perpetuity so long as TransCanada is theoretically capable of fulfilling the fifty permit requirements created in 2009, no matter how radically circumstances have changed over time. Simply put, the PUC's interpretation of SDCL § 49-41B-27 has dangerously circumscribed its own power to regulate permittees operating within South Dakota's jurisdictional boundaries.

Such a contextual reading is further reinforced by SDCL § 49-41B-22.1. This provision allows denied applicants an opportunity to reapply. To do so, a re-applicant must show that circumstances have not changed with regard to criteria upon which the original application was not denied. SDCL § 49-41B-22.1. In drafting this section the Legislature was mindful that surrounding conditions change, just as in the case with a permittee who has failed to initiate construction within four years and must submit themselves to a certification proceeding to show that conditions have not significantly changed. In other words, when SDCL § 49-441B-27 is read in context with SDCL § 49-41B-22.1 it becomes immediately apparent that the Legislature has granted the PUC the same broad discretionary power to review all relevant circumstances regarding a permitted-but-yet-to-be-built facility after four years as it does for re-applicants.

The PUC's interpretation lacks context. It ignores the broad discretionary language used throughout the statute. The PUC's interpretation of SDCL § 49-41B-27 will almost certainly lead to absurd and unreasonable results in some future case involving recertification. If the Court were to uphold the PUC's Final Order Granting TransCanada's Petition for Certification, and along with it the PUC's determination that its powers in proceedings held pursuant to SDCL § 49-41B-27 are narrowly limited to original permit requirements, it would forever handcuff the PUC to its original permit decision(s) regardless of changed circumstances. Such an outcome would render the PUC entirely unable to adapt to new information or changed circumstances, no matter how irrational the result. In other words, the PUC has arbitrarily and capriciously granted TransCanada a permit in perpetuity which can only be revoked or suspended if one of the fifty requirements from 2009 is violated. This narrow and isolated reading of the statute is an arbitrary and capricious use of power on the part of the PUC.

## III. CONCLUSION

The initial burden of proof in the HP14-001 proceedings was on TransCanada. Moreover, in order to survive judicial review the PUC must base a decision to recertify on substantive evidence. Testimonial evidence may be sufficient to satisfy a substantive evidence analysis, but in order to do so it must be specific and substantive. TransCanada's vague and conclusory testimony proffered during the HP14-001 evidentiary hearing was not substantive. It merely recited the language contained in SDCL § 49-41B-27. As such, the PUC had no basis upon which it could grant TransCanada's Petition for Order Accepting Certification. The PUC's January 2016 Final Order Finding Certification Valid and

Accepting Certification was an arbitrary and capricious use of power because no substantive evidence exists in the HP14-001 record.

Moreover, the PUC arbitrarily and capriciously reasoned that requirement number two remains prospective despite the President Obama's rejection of TransCanada's Presidential permit application. Finally, the PUC arbitrarily and capriciously abused its discretion when it narrowly defined the scope of the HP14-001 proceedings to the fifty 2009 permit requirements. For these reasons the Cheyenne River Sioux Tribe asks the Court to reverse the PUC's Final Order Finding Certification Valid and Accepting Certification and remand this matter to the PUC with instructions to dismiss TransCanada's Petition for Order Accepting Certification. The Cheyenne River Sioux Tribe further requests that the Court schedule and hear oral argument on the legal issues addressed in this Brief.

Dated this 16th day of May 2016.

Respectfully Submitted,

/S/

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