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	)	Civ. 32CIV16-33

ON APPEAL FROM THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

DOCKET NO. HP14-001

APPELLANT'S BRIEF

FOR DAKOTA RURAL ACTION

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INTRODUCTION

Dakota Rural Action ("**DRA**") appeals the Final Decision and Order Finding Certification Valid and Accepting Certification (the "**Order**") entered by the South Dakota Public Utilities Commission (the "**PUC**") on January 21, 2016 in favor of TransCanada Keystone Pipeline, LP ("**TC**") in Commission Docket No. HP14-001. The Order constitutes a final decision by the PUC from which appeal is allowed under SDCL § 1-26-30.2. DRA hereby requests oral argument.

This case involves the challenge made by DRA and other intervenors to TC's petition for certification under SDCL § 49-41B-27 of the PUC's Amended Final Decision and Order of June 29, 2010 (the "**Original Permit**"), for construction of the proposed Keystone XL Pipeline (the "**KXL Pipeline**" or the "**Project**") subject to fifty separate conditions. The statute provides in pertinent part that:

> "Utilities which have acquired a permit in accordance with the provisions of this chapter may … **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.

Because construction of the Project had not commenced within four years of obtaining the Original Permit, TC was required to certify to the PUC that "such facility continues to meet the conditions upon which the permit was issued." The PUC proceedings culminated in a nine-day evidentiary hearing held on July 27 through August 1, and August 3 through August 5, 2015 (ROA 031683)[1].

DRA's Statement of Issues provided a comprehensive list of reasons for reversal. They fall into three main categories: (i) procedural errors with respect to the conduct of the proceedings and evidentiary rulings, (ii) substantive errors of law made concerning interpretation of SDCL § 49-41B-27, and (iii) the clearly erroneous findings of fact and conclusions of law. Significant issues include the PUC's limitations on discovery and exclusion of witnesses and exhibits, and its entering the Order in the absence of a showing by TC that it "continues to meet the conditions" upon which the Original Permit was issued.

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[1] "ROA" references the Record on Appeal as filed by the Commission in these proceedings.

STATEMENT OF FACTS AND ERRORS IN COMMISSION FINDINGS

The proposed KXL Pipeline would primarily be used to transport tar sands crude oil extracted from the Western Canadian Sedimentary Basin from a hub near Hardisty, Alberta, Canada to delivery points in Oklahoma and Texas (ROA 009173, referencing *U.S. State Dept. Final Supplemental Environmental Impact Statement* ("**FSEIS**"), pp. ES-6-7). In South Dakota, the proposed KXL Pipeline would cross portions of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp counties (ROA 031684-031685).

The procedural history of this matter before the PUC is set forth in detail in the Order. The transcripts of hearings held before the PUC, along with the parties' exhibits, are filed with the Court as part of the record on appeal. Because of the breadth of information presented in these proceedings, this statement of facts will focus on items relevant to the issues raised by DRA on appeal.

A. The Original Permit.

The Original Permit was issued on June 29, 2010 (ROA 031684) and contained fifty separate conditions and multiple sub-conditions, each of which TC had to certify that it could continue to meet. Some of the more significant conditions relevant to matters raised by DRA on appeal include (by condition number): (***1***) Compliance with all applicable laws and regulations with respect to construction and operation of the Project (Original Permit, p. 25); (***2***) Obtain and thereafter comply with all applicable federal, state and local permits – including the Presidential Permit (Original Permit, p. 25); (***3***) Comply with and implement the recommendations set forth in the US State Department's final Environmental Impact Statement (Original Permit, p. 25); (***13***) Comply with all mitigation measures set forth in TC's Construction Mitigation and Reclamation Plan ("**CMR Plan**") (Original Permit, p. 27); (***16***) Repair and restore property damaged by construction to their preconstruction condition (Original Permit, p. 28); (***25***) Suspend construction when weather conditions are such that construction activities will cause irreparable damage (Original Permit, p. 33); (***26***) Reclamation and clean-up along right-of-ways must be continuous and coordinated with ongoing construction (Original Permit, p. 33); and (***31***) Construct and operate the Project in the manner described in TC's application and in accordance with the conditions of the Original

Permit and a Special Permit, if issued, by the U.S. Pipeline and Hazardous Materials Safety Administration ("**PHMSA**") (Original Permit, p. 34).

During PUC proceedings, DRA explored a number of conditions of the Original Permit to determine whether TC could continue to comply with them. The PUC made a number of findings in its Order. While some of the findings are simple statements of fact (Findings No. 1-7 identify parties and witnesses, among other things) others are clearly erroneous in light of the totality of evidence on the record.

B. PHMSA Special Conditions – Findings 18 and 20.

Findings No. 18 and 20 of Order recite that TC both adopted and promised to meet special conditions developed by PHMSA as set forth in Appendix Z of the FSEIS (ROA 031685). The PUC's findings are interesting when viewed in the context of the record. TC employee Meera Kothari[2] testified that Appendix Z of the FSEIS contains fifty-nine special conditions PHMSA (the "**PHMSA Conditions**") required with respect to the proposed KXL Pipeline (ROA 025544-025545). Condition No. 2 of the Original Permit mandates TC's compliance with any conditions imposed by any permitting agency, including PHMSA, and Condition No. 2 requires that TC comply with and implement the recommendations set forth in the FSEIS. Remarkably, though, Kothari testified that TC would only need to comply with the PHMSA Conditions if it chose to do so. Her explicit testimony was that TC has "**voluntarily adopted** to apply those Permit Conditions …" (ROA 025583-025594), despite her admission that PHMSA had not notified TC that the PHMSA Conditions were voluntary in nature (ROA 025585), and despite the fact compliance was required by Condition No. 3 of the Original Permit. A promise to comply is not a showing of continued compliance. Kothari's testimony was illustrative of TC's cavalier approach towards regulatory compliance, and was not a showing of continued compliance.

C. Flawed Risk Analysis; Spills in High Consequence Areas – Finding 25.

Finding 25 of the Order claims that a spill from the proposed KXL Pipeline in a High Consequence Area

[2] Meera Kothari was TransCanada's lead project engineer for the KXL Pipeline project. She is not licensed as an engineer in the United States (ROA 025603, 025681).

("**HCA**") would occur no more than once every 420 years (ROA 031685). This claim is clearly erroneous as unsupported by substantial evidence. TC's risk analysis was performed by Heidi Tillquist, an environmental toxicologist with no formal training in risk analysis whose testimony demonstrated a lack of knowledge of basic principles of risk analysis. (TR: 850)[3]. TC's entire risk analysis process was shown to be seriously inadequate. In fact, Tillquist's testimony revealed that TC had not even completed its engineering analysis for the KXL Pipeline (TR: 825-826).

A significant portion of Tillquist's testimony focused on risk analysis with respect to the probabilities of pipeline leaks and spills, possible spill volumes, and the environmental effects of a spill – for the entire pipeline system, including HCAs. Contrary to the PUC's findings in the Order, Tillquist's testimony exposed serious holes in TC's purported ability to comply with the Original Permit, and highlighted a disregard for the safety of South Dakota's residents and environment. This was demonstrated by Tillquist's admission that her choice of statistical methodologies used to calculate the risks posed by the KXL Pipeline were, in part, designed for public relations purposes (TR: 844-847).

Tillquist admitted that her risk analysis was based largely on analysis of the PHMSA database (TR: 825-828). She also acknowledged that her risk analysis excluded risk of spills at tanks and terminals (TR: 832), that she did not take geographical variance into account (TR: 861-863), that she was unable to factor in different construction and operation standards between pipeline companies reporting in PHMSA database (TR: 834-835), and that her risk analysis failed to account for an increased likelihood of adverse weather events (TR: 867). This last point was crucial in light of her admission that she did not take into account data on adverse weather events such as the two contiguous hurricanes that caused damage to a TC pipeline in Guadalajara, Mexico (ROA 027266-027267). When asked about risks from landslides, Tillquist admitted her risk data was taken from an analysis of the entire PHMSA database and was not localized to areas of high risk. She stated that TC would perform a more

[3] The designation "TR" references the transcript of the evidentiary hearing held before the South Dakota Public Utilities Commission in Docket No. HP14-001.

detailed engineering analysis, but that it had not been completed (TR: 871-872).

Further undercutting the PUC's findings concerning the likelihood of spills, Kothari acknowledged that there were 14 spills in the first year TC operated the base Keystone pipeline (TR: 1005-1006). In testimony that defied credibility, Kothari claimed a pipeline that spills 14 times in its first year of operation is "safe" (TR: 1007). Kothari also admitted only being "familiar generally" with the spills at the Keystone pumping stations upon initial operations. (ROA 025533).

Illustrating the risks posed, there was hearing testimony concerning a 400-barrel crude oil spill on the base Keystone pipeline at the Ludden Pump Station in May 2001. This spill was the largest in that pipeline's first year of operation (*see*, DRA Hearing Exhibits 69, 70 and 172), albeit eclipsed by the recent Hutchinson County spill. TC's lead project engineer Kothari testified about the Ludden spill, indicating that it involved failure of an "above-ground component, such as a fitting" (ROA 025533). She further testified that "reports are created" and was "aware there was a spill there, but...not...all the details," admitting that she had not read the reports (ROA 025676-025677) and, significantly, was unwilling to guarantee that a larger spill would not happen if the KXL Pipeline was constructed (ROA 025677-025678). Kothari was unaware of calculations performed by the consulting group Exponent that under the latest detection equipment plan TC provided to the US State Department, a spill of some 1,400 barrels of crude oil could occur for two hours before being detected electronically by TC's systems (ROA 025679-025680) (*see, also*, FSEIS, Appendix B, 3.0(1)(g), p. 28). As Kothari agreed, that is a "real lot of crude" (ROA 025680). 1,400 barrels of crude oil consists of 58,800 gallons.

The point of this testimony is that the PUC's Findings 18 and 20 concerning the likelihood of a spill were not based on credible, substantial evidence and were clearly erroneous in light of the entirety of the evidence. Tillquist testified that her calculation of a risk of a KXL spill was conservative (2.2 spills over 10 years of pipeline operation), yet the actual number of spills on the base Keystone pipeline greatly exceeded her "conservative" estimates (TR: 855-856, 860). Testimony concerning the risk of spills did not take into account the recent serious spill occurring in Hutchinson County, South Dakota, where a leak in the base Keystone pipeline resulted in nearly

17,000 gallons of tar sands crude leaking into the earth.[4] While the Hutchinson County/Keystone pipeline leak had not occurred at the time the PUC issued the Order, it is illustrative of the serious deficiencies in TC's risk analysis revealed during the proceedings, which the PUC erroneously ignored.

It is important to recognize that risk assessments are required by PHMSA for HCAs (Original Permit, Condition 14; 49 CFR 195.452; FSEIS 3.0(14), p. 33). In the FSEIS, State Department analysts noted the "large differences" between "system components and facilities that comprise the discrete elements [which] cast uncertainty on the use of aggregated metrics for risk" and equally on the use of aggregated "professional engineering judgment." (FSEIS 3.0(26), p. 38). For example, the FSEIS observed that seals and seats have a "higher potential for spills than (on equipment & pumps)" (FSEIS, Appendix B, 3.0(11)(a), p. 32). The FSEIS indicated that due to "dominance" of risks "associated with mainline pipe and other system components (other than mainline valves or tanks)" the risk assessment required by 29 CFR 195.452 should address both "to effectively reduce risk" (FSEIS 3.0(20a), p. 35). Contrary to the PUC's findings, TC provided no substantial evidence to demonstrate compliance with these requirements. As noted above, the reality was the opposite as TC's own witnesses revealed serious flaws in the required risk analysis. On this basis, the PUC's findings in the Order relating to risk of spills of tar sands crude oil in HCAs – not to mention the risk of spills along the entire pipeline system – was not supported by substantial (if any) evidence and was clearly erroneous.

D. Failure of Cathodic Protection; Fusion Bonded Epoxy; Spill Causes – Finding 28.

Finding 28 of the Order claims that TC has thousands of miles of the same grade of pipeline steel coated with fusion-bonded epoxy ("**FBE**") already produced for the KXL Pipeline. The finding notes only one instance of corrosion found to have occurred, in Missouri, and that TC was now installing more passive anodes for cathodic protection (ROA 031686).[5] This finding seems to support the PUC's conclusion that TC's proposed Project is "safe" and does not pose a risk to South Dakota's land and water resources. As with the PUC's erroneous findings

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[4] Neuhauser, US News and World Report, "*Keystone Leak Worse Than Thought*", April 8, 2016.

[5] As of this date, no root cause analysis has been released with respect to the large spill that occurred in Hutchinson County, South Dakota. At this point it is unknown whether the spill was a result of corrosion.

relating to risk analysis, its findings relating to pipeline corrosion and the overall safety of the proposed Project are clearly erroneous.

The role of cathodic protection and FBE in construction of the proposed Project was explored in testimony at the hearing. Cathodic protection is a technique used to control the corrosion of a metal surface near another metal surface by making it the cathode of an electrochemical cell. FBE is a coating applied to the outer surface of the metal pipe in order to protect it from corrosion from contact with the earth after burying it.

1. The Missouri Incident

The segment of the base Keystone pipeline referenced in the PUC's findings as the site of the "Missouri" incident was constructed by TC in a pipeline corridor, some 40 feet from two other metal pipelines (TR: 1027). The "near miss" involved discovery of corroded areas on the walls of buried and in-service pipe, including one where the hazardous pipeline wall nearly corroded through within two years of the being installed (TR: 1026).

In spite of his role as President of TC's Keystone pipeline system, Goulet testified that he was not familiar with TC's *Study of Root Cause and Contributing Factors to the Keystone Pipeline Corrosion Anomaly - Final Report of TransCanada 2-13-13* (ROA 024360-024361, 024371) (the "**Root Cause Study**"). The Root Cause Study indicated that a one dig site alone, "Dig Site 1," where the peak depth of one anomaly was "96.8%," there were 6 anomalies caused by external corrosion (ROA 024369-024370). Goulet was not even able to generally estimate how many corrosion anomalies were eventually discovered (ROA 024318); however, he did claim that the corrosion was the "result of interference of another pipeline that runs in parallel to that particular portion of pipeline in Missouri. And, there's also electrical transmission line, I believe, in that area as well" (ROA 024291-024292). Note that TC installed its pipeline after the other one it claimed interference from.

While Goulet attempted to absolve himself for the "near miss" (ROA 024158), Kothari testified that the "root cause" of the "corrosion anomaly was related to cathodic protection interference" (TR: 1026, 1029). When asked whether TC's construction oversite included ensuring proper cathodic protection was in place, Goulet responded that "under the regulations, the cathodic protection system doesn't have to be operational when a

pipeline goes into service" (ROA 024180), adding it was "actually required to be in service within 6 months ... of … operation" (ROA 024181). Neither Goulet or Kotheri, nor any other TC witness ever explained whether the "near miss" in Missouri caused TC to rethink its protocols as to whether cathodic protection would be immediately installed during construction of the proposed Project instead of waiting until a later date.

Goulet expressed that he was "aware" that in the "past" TC buried pipe with line strikes and weld splatters – both of which could damage FBE and hence result in pipeline corrosion. "But our quality assurance process prevented that system from going into operation and we subsequently repaired those coating problems" (ROA 024183-024184). Goulet's testimony raises serious questions about TC's quality assurance process which the PUC ignored in issuing the Order.[6] When questioned about the Root Cause Study, Goulet testified that he was "not familiar with all the details" (ROA 024360).

While Goulet attempted to minimize the corrosion issues near St. Louis by claiming that the corrosion "feature, although it was as thick as a dime, it was also only the size of a dime in diameter" (ROA 024307). After being confronted with photographs of the anomalies juxtaposed with a ruler, Goulet agreed the corroded areas shown in Figure 10 of Root Cause Study were in fact larger, "maybe 1 3/4 average diameter" (ROA 024370). Challenged with information that another anomaly resulted in more than a 50% wall loss on a segment of pipe, Goulet again had to agree that another anomaly on p.18 of the Root Cause Report, at what was designated "Dig Site 2" had a "73.9%" wall loss (ROA 024373, 024379).

Reluctantly, Goulet acknowledged that the impact of corroded areas of pipe of the depth and size shown in the Root Cause Study was such that if the corrosion went through the remaining outer wall of the pipeline, then "obviously it would create a leak" (ROA 024360). Further attempting to downplay the "near miss" that caused an emergency shutdown of the base Keystone pipeline for four days (ROA 024372), Goulet stated: "I don't know

[6] In 2012 former TC employee Evan Vokes filed a complaint with Canada's National Energy Board ("**NEB**") concerning TC's practices. In her unrefuted testimony, individual intervenor Bonnie Kilmurry told the Commission the NEB found: "Many of the allegations of regulatory noncompliance identified by the complainant were verified by TransCanada's internal audit'." (ROA 024629).

if I'd call it an incident, but it was a feature that was found during the in-line inspection" (ROA 024316-024317).

Kothari then encouraged the PUC to not worry about cathodic protection, since "no similar situation could exist in South Dakota because there are no shared utility corridors" (TR: 1025). Kothari's testimony was patently incorrect. Goulet previously testified the proposed KXL Pipeline route crosses a metal pipeline of a major water transportation system known as the "Mni Wiconi Project" (ROA 024181-024182; also ROA 024763-024764), as well as a 50-year old cast iron water pipe for the City of Colome's water system (ROA 024257-024257).

2. Fusion Bonded Epoxy (FBE)

Kothari testified that FBE, a corrosion control coating, is applied to pipe at pipe coating mills. It is subject to degradation by ultraviolet ("UV") light (ROA 25895-25896). As TC's lead project engineer for the Project, she was unaware of any inspections performed on the FBE prior to the KXL pipe being moved to open yard storage (ROA 25896). Kothari testified that equipment used to check the thickness of FBE did not detect "holidays," an occurrence when FBE disbonds from the pipe (ROA 25897).

Other witnesses provided information concerning degradation of FBE. PUC staff witness David Schramm[7] testified that "when the pipeline is stored above grade at some point the ultraviolet light also with some humidity effects begins to degrade the outer surface of the FBE and it's only in effect on the outer surface and it typically produces a chalking effect … things like high heavy rain events or other things could remove that chalking …" (ROA 025982-025983). The length of time pipe is stored is significant, and the Order ignored testimony that substantially undercut its findings concerning FBE.

Schramm testified that while PHMSA has not regulated the length of time FBE-coated pipe can be safely exposed to the elements before breaking, he noted that organizations such as the National Association of Protective Coating Applicators issued recommendations that coatings should be applied over FBE (ROA 026011-026012) "within six months." (ROA 026012). However, Kothari testified, when shown photographs of KXL-

[7] David Schramm of EN Engineering was hired at the taxpayers' expense to provide analysis and testimony in the KXL Pipeline proceedings. At the time of the hearing, EN Engineering listed TransCanada among its clients. (ROA 026498-026499).

destined pipe stacked in a large open pipe yard, that TC did not apply protective coating for some time beyond that, stating "a year to 18 months is typically after the pipe has been manufactured" (ROA 25655). When cross-examined about the mishandling of pipe coatings, Schramm responded "I have no part of that." (ROA 026060).

Evidence on the record shows that TC's practices with respect to quality assurance and maintaining the integrity of the pipe it places in the ground are, at best, suspect. Testimony concerning both the failures of cathodic protection and inadequate protection of pipeline coatings shows that the PUC's findings were clearly erroneous. Other issues, including inadequate inspections, defects in pipe materials and connecting welds, will be addressed below in the section discussing Evan Vokes's testimony, also relevant to this Finding.

E. Failed Land Reclamation Efforts – Finding 41.

Finding 41 of the PUC's Order concerned land reclamation. Condition 16(m) of the Original Permit requires TC to re-seed all land affected by pipeline construction with comparable grasses and native species. The PUC went to great lengths in its finding to attempt to contradict the testimony presented by DRA and Sue Sibson concerning TC's ongoing failure, over a six-year period, to reclaim portions of her land damaged during construction of the base Keystone pipeline (ROA 031687).

Ms. Sibson and her husband own a farm in Miner County, South Dakota, where they raise grain, corn and beans, and feeder cattle (ROA 026753). The integrity of their land and, in particular, the quality of their grassland, is crucial to their ability to farm and ranch (ROA 026754). The base Keystone pipeline slices through approximately one and quarter miles of their property. *Id*. Once construction commenced, even though the Original Permit conditions required TC to take into account weather conditions, the company's contractors used heavy machinery in wetlands area during heavy rains, causing tremendous damage (ROA 026761-026762). When TC re-seeded the Sibsons' property, the effort was not done properly –the workers scattered seeds from a tractor running at high speed during high wind conditions. As a result, the following year saw nothing but noxious weeds growing on the pipeline easement area (ROA 026762-026763).

As of 2015, six years after construction, TC has still failed to reclaim the Sibsons' property, leaving

noxious plants – primarily a thick spike wheatgrass – the Sibsons' cattle are unable to eat (ROA 026765-026766). In areas of their farm where the Sibsons raise crops (corn and soybeans) instead of maintaining grassland, heat from the pipeline affects the root structure of their crops resulting in significantly reduced yields (ROA 026793). The PUC's findings in the Order recite Goulet's testimony that very few landowners remain who have reclamation issues with TC. Ms. Sibson's testimony was that all her neighboring property was in the same poor condition post-construction, yet those landowners simply chose not to follow up with TC's obligations to them (ROA 026798). Six years after construction of the base Keystone pipeline, the Sibsons' property has not been reclaimed as required (ROA 026814-026815). This testimony went directly to TC's inability or unwillingness to comply with the conditions of the Original Permit. Finding 41 was clearly erroneous in light of the testimony.

F. Effect of Proposed KXL Pipeline on Water Resources – Finding 43.

One of the more remarkable statements contained in the Order was Finding 43. The PUC found that testimony from a number of intervenors regarding the potential impact of the proposed KXL Pipeline on South Dakota's water resources does not apply to TC's ability to demonstrate continued compliance with conditions of the Original Permit, but instead, relates to its burden of proof under SDCL § 49-41B-22 (ROA 031687). SDCL § 49-41B-22 states that:

> The applicant 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.

While the PUC has styled this finding as a finding of fact, it is more appropriately a conclusion of law, and an erroneous one at that. TC had to establish that it met the requirements of SDCL § 49-41B-22 to obtain the Original Permit. However, SDCL § 49-41B-27 requires that TC must be able to demonstrate that it continues to comply with the Original Permit conditions. Those conditions, by necessity, include the relevant portions of SDCL § 49-41B-22 and particularly Original Permit condition number 1, which requires TC to "comply with all

applicable laws and regulations in its construction and operation of the Project." By dismissing the intervenors' concerns about the Project's potential effects on South Dakota's water resources, the PUC seriously erred. TC had the evidentiary burden to demonstrate that its proposed Project could continue to meet all these conditions, including that it neither "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" and that it "will not substantially impair the health, safety or welfare of the inhabitants." SDCL § 49-41B-22.

These issues were significant in the overall context of the proceedings, and it is unfortunate that the PUC erroneously chose to sidestep concerns about South Dakota's water in this context. Testimony from Cindy Meyers, an individual intervenor and registered nurse, brought a tremendous amount of clarity to the proceedings. Ms. Meyers noted, among other things, that TC had not prepared a health impact statement, and that its Emergency Response Plan set forth in the FSEIS failed to indicate a specific medical emergency response plan (ROA 026266). Her testimony highlighted that emergency responders were not adequately prepared to deal with either testing for or handling potential spills of tar sands crude oil, a component of which consisted of a highly toxic chemical, benzene (ROA 026266-026268). This is a serious concern because "benzene is the dominant toxin to be concerned about" and because "of benzene's solubility and its allowable limit of only 5 parts per billion in drinking water, a pipeline leak could contaminate a large volume of surface water and groundwater" (ROA 026268-026269). Ms. Meyers noted that there was no evidence demonstrating, for example, that TC had interfaced in any way with the Indian Health Service in regard to developing emergency medical responses (ROA 026268).

The PUC's failure to consider the effect of a potential KXL tar sands crude oil spill on South Dakota's water resources was a manifest legal error and, in light of the facts elicited at the hearing, resulted in a decision by the PUC that was clearly erroneous with respect to Finding 43 and TC's ability to continue to meet the conditions of the Original Permit.

G. Geological Risks Posed by Proposed KXL Pipeline – Findings 44-48.

Findings 44-48 of the Order specifically relate to testimony presented by Dr. Arden Davis, Professor Emeritus of Geology at the South Dakota School of Mines (ROA 031687-031688). Dr. Davis provided extensive testimony at the hearing concerning South Dakota's geological features and, in particularly, the geology of the areas traversed by the proposed KXL Pipeline. In showing the PUC maps from the US Geological Survey ("**USGS**") contained in the FSEIS, he estimated that the proposed KXL Pipeline would travel within "slightly more than 150 miles of Pierre Shale" (ROA 026403), which highlighted that a significant portion of the proposed route runs through areas characterized by the USGS as a "high landslide Hazard Area" (*see*, FSEIS, Volume 2, Chapter 3, 3.1 Geology, Figure 3.1.2-3, p. 3.1-29) due to its bentonite content.

Flying in the face of reality, TC insisted that only 1.6 miles of the proposed Project route traversed areas prone to landslide risk, with Kothari (who is not a geologist) even testifying that she was not sure if even this minute portion is really in such a high hazard area (ROA 025573-025574). When asked to comment on Kothari's testimony, Dr. Davis replied "I would be very surprised to hear that" (ROA 026403). Remarkably, Kothari attempted to maintain this position even after agreeing that the above-referenced USGS map shows the proposed route traversing up to 150 miles of high landslide hazard topography (ROA 025575-025576).

TC witness John Schmidt acknowledged that slope stability is an important safety consideration in routing a pipeline (ROA 024709). He testified that if "there's slope coupled with erodible ... you look to try and minimize," claiming it would also become a "reclamation issue" following construction, since it would be "difficult to maintain that right of way" (ROA 024712). Schmidt further agreed that bentonite soils would "potentially" create a "stability problem," especially when "coupled with water source and slope and other factors" (ROA 024713). He agreed that ground movement "may" occur in this area of South Dakota due to presence of Pierre Shale, especially the bentonite layers (ROA 024725). The presence of bentonite along the proposed Project route was crucial in that Dr. Davis described the clay nature of bentonite and concerns about construction where it predominates the ground-structure. Bentonite is "… a clay mineral. It's a platy mineral that can absorb water in between the sheetlike layers. And bentonite in particular can absorb up to around 190 percent

of its own weight in water. So the weight of water divided by the weight of solids can be almost two to one. And when it absorbs water then it's prone to failure. It also shrinks drastically during dry periods so it's the swell-shrink material that leads to slope instability." (ROA 026396).

Schmidt's admissions concerning geologic risks were important because, as TC's contractor charged with responsibility for "cultural surveys, biological surveys, wetlands, water bodies, things of that nature" (ROA 024671), he "wasn't aware" of a recent 500-year flood along the route, and admitted that "2, 3, 4, 5 inches of rain" could create a problem for the KXL Pipeline in unstable soils.[8] (ROA 024713). While Schmidt initially testified that he did not recall seeing information in the FSEIS that a majority of the proposed route through South Dakota is through such a "high landslide hazard area," (ROA 024714-024715). Upon being shown the USGS map, he acknowledged that TC's proposed re-routing maps did "obviously not" remove the pipeline from high landslide hazard areas (ROA 024715).

Schmidt also agreed that the "land forms and topography of the area" the KXL Pipeline is routed to go through are "characterized by dissected plateau with river channels that have incised into the landscape" and that each has numerous tributaries that feed water into major rivers (ROA 024717-024718), and are "important" component of the area's "watershed" (ROA 024719). Schmidt also acknowledged that almost all of Haakon, Jones, and portions of Tripp County have potentially unstable "gumbo" soils (ROA 024724). Schmidt admitted that he did not know the status of any plans to compensate for weather issues during construction, as required by Original Permit Condition 25 (ROA 024754-024755), despite this area and the areas with bentonite soils being susceptible to instability upon weathering (ROA 024725) – from "basic wind, sun, water ... those are mainly the erosive forces" (ROA 024754).

In its Order, the PUC dismissed the specific geological evidence presented by Dr. Davis on direct examination and admitted by Schmidt during his cross-examination. In doing so, the PUC relied entirely on

[8] Schmidt acknowledged that clay is well-known for absorbing large quantities of water (ROA 024722).

conclusory statements from the flawed risk analysis presented by Tillquist (an environmental toxicologist, not a geologist or geophysicist) to arrive at its findings that the risks posed by TC's Project were "highly unlikely." Findings 44-48 are clearly erroneous in that, among other things, it accepted flawed testimony from a witness whose approach to risk analysis was manifestly deficient over credible testimony from a reputable professor of geology who had specific knowledge of the geology of South Dakota.

H. Risk to Water Supplies of the City of Colome, South Dakota – Finding 49.

An issue hotly contested during the hearing concerned the risks posed by the KXL Pipeline to the drinking water supply of the City of Colome. Finding 49 discussed testimony from intervenor John Harter concerning the City of Colome and risks to its drinking water wells (ROA 031688). The PUC dismissed Harter's concerns noting that this was not an issue that affected TC's ability to meet conditions of the Original Permit. This response on the part of the PUC constituted clear error.

As noted above, SDCL § 49-41B-27 requires TC to demonstrate that it continues to comply with the conditions of the Original Permit, which include demonstrating compliance with all applicable laws and regulations in its construction and operation ..." Ongoing compliance with all laws also includes demonstrating compliance with the requirements of SDCL § 49-41B-22 that its proposed Project does not pose a "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" and that it "will not substantially impair the health, safety or welfare of the inhabitants."

Mr. Harter's testimony concerning the proximity of the proposed KXL Pipeline to the City of Colome's drinking water well intakes was important when viewed in the light of testimony presented at the hearing that a tar sands crude oil spill created a substantial risk of a release of benzene into the surrounding soil and water, in that "benzene is the dominant toxin to be concerned about" because its "solubility and its allowable limit of only 5 parts per billion in drinking water, a pipeline leak could contaminate a large volume of surface water and groundwater" (ROA 026268-026269). This was illustrated by the fact that the City of Colome's water tower

contains approximately 50,000 gallons of water, and it only takes 17 drops of benzene to contaminate that entire water supply (ROA 026272).

The proposed Project is approximately 455 yards from the City of Colome's drinking water wells (ROA 024061) and approximately 175 feet away from the City of Colome's source water protection area (ROA 025962). Contrary to TC's arguments and the PUC's findings, evidence from Dr. Davis indicated that notwithstanding the fact that the proposed Project was 175 feet away from the City of Colome's source water protection area, the permeable soils and geology of the area are such that a pipeline leak could contaminate Colome's water supply (ROA 026431-026432).

While the issues with the City of Colome constituted the focus of testimony, there are approximately 105 known wells within one mile of the proposed Project route (ROA 026272). However, the water supply in southern Tripp County is very vulnerable. *Id*. "[T]he aquifer in Tripp County serves for several domestic farm wells near the pipeline as well as the public water system at Colome." *Id*.

The PUC's findings referenced testimony from Brian Walsh with the South Dakota Department of Environment and Natural Resources ("**DENR**"), that the proposed Project route had been moved 175 feet away from the City of Colome's source water protection area as a result of consultations with DENR, which relied on calculations of the potential time it would take for contamination to travel to Colome's water supply (ROA 026969). What the PUC's findings failed to mention, however, was the significance of a geologic "cone of depression" that would draw contamination from a potential spill site into a zone where it could affect Colome's water supply (ROA 026273). Critically, Walsh's testimony revealed that DENR did not calculate the cone of depression in its analysis (ROA 026969).

TC had to demonstrate that it could continue to comply with the conditions of the Original Permit. That included compliance with all laws, including those protecting drinking water sources. Finding 49 relating to the risks posed to the City of Colome's water supply was clearly erroneous in that the PUC failed to adequately assess the geological evidence relating to the area in light of the complete record.

I. Flaws in Pipeline Construction and Regulatory Non-Compliance – Findings 69-77.

The PUC's Order focused a number of its Findings, numbers 69-77, on testimony provided by former TC engineer Evan Vokes (ROA 031692-031693). Vokes has undergraduate and master's degrees in materials engineering from the University of Alberta, and his background includes metallurgy and dealing with corrosion issues (ROA 026106, 026117). While employed at TC, proposed KXL Pipeline was one of the projects he worked on (ROA 026140, 026362). Vokes focused on and gained expertise in pipeline welding (ROA 026121). As Vokes noted, ensuring proper welds exist on pipelines is crucial because faulty welds can result in pipeline leaks or ruptures (ROA 026130). Vokes provided tremendous detail about various testing methodologies to check for weld integrity (ROA 026131-026135).

Commenting on the testimony, Commissioner Hanson quipped "I've got a master's degree just from listening here, and I don't need a doctorate." (ROA 026164). Vokes testified that it was important to qualify welders on pipeline projects because re-doing welds is expensive (ROA 026149-026150).

Having established his expertise, Vokes turned his attention to issues with TC and its management. He testified that during his tenure at TC, Canada's National Energy Board ("**NEB**") (the Canadian regulatory agency equivalent to PHMSA) notified the company of problems with welding procedures on the TC Cutbank project (ROA 026151). A TC manager had signed off on welding procedures (ROA 026152). Vokes and another TC employee were tasked with responding to the NEB notification and upon investigating the issues found significant deficiencies in TC's welding procedures (ROA 026152-026153). Vokes notified TC management of the existence of the problems (ROA 026153). Instead of correcting the problems, TC management re-certified the defective welding procedures notwithstanding having received direct notice of deficiencies (ROA 026154). Vokes noted that TC had been installing pipelines for a number of years using deficient welding procedures (ROA 026155). This caused Vokes tremendous concern, noting that a pipeline explosion near Otterburne, Manitoba, was a striking example of a latent welding defect that could create a disaster (ROA 026155-026156).

Vokes's work on the base Keystone included auditing the automated ultrasonic testing process (ROA

026156-026157). A key portion of his testimony concerned the discovery of problems with "peaked pipe" on the base Keystone pipeline. This was a manufacturing defect TC management was aware of, yet its management chose to use the defective pipe anyway in order to keep the Keystone project on schedule (ROA 026167-026171).

While working on TC's Bison pipeline, Vokes flagged welding inspection issues, noting that some 1,200 to 1,300 welds had not been appropriately inspected, which he reported to TC management. (ROA 026178-026179). In response, TC performed tests on a limited number of samples and then left the rest of the welds in question in the ground without proper inspection (ROA 026180). Once the Bison pipeline went into service, TC needed to report to PHMSA on operational problems encountered. Vokes testified that he highlighted a number of issues and wrote reports detailing problems with welds on the pipeline. Instead of being lauded for his diligence and focus on quality control, he was instead reprimanded for "creating the project trouble." (ROA 026180-026181). Shockingly, Vokes was told by his manager to just "slip it on by, like the rest of everything was done. Just participate." (ROA 026181).[9]

Testimony from Vokes concluded with his description of issues involving Weldsonix, an outside contractor hired by TC to examine pipeline welds on the KXL Pipeline (ROA 026362). Vokes testified that Weldsonix was hired even though another TC subsidiary, Nova Gas, had removed them as a contractor since "they had problems with performance, serious performance issues that affected pipeline construction" (ROA 026363). Vokes alerted TC manager David Taylor to the problems with Weldsonix, but he was ordered by Taylor and Kothari that Weldsonix would be used as a contractor (ROA 026364). In addition to Vokes, another project team member as well as TC's quality management and supply chain management teams also raised objections to using Weldsonix with the KXL Project managers, including Kothari. However, they were instructed to use Weldsonix notwithstanding their objections (ROA 026365-026367), and Weldsonix was ultimately hired (ROA 026367-026368). Shortly thereafter, Vokes left TC.

[9] See also evidence of PHMSA violations regarding defective welding on the Gulf Coast segment of the Keystone Pipeline (ROA 024341-024343).

The import of Vokes's testimony is that it goes to the heart of the issues TC must deal with in certifying that it can continue to comply with the conditions of the Original Permit. As noted above, a key condition requires TC's compliance with all laws and regulations. When Vokes was directly asked if he was instructed by TC management to ignore regulatory violations, his answer was "[m]ore than once. Many times." (ROA 026184). Taken in its totality, Mr. Vokes presented credible and specific evidence that TC has a corporate culture of regulatory non-compliance. When his testimony is viewed in the context of Findings 69-77, the PUC's findings are clearly erroneous in light of the entire record.

STANDARD OF REVIEW

SDCL § 1-26-36 provides the basis for reversing the Order. "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."

In reviewing the PUC's Order, the PUC's factual findings and credibility determinations are reviewed under a clearly erroneous standard, and questions of law are reviewed *de novo*. *Sauder v. Parkview Care Center*, 2007 S.D. 103, ¶ 11, 740 N.W.2d 878, 882 (S.D. 2007).

In addition to the standard basis for review set forth above, DRA suggests that the PUC is held to a higher standard with respect to its decision-making process under the principles of the Public Trust Doctrine. The Public Trust Doctrine holds that certain natural resources belong to all and cannot be privately owned or controlled because of their intrinsic value to each individual and society. Public governmental bodies such as the PUC are, in effect, held to be trustees, with a fiduciary duty owed to the public to safeguard those resources. "[T]he Public Trust Doctrine is a critically important reminder of the duty of government to preserve wildlife, to protect the

public's right to enjoy and benefit from a diverse ecosystem, and the duty of courts to carefully scrutinize any attempts to abandon the public trust in those resources." *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008) (quoting Carstens, *The Public Trust Doctrine: Could a Public Trust Declaration for Wildlife Be Next?* (2006) vol. 2006, No. 9, Cal.Envtl. L.Rptr. 1).

South Dakota explicitly recognized the Public Trust Doctrine. In *Parks v. Cooper*, 2004 S.D. 27 ¶ 46, 676 N.W.2d 823, 848 (S.D. 2004), the South Dakota Supreme Court held that "as matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine …" This principle in South Dakota extends back to the earlier part of last century, when in *Filsrand v. Madson,* 35 S.D. 457 (1915), the Court held that a riparian owner of water cannot interfere with "navigating, boating, fishing, fowling and like public uses" by the public. Interestingly, while not directly addressing the public trust doctrine, the South Dakota Supreme Court, in *State v. Schwartz*, 2004 S.D. 123 ¶ 52, 689 N.W.2d 430, 443 (S.D. 2004), stated:

> "[O]ur decision in *Parks v. Cooper* exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution." *Id.*

The Public Trust Doctrine imposes a heightened fiduciary standard on the PUC in protecting South Dakota's environment and resources from potential damage from a pipeline leak or spill. The public trust doctrine has explicitly been extended to protection of the State's water resources – which would include its surface and groundwater. The same principle applies to protection of the State's land, including its soil, native grasses, and crops. DRA suggests that the application of the Public Trust Doctrine means that the PUC should have set a higher bar for companies such as TC, whose activities risk damaging the State's land and water resources. This Court should review the PUC's Order through the lens of the Public Trust Doctrine in addition to the base-line statutory standard set under SDCL § 1-26-36.

ARGUMENT

The Order should be overturned for a number of reasons – purely as a matter of law in light of the statutory requirements of SDCL § 1-26-36, and also when viewing the PUC's actions through the lens of the public trust

doctrine. Using these standards, the PUC's Order was clearly erroneous in light of the entire evidence in the record, was based on unlawful procedure, violates the statutory provisions of South Dakota's Energy Conversion and Transmission Facilities law, SDCL Chapter 49-41B, and contains numerous legal and factual errors warranting reversal.

A. Intervenors' Motion to Dismiss

The PUC fatally erred in denying the Intervenors' Joint Motion to Dismiss in its December 29, 2015 order (ROA 031643-031644) which moved the PUC to (a) dismiss TC's petition for certification, and (b) revoke the Original Permit as a result of the denial of a Presidential Permit for the Project.

For proposed international petroleum pipelines (such as the Project) the President of the United States, through Executive Order 13337, directs the Secretary of State to decide whether a project serves the national interest before granting a Presidential Permit. On November 6, 2015, the President determined that KXL Pipeline would not serve the national interest of the United States and denied TC's application for a Presidential Permit (ROA 031684).

The Original Permit was issued subject to fifty separate conditions and multiple sub-conditions which ranged from compliance with all federal and state environmental laws, to compliance with a variety of other matters. Condition No. 1 of the Original Permit requires TC to comply with all applicable laws and rules. Condition No. 2 of the Original Permit specifically provides that "Keystone **shall obtain** and shall thereafter comply with **all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State**" [*emphasis added*].

SDCL § 49-41B-27 clearly provides that TC must show it could continue to meet the conditions of the Original Permit in order to obtain certification. South Dakota's legislature did not draft SDCL § 49-41B-27 in a manner that permits applicants to only argue, not show, that they will meet conditions at some point in the future. Similarly, the Original Permit does not operate on a speculative basis. Likewise, the Original Permit does not say "if TC can comply at some unknown date." Its language was clear in mandating that TC "shall obtain" permits,

including the Presidential Permit. TC applied for a Presidential Permit and it was denied. That is the end of the story. The PUC should have immediately dismissed TC's petition for certification and issued an order granting the Intevenors' Joint Motion to Dismiss. The PUC's failure to do so and its issuance of the Order was in excess of its statutory authority, constituted an error of law, and was arbitrary or capricious in nature. The PUC's actions warrant reversal of the Order pursuant to SDCL § 1-26-36.

In exploring the PUC's view that the mere prospect of TC being able to at some point in the future apply for and receive another Presidential Permit would suffice to support its decision, a compelling argument was raised by individual Intervenor and rancher, Paul Seamans during the hearing on the Intervenors' Joint Motion to Dismiss. He told the PUC that "if you let this thing go on forever and ever, you have that easement hanging over your head. And it's going to affect the saleability of your land if you ever decide to sell it. And I can speak from personal experience on that because about four years ago we had our home place, farm/ranch listed for sale and we had a pretty serious buyer lined up and he got the thought that the Keystone XL was going to cross the land that we were going to sell and he – he was ready to back out of it." (ROA 031601).

By denying the Intervenors' Joint Motion to Dismiss and thereafter issuing the Order, the PUC has effectively told South Dakota landowners that title to their property is clouded in perpetuity. A perpetual cloud on landowners' title, with a corresponding impairment of marketability of property, creates a tremendous issue with respect to due process of law and a deprivation of property rights. The due process clause of the Fourteenth Amendment of the U.S. Constitution prohibits state governments from depriving "any person of life, liberty or property, without due process of the law ...." *Tri County Landfill Ass'n, Inc. v. Brule County*, 2002 S.D. 32, ¶ 10, 641 N.W.2d 147, 151 (S.D. 2002). The Supreme Court noted that the constitutional protections afforded by the due process clause may be split into its two counterparts, procedural due process and substantive due process, and that a violation of substantive due process occurs when "certain types of governmental acts [violate] the Due Process Clause regardless of the procedures used to implement them." *Id*., citing *Tri County Landfill Ass'n, Inc. v. Brule County*, 2000 S.D. 148, ¶ 14, 619 N.W.2d 663, 668 (S.D. 2000). The PUC's Order, by effectively creating

a perpetual cloud on landowners' title, is a violation of those landowners' due process rights. South Dakota's legislature cannot have written SDCL § 49-41B-27 in a manner that would deprive landowners of their property interests, in perpetuity, based on the PUC's mere speculation that an applicant for a hydrocarbon pipeline permit might in the future, apply for and obtain a required federal clearance. That is not due process. The PUC's denial of the Intervenor's Joint Motion to Dismiss constituted manifest error.

Concurrently with their request to dismiss TC's petition for certification, in their Joint Motion to Dismiss the Intervenors also asked the PUC revoke the Original Permit pursuant to SDCL § 49-41B-33(2), which provides in pertinent part that "[a] permit may be revoked or suspended by the Public Utilities Commission for … [f]ailure to comply with the terms or conditions of the permit …"

The statute is clear and permissive in nature. With the denial of the Presidential Permit, TC was unable to comply with the conditions of the Original Permit in that it could not obtain the Presidential Permit it applied for and, hence, is also unable to comply with all applicable laws and rules as required under the conditions of the Original Permit. Consequently, revocation of the Original Permit is within the PUC's statutory authority under the plain language of SDCL § 49-41B-33(2). The PUC staked out the position that the Presidential Permit requirement was purely prospective in nature and, hence, it did not have authority to revoke permit under SDCL § 49-41B-33(b). (ROA 031623-031625). That determination constituted legal error in that the statute places no such limitation on the PUC's authority. While the term "may" is used to describe the PUC's authority, this means that a decision to revoke an applicant's permit is permissive or discretionary in nature. However, given that a key condition of the Original Permit required a Presidential Permit – which was denied – the PUC's failure to exercise its authority and revoke the Original Permit constituted an abuse of its discretion.

B. Burden of Proof

Issues of an appropriate burden of proof permeate the PUC's Order. This is an important issue because, first, the record clearly demonstrates that TC failed to meet its burden of proof under SDCL § 49-41B-27, and second, because the PUC sought to improperly shift the burden of proof onto the Intervenors in this case. This

inversion of a key legal principle underpins numerous of the PUC's findings set forth in the Order. Having adopted this unusual and erroneous position, the PUC then contradicted itself by stating in Conclusion of Law No. 3, that TC has the burden to show that its certification is valid (ROA 031694).

DRA would certainly agree with that basic proposition. There is no question that TC bears the burden of proof in advancing its petition for certification under SDCL § 49-41B-27. This principle is long-standing under South Dakota law, with the South Dakota Supreme Court "affirming the well-established rule that, "He who asserts an affirmative has the burden of proving the same."" *Tripp State Bank of Tripp v. Jerke*, 45 S.D. 580, 189 N.W. 514 (S.D. 1922).

The PUC's rules expressly 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). TC is the petitioner. TC submitted a petition to the PUC pursuant to SDCL § 49-41B-27 alleging that it continues to meet the conditions upon which the Original Permit was issued. The petition asks the PUC to make a factual determination that it can continue to meet the conditions upon which the Original Permit was issued. That petition was opposed by the intervenors, including DRA. Hence, TC has the burden of proving that the proposed KXL Pipeline project continues to meet the conditions upon which the Original Permit was granted.

These principles were acknowledged prior to the PUC's evidentiary hearing. Chairman Nelson directly instructed the parties as to who had the burden of proof and what that burden was:

> "It 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. I would like to stress again to all parties here today that this case is about whether the project continues to meet those 50 Conditions." (ROA 023968).

TC also acknowledged its burden during the course of its opening statement to the PUC: "We 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." (ROA 024025). TC affirmed that it would call seven witnesses to satisfy its burden of proof, "five of whom are direct witnesses, two

of whom are rebuttal. We will present exhibits that meet that burden of proof." *Id*. TC's burden of proof was further articulated by the PUC's counsel at the conclusion opening statements: "And the party having the burden of proof, the Petitioner, TransCanada Keystone Pipeline, LP, please proceed with your case in chief." (ROA 024106).

It is absolutely clear that TC had the only burden of proof to establish by substantial evidence that it could continue to meet each and every one of the conditions of Original Permit to support PUC certification. The foregoing discussion concerning denial of the Presidential Permit aside (which conclusively demonstrates TC cannot meet Conditions No. 1 and 2 of the Original Permit), the record before the PUC is remarkable in a very significant manner. What is remarkable is what is missing.

Upon conclusion of evidence at the evidentiary hearing, counsel for Intervenor Standing Rock Sioux Tribe, joined by DRA and other intervenors, moved for immediate dismissal of TC's petition for certification (ROA 027338). As a visual aid to assist the PUC, counsel provided a "tracking table of non-evidence" which tracked each and every permit condition which had been the subject of testimony by TC or PUC staff witnesses during the course of the proceedings (ROA 027339). The import being that of the fifty conditions of the Original Permit (which contained 107 separate and distinct requirements), during the entire course of the proceedings, TC had presented limited and insufficient evidence only as to its purported ability to continue to comply with six of those conditions (specifically, Conditions Nos. 1, 2, 6A, 13, 15, and 31). Furthermore, the PUC's staff's witnesses only presented evidence as to four conditions (Conditions Nos. 1, 13, 15 and 31). (ROA 27340). It bears repeating that under SDCL § 49-41B-27 TC was required to "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." Yet TC, perhaps in a monumental display of hubris, failed to present ***any*** evidence with respect to the majority of the conditions of the Original Permit. Quite simply, TC failed and the PUC should have summarily denied certification.

Instead, in what appears to be an attempt to save TC from its fatal self-inflicted wound, the PUC rode to TC's rescue by first improperly inverting the very precept of which party bore the burden of proof, and second,

by accepting (in Conclusion of Law No. 8 of the Order (ROA 031694)) the premise that a conclusory statement by Goulet on behalf of TC that he "certified" that the company could continue to meet the conditions of the Original Permit was sufficient.

The PUC, in its Order, erroneously shifted the burden of proof to the intervenors. For example, Finding No. 31, which relates to approximately 41 separate requirements within the 50 conditions of the Original Permit, recites that "[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future". (ROA 031686). Likewise, Findings Nos. 32, 33, 34, 37, 42 and 68 also recite, in somewhat similar language, that "no evidence was presented that Keystone cannot continue to comply with this condition." (ROA 031686-031687, 031691). The PUC went even further in Conclusion of Law No. 10, which recites that the intervenors failed to establish any reason why TC cannot continue to meet conditions of the Original Permit (ROA 31694).

The PUC clearly erred in attempting to shift the burden of proof to the intervenors given "… the general rule that the burden of proof falls on the party alleging the affirmative of an issue." *Frank Stinson Chevrolet, Inc. v. Connelly*, 356 N.W.2d 480, 482 (S.D. 1984). The Supreme Court notes that the test for determining which party has the burden of proof, "is found in the result of an inquiry as to which party would be successful if no evidence were given, the burden being on the adverse party." *Frank Stinson Chevrolet, Inc. v. Connelly*, supra; (citing *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979); *Fortgang Bros., Inc. v. Cowles*, 249 Iowa 73, 85 N.W.2d 916 (1957)). TC had the burden of demonstrating, through substantial evidence, that it could continue to comply with the conditions of the Original Permit. In the absence of any evidence, certification could not have been granted. SDCL § 49-41B-27 is clear that it is up to the applicant to meet the burden. TC failed to do so, and in an attempt to rescue the company, the PUC erroneously shifted the burden to the intervenors. That, combined with the lack of substantial (if any) evidence presented by TC concerning the conditions of the Original Permit, constitutes a substantial error warranting reversal of the Order.

C. Substantial Evidence

With the burden of proof squarely on TC to demonstrate that it can meet or continue to comply with the

conditions of the Original Permit, it has the obligation to demonstrate that it can meet that burden by presenting substantial evidence to support its petition under SDCL § 49-41B-27. 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." SDCL § 1-26-36.

In determining whether a decision by the PUC is clearly erroneous the courts examine whether **substantial evidence** exists in the record upon which the PUC based its decision. *Helms v. Lynn's, Inc.*, 1996 S.D. 8, ¶ 10, 542 N.W.2d 764, 766 (S.D. 1996); *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, 545 N.W.2d 834 (S.D. 1996); *In re Establishing Certain Territorial Elec. Boundaries*, 318 N.W.2d 118, 121 (S.D. 1982).

Substantial evidence is more than a mere promise, hope, or conclusory statement. 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." The Supreme Court explained this requirement in *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, ¶ 15, 793 N.W.2d 816, 822 (S.D. 2011). In *M.G. Oil. Co.*, the "evidence" at a city council meeting consisted of vague conclusory statements as to the potential impact of granting a permit. The Court considered whether testimony and comments submitted constituted substantial evidence. Its conclusion was that it was not. The Court held 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)).

TC is in a similar position. First, the PUC erroneously relied on Goulet's self-serving conclusory "certification" of compliance to support its decision. *See*, Conclusion of Law No. 8 (ROA 031694). Second, the PUC issued its Order without TC having presented any evidence as to its continued compliance, or even its ability to comply, with a majority of the conditions of the Original Permit (ROA 027339). The Original Permit contained fifty conditions, including 107 separate requirements. TC had an opportunity to make its case, yet it presented

evidence only as to its purported ability to continue to comply with six conditions (Nos. 1, 2, 6A, 13, 15, and 31). PUC staff witnesses only presented evidence as to four conditions (Nos. 1, 13, 15 and 31). (ROA 27340). This does not constitute substantial evidence.

D. Erroneous Procedural Rulings – Evidentiary and Discovery

1. The PUC erroneously limited the scope of discovery.

The PUC made numerous procedural errors that provide a basis for reversing the Order beginning on December 17, 2014, when it issued an order granting TC's motion to limit the scope of discovery to the fifty conditions of the Original Permit and proposed changes to the findings of fact in the Original Permit that were identified in TC's "Tracking Table of Changes" attached as Appendix C to its petition for certification (the "**Discovery Order**") (ROA 001528-001529).

The Discovery Order adopted an erroneously narrow reading of SDCL § 49-41B-27 because it failed to look at the statute in context. Statutes addressing the same subject matter are taken into consideration and read, or *in pari materia*. *Onnen v. Sioux Falls Indep. Sch. Dist. No. 49–5*, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (S.D. 2011). "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683 (S.D. 2001). Certification of continued compliance under SDCL § 49-41B-27 must be read in the context of SDCL §§ 49-41B-22 and 49-41B-33 which permit revocation of a permit and which require consideration of factors including whether the proposed Project will comply with all applicable laws and rules, pose a threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area, substantially impair the health, safety or welfare of inhabitants, or unduly interfere with the orderly development of the region.

Additionally, the Discovery Order runs afoul of established law concerning the scope of discovery in contested proceedings. The scope of pretrial discovery is, for the most part, broadly construed. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), citing *Bean v. Best*, 76 S.D. 462, 80 N.W.2d 565 (S.D.

1957). Furthermore, SDCL 15–6–26(b) provides, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ..." A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial. *Kaarup v. St. Paul Fire and Marine Ins. Co*., supra. The limitations placed on DRA and other intervenors by the Discovery Order constituted reversible error.

2. The PUC erroneously characterized communications between TransCanada and PUC staff as attorney work product.

On April 22, 2015, the PUC entered an order denying DRA's motion to compel discovery from PUC staff (ROA 004798-004799). DRA sought copies of all communications between TC and its affiliates and the PUC and its staff. This information was sought because of perceptions on the part of DRA and other intervenors that the interests of a regulatory agency and a company within the industry it purports to regulate were improperly aligned. These perceptions began at the outset of the proceedings when, for example, TC's and the PUC's staff's respective counsel were observed meeting behind closed doors in the PUC's staff's offices during a break at the December 9, 2014, PUC hearing where TC's motion to limit the scope of discovery was argued. Throughout the course of the proceedings, DRA and other intervenors were left with the impression that PUC staff, instead of engaging on an independent basis, appeared largely supportive of TC's attempt to seek certification. In response, DRA sought to obtain communications between TC and its regulator.

Access to the documents sought from PUC staff were important from a number of perspectives. First, government should be open and transparent. Transparency demands that dealings between corporate applicants and their governmental regulators be available for public inspection. Second, as a public interest organization, DRA is concerned about the prospect of regulatory capture with respect to the PUC's relationship with hydrocarbon pipeline operators. Regulatory capture is a form of government failure that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or political concerns of special

interest groups that dominate the industry or sector it is charged with regulating. It is a recognition that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." George Stigler, "*The Theory of Economic Regulation*," Bell Journal of Economics and Management Science (Spring 1971).

In denying DRA's motion to compel discovery and obtain the communications between TC and PUC staff, the PUC erroneously determined that the communications sought constituted attorney work product (ROA 004798-004799). The attorney work product doctrine exists for the purpose of protecting the attorney/client privilege. By adopting the position that communications between TC and PUC staff constitute attorney work product, the PUC has inadvertently admitted that the interests of PUC staff and TC are aligned in an almost *de facto* attorney/client relationship, constituting the essence of regulatory capture and providing clear and convincing evidence of underlying bias.

3. The PUC erroneously excluded evidence from the hearing.

The PUC excluded numerous DRA exhibits following a motion *in limine* filed by TC. While a small number of excluded exhibits were permitted on reconsideration (ROA 021070- 021071), the PUC's order was erroneous in that it was largely based on TC's complaint that the proposed exhibits were not timely disclosed in discovery. The PUC abused its discretion and acted arbitrarily and capriciously because the bulk of the excluded exhibits constituted documents disclosed by TC to DRA during discovery. TC was on notice that its own documents could be used as exhibits and the PUC's exclusion of those documents was in error

E. PUC Bias/Other Issues Affecting Tribunal

A variety of issues arose during the proceedings before that PUC that, in their totality, warrant reversal of the Order or, at a minimum, require remand for a new hearing. At the outset of the evidentiary hearing, it was announced that Commissioner Fiegen would not be present due to a serious medical issue (ROA 023965). DRA, along with other intervenors expressed concerns for her health and wished her a full recovery. Although Commissioner Fiegen certified that she read the official transcripts of the proceedings prior to voting in favor of the Order (ROA 029755), as this Court knows, being physically present in a courtroom as a trier of fact and

actually observing witnesses testify is invaluable with respect to being able to effectively assess the credibility of witnesses testifying before the tribunal. It is unfortunate, but Commissioner Fiegen's absence during the evidentiary hearing has resulted in a scenario where the procedural due process rights of the parties to the proceedings have been compromised by the Commissioner's inability to fairly and accurately assess the credibility of witnesses by seeing their testimony.

Another unfortunate issue arose during the evidentiary hearing, this time with respect to Commissioner Hanson. During witness testimony, the Commissioner appeared to be asleep. In the ensuing discussion, the Commissioner revealed that he was suffering from severe back pain, was taking medication for relief prior to being scheduled for surgery, and that the medication was making him nauseous (ROA 026446-026449). DRA is sympathetic to Commissioner Hanson's medical issues. Unfortunately, those issues created a public perception that the Commissioner was insufficiently engaged in the proceedings during the course of witness testimony, thereby creating an issue similar to that faced with Commissioner Fiegen's absence.

While sensitive due to the nature of the respective Commissioners' medical issues, these circumstances are significant due to the deference afforded administrative agency decisions by the courts. South Dakota's Supreme Court has noted that "we defer to the agency on the credibility of a witness who testified live because the agency 'is in a better position ... to evaluate the persuasiveness of [witness] testimony.'" *In re Prevention of Significant Deterioration (PSD) Air Quality Permit Application of Hyperion Energy Center*, 2013 S.D. 10, ¶ 41, 826 N.W.2d 649, 661 (S.D. 2013), citing *McKibben v. Horton Vehicle Components, Inc.*, 2009 S.D. 47, ¶ 11, 767 N.W.2d 890, 894 (S.D. 2009).

The final issue relating to the PUC ties directly back to the discussion of regulatory capture discussed in the preceding section of DRA's argument, and is quite troubling. Testimony from PUC staff witness David Schramm revealed the existence of a letter from South Dakota Governor Daugaard to PUC Chairman Nelson urging approval of the Project (ROA 025993, 008531). Two of the three Commissioners who approved the Order were appointed to their positions by the Governor. The combination of political support for a large multinational

energy company expressed by the State's political leadership, and the perception that the PUC and its staff are subject to regulatory capture by the industry they are charged with regulating, leads to a perception that the Order was tainted by an underlying bias. Those perceptions suggest that the PUC's decision should not be given deference, and render the PUC's Order arbitrary and capricious so as to warrant reversal of the Order.

CONCLUSION

In issuing the Order, the PUC made numerous fatal errors – ranging from the procedural by erroneously limiting the scope of discovery and improperly excluding exhibits, to the substantive. The ultimate question is whether TC was able to demonstrate through substantial evidence that it could continue to comply with the conditions of the Original Permit as required under SDCL § 49-41B-27. The overwhelming conclusion is that TC failed to meet its burden. Not only did TC fail to present substantial evidence as to the majority of the Original Permit conditions – it failed to present any evidence at all. TC only presented evidence on six of the fifty conditions, and the evidence it presented was insufficient when viewed in the entirety of the record. The most striking example is that the Original Permit was conditioned on TC obtaining a Presidential Permit. TC applied for a Presidential Permit and it was denied. It cannot meet that condition. At best, TC was only able to promise to comply with the Original Permit conditions. A mere promise does not constitute substantial evidence of compliance. The PUC's Order should be reversed.

Respectfully submitted this 16th day of May, 2016.

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