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, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	* * * * * * * * * * * *	32CIV. 16-000033 **CHEYENNE RIVER SIOUX TRIBE RESPONSE BRIEF**

I. INTRODUCTION

Appellant Cheyenne River Sioux Tribe ("CRST") offers this brief in reply to the arguments raised in Opening Briefs submitted by TransCanada Keystone XL Pipeline, LP ("TransCanada") and the South Dakota Public Utilities Commission ("PUC"). CRST, among others, filed an appeal of the PUC's Final Decision and Order Finding Certification Valid and Accepting Certification, which was entered on January 21, 2016 in PUC Docket No. HP14-001. The Opening Briefs filed by both TransCanada and the PUC are closely aligned in their position and arguments. As such, this Reply Brief will serve as a response to both.

As was noted in CRST's Opening Brief, the PUC issued a permit to TransCanada to construct and operate a hydrocarbon pipeline on June 29, 2010. More than six years have now lapsed from the date of the PUC's original permit issuance. Because more than four years had passed with construction on the proposed pipeline failing to commence, TransCanada submitted a petition for certification pursuant to SDCL § 49-41B-27. This statute requires TransCanada to certify that the project continues to meet the conditions

upon which the permit was issued. This Reply Brief will concentrate on the following issues.

1. The failure of the PUC to base its Final Decision and Order Finding Certification Valid and Accepting Certification on any substantive evidence submitted during the evidentiary hearing;
2. The decision by the PUC to reject the Appellants' November 9, 2015 Motion to Dismiss on the basis that condition number two in the Amended Final Decision and Order issued in Docket HP009-001remains prospective in nature, thereby rendering the condition meaningless; and
3. The PUC's interpretation of the word "conditions" in SDCL § 49-41B-27, which renders the statute meaningless and creates a permit that exists in perpetuity.

II. ARGUMENT

A. The PUC failed to base its Final Decision and Order Finding Certification Valid and Accepting Certification on substantive evidence.

The PUC argues in its Opening Brief that its Final Decision and Order Finding Certification Valid and Accepting Certification is valid because it was not based on personal, selfish, or fraudulent motives, or on false information, and sufficient evidence was received at the hearing to support the PUC's decision. *PUC Opening Brief*, p. 5. In support of this contention, the PUC states 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 that] [t]he Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages." *Id.* at 6.

The PUC seems to be arguing in its Opening Brief that the requirement to base its decision on "sufficient evidence" is satisfied so long as there are numerous procedural and discovery motions, numerous motion hearings, and the quantity of evidentiary hearing days and transcript pages are high. The number of procedural and discovery motions and hearings has absolutely no relevance as to whether "sufficient evidence" was submitted by TransCanada upon which the PUC could base its decision to recertify. Likewise, the number of days and transcript pages has no relevance on whether sufficient substantial evidence was submitted.

The issue in the instant matter is not one of quantity, but rather the *quality* of evidence. The PUC must base its decision regarding TransCanada's Petition for Order Accepting Certification Under SDCL §49-41B-27 on at least some *substantive* evidence. TransCanada failed to submit such substantive evidence during the evidentiary hearing. In deciding whether the PUC's decision was "clearly erroneous" or "arbitrary and capricious" a court must identify whether substantial evidence exists in the evidentiary hearing record. See 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); Abilb v. Gateway 2000, Inc., 1996 S.D. 50, 547 N.W.2d 556 (S.D. 1996); M.G. Oil Co. v. City of Rapid City, 2011 S.D. 3, ¶ 15, 793 N.W.2d 816 (S.D. 2011).

As noted in the Tribe's Opening Brief, 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). In order to withstand judicial scrutiny, the testimonial evidence submitted by TransCanada must have been

specific and substantive in order to be regarded as substantive evidence. See In re Establishing Elec. Boundaries, 318 N.W.2d at 122. The vague and conclusory testimony offered by TransCanada's witnesses simply parroted SDCL § 49-41B-27 and cannot reasonably be construed as substantive evidence. During the evidentiary hearing TransCanada's witnesses merely referenced which changes that he or she was responsible for in the Tracking Table of Changes and then made 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. Indeed, upon examination of the 2,507 pages of transcripts the Court will find that nearly all of it is the Intervenors' cross examinations of TransCanada's witnesses and not substantive evidence testimony.

Admittedly the burden of proof which TransCanada was required to meet during the evidentiary hearing is low. Any substantial evidence whatsoever would have sufficed. Nonetheless, TransCanada chose not to submit specific and substantive testimonial evidence and instead chose to submit prefiled testimony which was vague, conclusory, and merely parroted the language of SDCL § 49-41B-27. As such, 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 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 interpretation that condition number two in the Amended Final Decision and Order issued in Docket HP009-001remains prospective in nature renders the condition meaningless.

The second requirement in the original permit requires TransCanada to obtain a Presidential permit. On November 6, 2015 President Obama rejected TransCanada's Presidential permit application. The PUC continues to argue in its Opening Brief that because it is still theoretically possible for TransCanada to obtain a Presidential permit sometime in the future it must recertify the permit. See PUC Opening Brief, pg. 16-17. Essentially the PUC and TransCanada argue that during the evidentiary hearing Intervenors could have shown that TransCanada could not meet the conditions upon which the original permit was granted. See January 5, 2016 PUC Hr'g Tr. at 031661:4-18. With respect to condition number two the Appellants showed just that. By interpreting that complying with condition number two remains theoretically possible the PUC has essentially moved the goal posts on the Intervenors, making it impossible to prove. Such an interpretation is an abuse of the PUC's discretion and amounts to reversible error.

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

The PUC correctly points out that South Dakota Courts apply the interpretive rule of *in pari material*. Goetz v. State, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. However, as illustrated in Goetz itself, in pari material interpretation is not an absolute rule. It applies only when the terms "...relate to the same person or thing, to the same class of person or things, or have the same purpose or object." Id. In the instant matter interpreting the term conditions in SDCL § 49-41B-27 as being identical to its use in SDCL § 49-41-24 would create surplusage and render SDCL § 49-41B-27 meaningless. In other words, the word conditions, as used in SDCL § 49-41B-27, is ambiguous. Generally terms used in a statute

are given their plain meaning and effect *unless* they are ambiguous. US West v. PUC, 505 N.W.2d 115, 123 (S.D.1993). Given the ambiguity of the word conditions in SDCL § 49-41B-27 the Court must interpret the word in a way that does not create 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.

As detailed more fully in the Tribe's Opening Brief, the only reasonable 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 avoids surplusage and makes more logical sense in light of the rest of the statute. Over the course the last six years since the PUC issued TransCanada's original permit, conditions/circumstances have changed. Reading the word conditions in SDCL § 49-41B-27 broadly gives the PUC the greatest amount of flexibility to adjust to such changed conditions. Indeed even if TransCanada submits yet another application for a Presidential permit and it were granted by a new administration, many more years will have passed and conditions/circumstances will have changed even more.

The PUC argues in its Opening Brief that it would not be handcuffed to its original decision to issue a permit because under SDCL § 49-41B-33(2) the PUC could revoke the permit if TransCanada can no longer comply with the original permit conditions. *PUC Opening Brief*, p. 20. The PUC once again is missing the argument. The PUC would only have the power to revoke TransCanada's permit if it can no longer meet the fifty

requirements contained in the original permit. The argument that CRST makes is that SDCL § 49-41B-27, when read broadly, would allow the PUC to adjust its requirements to address changed circumstances. Otherwise the PUC would have no ability to revoke or adjust the permit so long as TransCanada could show that it meets the requirements placed on it years prior under different surrounding conditions. For the sake of the PUC's power to respond appropriately to such changes, and for the safety of the State and its citizens, the Court must read the term conditions broadly. Simply put, if the Court upholds the PUC's and TransCanada's current interpretation of the term conditions in SDCL § 49-41B-27, the Court would be eliminating the PUC's ability to amend, add, and/or rescind permit requirements to changed circumstances, thereby creating a permit that essentially exists in perpetuity.

III. CONCLUSION

Based on the foregoing, CRST respectfully asks that the Court reverse the PUC's Final Decision and Order granting certification .

Dated this 25h day of August, 2016.

Respectfully Submitted,

/S/

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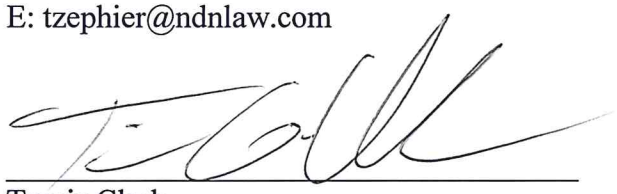

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