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

* * * *

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

* * * *

CIV16-33 (32CIV16-000033)

* * * *

REPLY BRIEF TO DAKOTA RURAL ACTION'S BRIEF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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PRELIMINARY STATEMENT

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

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

JURISDICTIONAL STATEMENT

Intervenor, Dakota Rural Action, appealed to this Court from the Commission's Final Decision and Order; Notice of Entry in Docket HP14-001, issued January 21, 2016. This appeal is taken pursuant to SDCL 1-26-30 and 1-26-30.2. The Circuit Court has jurisdiction over this

case pursuant to SDCL 1-26-30.2 and 1-26-30.4. The venue of this action properly lies in Hughes County pursuant to SDCL 1-26-31.1.

STATEMENT OF ISSUES

DRA's brief does not contain a statement of issues as required by SDCL 1-26-33.3, so the Commission will attempt to state the issues based on our reading and construction of them.

Introductory statement by DRA. Whether sufficient evidence was presented to support the findings of fact set forth in the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Commission asserts that substantial evidence was introduced into the record at hearing to render the Decision as discussed in detail in response to DRA's issues B and C.

Issue A. Whether the Commission committed reversible error by denying Intervenors' Joint Motion to Dismiss, whether sufficient evidence was presented to support the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification, and whether the Commission abused its discretion in issuing the Decision?

The Commission asserts that its denial of Intervenors' Joint Motion to Dismiss was justified, that sufficient evidence was presented to support the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification, and that the Commission did not abuse its discretion in issuing the Decision.

Issues B. and C. Whether the Commission improperly applied the burden of proof given the statute at issue in this case and whether sufficient evidence was presented at the hearing and through judicial notice to justify the Commission's Decision?

The Commission asserts that it properly applied the burden of proof given the statute at issue in this case and that sufficient evidence was presented at the hearing and through judicial notice to justify the Commission's Decision.

Issue D.1. Whether the Commission's rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a sufficient process of discovery prior to hearing?

The Commission asserts that its rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a very thorough process of discovery prior to hearing involving a very significant number of responses to interrogatories and the production of thousands of documents.

Issue D.2. Whether the Commission properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product, and whether, if the Commission's determination was incorrect, such ruling resulted in sufficient prejudice to DRA to justify reversal of the Decision?

The Commission asserts that it properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product and further asserts that if the Commission's determination was incorrect, such determination did not result in sufficient prejudice to DRA to justify reversal of the Decision.

Issue D.3. Whether the Commission's issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was clearly erroneous and whether such orders resulted in substantial prejudice to DRA?

The Commission asserts that its issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was not erroneous and did not in any case result in substantial prejudice to DRA due to the evidence at hearing regarding the matters to which the excluded exhibits pertained.

Issue E. Whether the proceedings conducted by the Commission were handled fairly and competently and comported with state law and whether the Commission acted with bias in rendering its decision?

The Commission asserts that the proceedings conducted by the Commission were handled fairly and competently and comported with state law and that the Commission did not act with bias in rendering its decision.

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Dakota Rural Action on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled "In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline." The Commission granted intervention to all forty-two persons and organizations that applied for intervention. The Commission approved withdrawal from Docket HP14-001 to three intervenors who requested to withdraw. The Commission heard and issued decision orders on a

very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

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

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

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

The Commission's "findings of fact are reviewed under the clearly erroneous standard . . . . A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on factual questions. *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228-229. "Factual findings can be overturned only if we find them to be 'clearly erroneous' after considering all the evidence. SDCL 1-26-36; *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987). Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them." *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. On factual issues, courts "give great weight to the findings and inferences made by the agency on factual questions." *Woodcock v. City of Lake Preston*, 2005 SD 95, ¶ 8, 704 N.W.2d 32, 34. The requirement in SDCL 1-26-36(5) that the Court is to look at the whole record, does not, however, allow the Court to substitute its judgment for the Commission's judgment as to the weight of evidence on questions of fact. *City of Brookings v. Department of Environmental Protection*, 274 N.W.2d 887, 890 (S.D. 1979).

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE FINDINGS OF FACT SET FORTH IN THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION

Sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. As the references to the hearing transcript and

exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision and Order entered by the Commission. The Commission has set forth below in response to DRA's issues B. and C. a detailed recitation of the evidence supporting the Decision and basis for the Commission's Decision.

A.

THE COMMISSION DID NOT COMMIT REVERSIBLE ERROR BY DENYING INTERVENORS' JOINT MOTION TO DISMISS AND REVOKE THE PERMIT ISSUED IN DOCKET HP09-001, SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION, AND THE COMMISSION DID NOT ABUSE ITS DISCRETION IN ISSUING THE DECISION.

The record in this case does not support DRA's contention that the Commission's Decision in this case was arbitrary and capricious because of the denial of the Presidential Permit by the U.S. Department of State. The South Dakota Supreme Court has set forth the standard for concluding that an agency's action was arbitrary and capricious as follows:

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

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

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

and required Keystone to produce an enormous quantity of documents. The Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages. The parties to this case were certainly afforded procedural due process. The Commission's Decision contains specific cites to the transcript and the administrative record for its Findings of Fact. With respect to evidence which was conflicting at hearing, of which there was virtually none, it is the Commission's responsibility, as the trier of fact, to analyze such evidence and give it the credibility and weight it deserves. The fact that a party disagrees with an administrative decision does not render the decision arbitrary and capricious.

As far as the Commission's interpreting KXL Condition 2, Apx A-26, #2, as a prospective condition creating a permit that will last in perpetuity and deprive the landowners of their property interests in perpetuity and therefore deprives them of their due process rights, the Commission does not believe this to be the case. First, the term "condition" employed in SDCL 49-41B-24 and SDCL 49-41B-27 is defined as "[a] future and uncertain event on which the existence or extent of an obligation or liability depends. . . . [A] condition is a fact or event on the occurrence of which some legal right or duty comes into existence." Black's Law Dictionary (10th ed. 2014). "Prospective" simply means something "in the future" or "anticipated or expected; likely to come about." Black's Law Dictionary (10th ed. 2014). Second, one of the definitions of "shall" also means "something that will take place in the future," and another definition of "shall" is a "requirement." The American Heritage College Dictionary (3rd ed. 1993). If the presence in a Commission order of conditions that will largely come into performance at points in the future *per se* constitutes a violation of persons' due process rights, then effectively SDCL 49-41B-24 and SDCL 49-41B-27 must be unconstitutional.

Under KXL Condition 2, it is clear that Keystone did not have the permits set forth in the condition at the time the KXL Decision was issued, but that it would be required to obtain such permits, to the extent such permits were still required by law, before it could proceed with the Project. As explained above, the term "condition" generally refers to something that must be done in the future. To argue that the Commission is impermissibly interpreting KXL Condition 2 as prospective simply does not make sense.

In terms of substantive due process, the Commission doesn't believe its Decision comes remotely close to meeting the standard for a substantive due process violation. The South Dakota Supreme Court has stated as follows:

> It is well settled that the doctrine of substantive due process, "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'" *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31±32 (1st Cir. 1991) (quoting *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted)) (emphasis added).

Tri County Landfill v. Brule County, 619 N.W.2d 663, 2000 S.D. 148. The Eighth Circuit Court of Appeals has further stated:

> The . . . substantive-due-process claims should be limited to "truly irrational" governmental actions . . . . An example would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet.

Anderson v Douglas County, 4 F.3d 574, 1993 WL 325684. The Commission's determination that KXL Condition 2 is prospective and may be able to be complied with within a reasonable period of time was not "truly irrational." As stated in the Decision, Keystone has previously had its Presidential Permit denied, and it reapplied. The fact that it was once again denied does not

mean that it cannot reapply and obtain such a permit in the future. Does this mean the permit remains intact in perpetuity? It does not. SDCL 49-41B-33 allows the Commission to revoke Keystone's permit for "failure to comply with the terms or conditions of the permit." At a point where Staff or the Commission determines that KXL Condition 2 , Apx A-26, #2, cannot be complied with by Keystone, Staff or the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived.

Lastly, the Commission did not abuse its discretion by not granting Intervenor's request in the Joint Motion to Dismiss for the Commission to revoke the permit at this time. The South Dakota Supreme Court has stated the following with respect to the abuse of discretion standard:

> An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Thurman v. CUNA Mut. Ins. Soc'y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616.

In re Jarman, supra. First of all, this proceeding was not a revocation proceeding under SDCL 49-41B-33(2), but rather a certification proceeding under SDCL 49-41B-27. The issue of revocation was not raised during the proceedings prior to the Joint Motion to Dismiss, which was filed on November 9, 2015, months after the discovery and hearing process concluded. To take action at that late stage that had not been noticed and adjudicated at all simply was not appropriate. Does this mean that the Commission will never take action to revoke the Keystone XL permit, and the permit will remain in effect in perpetuity? It does not. At a point where Staff or the Commission determines that KXL Condition 2, Apx A-26, #2, cannot be complied with by Keystone, Staff or the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived and that this proceeding was not the appropriate proceeding in which to take such action.

B. AND C.

THE COMMISSION DID NOT IMPROPERLY APPLY THE BURDEN OF PROOF GIVEN THE STATUTE AT ISSUE IN THIS CASE AND SUFFICIENT EVIDENCE WAS PRESENTED AT THE HEARING AND THROUGH JUDICIAL NOTICE TO JUSTIFY THE COMMISSION'S DECISION

A central issue in this proceeding boils down to what is meant by the term "certify" in SDCL 49-41B-27 and what effect does the use of that term have on issues such as the certifying party's *prima facie* case and burden of proof. In terms of statutory construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to "establish" that:

(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

SDCL 49-41B-22. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word "establish," the word "prove," or the word "demonstrate." The language of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

> Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or

> transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

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

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "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. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit, indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22, or apply for a new permit. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued."

The Commission's Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

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

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

Instead, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

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

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

The word "certify" is a precise and narrow verb. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Black's Law Dictionary (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." *Id.*; *Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 ("Words and phrases in a statute must be given their plain meaning and effect."). Thus, under the plain meaning of the language of the statute, Keystone's obligation under SDCL 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50

KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. Apx A26-A39. Keystone's obligation to "certify" could certainly be construed to mean that Keystone met its burden under the statute by filing with the Commission a certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Although the Certification standing alone would seem to have met the "must certify" requirement set forth in SDCL 49-41B-27, Keystone also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with a Quarterly Report of the status of Keystone's activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8 and a tracking table of minor factual changes that had occurred since the Commission's issuance of the KXL Decision attached as Appendices B and C respectively. Apx 27-28, #8. SDCL 49-41B-27 does not even explicitly require the Commission to open a docket proceeding to consider whether to "accept" the certification as compliant with the statute. Due to Keystone's simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission's prior history of handling the receipt of certifications, however, the Commission opened a docket to consider Keystone's Petition and Certification.

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must "certify," it can certainly be reasonably argued that Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

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

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

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

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being

sufficiently adequate to support a conclusion." Substantial evidence "'does not mean a large or considerable amount of evidence ...,' *Pierce v. Underwood*, 487 U.S., 564-65, 108 S.Ct., 2549, 101 L.Ed.2d, 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 (1938)." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

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

permit was issued," but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4, Apx A26, #4, is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Conditions 7 through 9, Apx 27-28, #7, 8, and 9, require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Keystone appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline project. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone's appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed five annual reports and twenty-three quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

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

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, # 15.

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

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

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630 (AR

024761), 637 (AR 024768); Petition, Appendix B, Condition 41. Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41; Apx A36-37, #41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965 (AR 026769); Ex 1003 (AR 002918-002920). Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978 (AR 026781-026782). She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307 (AR 026779, 026782, 024304-024305). Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306. There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. It is the Commission, as the adjudicatory fact finder under SDCL 1-26-36 who is to determine what credibility and weight to give the evidence in this case. It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its decision, that the Commission took this matter seriously. This case is not a retrial of the original permitting proceeding in Docket HP09-001. Intervenors simply did not provide any significant evidence indicating that Keystone does not currently comply with KXL Decision Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

D.

THE COMMISSION'S EVIDENTIARY AND DISCOVERY PROCEDURAL RULINGS WERE JUSTIFIED AND LAWFUL AND DID NOT RESULT IN SUBSTANTIAL PREJUDICE TO DRA OR INTERVENORS COLLECTIVELY

1. The Commission's rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a very significant process of discovery prior to hearing involving a very significant number of responses to interrogatories and the production of thousands of documents.

The scope of discovery is set forth in SDCL 15-6-26(b):

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . (emphasis supplied)

In its Order Granting Motion to Define Issues and Setting Procedural Schedule issued on December 17, 2014, the Commission determined that the subject matter issue to which discovery requests must be relevant is whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the KXL Decision. This ruling was based on the Commission reading of the statute at issue in this docket, SDCL 49-41B-27.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

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

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

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "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. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit or indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued."

Furthermore, the proceedings in this case following the Commission's issuance on December 17, 2014, of its Order Granting Motion to Define Issues and Setting Procedural Schedule involved a very large number of motions filed by numerous parties, including motions to compel discovery filed by DRA and other Intervenors, several of which were granted, at least in part, by the Commission. In response to such motions to compel, Keystone produced 42.54 GB of electronic data, consisting of 6,214 total files, plus numerous additional documents that it had already produced. AR 002475, 005072, 005240, 005247-005250, 005256-006303, 021109.

Again, as stated previously, the issue in this case is a narrow one, i.e., whether Keystone's certification that it continues to meet the conditions upon which the permit was

granted is valid. The massive amount of documents and discovery responses produced by Keystone went far beyond what should have been required for making such a determination. The Commission's proceedings in this docket resulted in a record consisting of over 31,000 pages, including a hearing lasting nine days. DRA's argument that the Commission committed prejudicial error in that portion of its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule concerning discovery limitations has no merit. "'[T]he extent of discovery permitted by either side rests in the discretion of the court'" *State v. Erickson*, 525 N.W.2d 703, 711 (S.D. 1994). The Commission did not abuse its discretion in its oversight of discovery conducted by the parties over a period of many months.

2. The Commission properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product and if the Commission's determination was incorrect, it did not result in sufficient prejudice to DRA to justify reversal of the Decision.

The only communications between the Commissioners, its advisor, or Commission Counsel and Keystone involving the Keystone XL Project since the hearing concluded in 2010 were the quarterly and annual reports that are publicly available on the website for Docket HP09-001 and the scheduling email exchange between Keystone's attorney Willian Taylor and Commission Counsel John Smith early in the process in November 2014, that is also on file in the record and publicly available on the web page for Docket HP14-001. Obviously, Staff, and in certain instances Commissioners and Commission advisors, had significant post-decision follow-up contact with Keystone regarding Keystone I construction issues, particularly reclamation issues, the most notable of which was on the Sibson's property, which was addressed at hearing and elsewhere in the record.

With respect to Staff communications and the "regulatory capture" theory, first of all it is important to note that the Staff does not advise the Commissioners in a contested case. In order to avoid violating the ex parte communications prohibition of SDCL 1-26-26, the Commission maintains a fairly rigorous separation between the Commission, consisting of Commissioners and the Commission advisors, and Staff. The Commission accordingly does not direct Staff as to what positions Staff should take regarding the issues presented in a case. The Commission's decisions sometimes are in accord with Staff's positions in a case and sometimes they are not. As far as DRA's assertion that Staff counsel met with Keystone's counsel "behind closed doors" during the short break during the December 9, 2014, Commission meeting, there is nothing in the transcript from the proceedings occurring after the break indicating that an impermissible meeting between Staff and counsel for Keystone occurred during the brief recess. (AR 001432-001527). The Commission also simply sees no basis in the record for DRA's statement that Staff and Keystone are aligned in an almost *de facto* attorney/client relationship.

SDCL 15-6-26(b)(3) states the following with respect to attorney work product:

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Commission determined that what DRA was seeking in the interrogatory objected to by Staff were documents and tangible things prepared in anticipation of litigation or for trial by or for another party's representative (including such other party's attorney). The Commission

determined that Staff was a party to this docket, and the materials sought by DRA from Staff were documents prepared by Staff counsel in anticipation of the evidentiary hearing in this matter and documents obtained by Staff for hearing preparation. As stated in *Kaarup v. St. Paul Fire and Marine Insurance Company*, 436 N.W.2d 17 (S.D. 1989):

> "The test we apply for determining whether a document or tangible thing is attorney work product is whether 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2024 (1970) at 198.

Furthermore, DRA made no showing that they had a substantial need, or any need at all, for the requested correspondence. See, April 14, 2015, motion hearing transcript 344-351 (AR 004526-004532); Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery. AR 003627-003635. The proponent of excluded evidence must also attempt to offer the excluded evidence at trial and make an offer of proof. *Joseph v. Kerkvliet,* 2002 SD 39, ¶ 7, 642 N.W.2d 533, 535 (quoting *State v. Norville,* 23 S.W.3d 673, 685 (Mo. Ct. App. 2000)). DRA did not.

Lastly, DRA has provided no evidence concerning prejudicial injury resulting from the Commission's denial of the Motion to Compel. Given the enormous amount of material produced through discovery in this proceeding, the lengthy hearing, and the fairly limited participation by Staff, it is difficult for the Commission to believe that any information produced under Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery would have had any significant influence on the outcome of this case.

3. The Commission's issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was not erroneous and did not in any case result in substantial prejudice to DRA

due to the evidence at hearing regarding the matters to which the excluded exhibits pertained.

On July 7, 2015, DRA submitted its exhibit list identifying 1,073 exhibits that DRA stated it may introduce at hearing. On July 10, 2015, Keystone submitted Keystone's Protective Motion *in Limine* Regarding Dakota Rural Actions Exhibit List Dated July 7, 2015. Keystone's motion requested that any of the documents set forth on DRA's exhibit list that were not identified in DRA's responses to Keystone's discovery requests be precluded from admission in evidence at hearing. On July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits). On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine*. As a result of the two orders, 86 of the 1,073 exhibits on DRA's exhibit list were precluded from admission at hearing.

The Commission has broad discretion in imposing sanctions for failure to comply with discovery orders. SDCL 15-6-37(c). *Schwarts v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979). The South Dakota Supreme Court has held:

> The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

Haberer v. Radio Shack, a Div. of Tandy Corp., 555 N.W.2d 606, 611 (S.D. 1996) (citing, *Magbahat v. Kovarik*, 382 N.W. 2d 43 (S.D. 1986)). The Court further stated:

> Prohibition of evidence offered by a party who has not complied with the discovery rules '"is designed to compel production of evidence and to promote, rather than stifle, the truth finding process.'" *Schrader*, 522 N.W.2d at 210 (quoting *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D.1986)). Imposing a sanction such as the exclusion of the testimony should result when failure to

> comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

Id. at 610. The Court also has made it clear that it takes seriously deadlines for discovery and compliance with the discovery process. The Court has stated that ". . . order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in this manner should not be heard to complain that a sanction was too severe." *Schwarts v. Palachuk, supra.*

The Commission does not believe that its issuance of the order on reconsideration violated the above principals of discovery sanctions. Out of the 1,073 documents listed on DRA's exhibit list, the Commission's order resulted in the preclusion of the admission of only 86 documents. The Commission doesn't believe this action was overly severe under the standards set forth above.

Furthermore, the Commission asserts that such preclusion of those 86 documents resulted in little if any prejudice to DRA. The Sibson photos, etc. were introduced by other Intervenors and admitted in evidence. Judicial notice was taken by the Commission of the entirety of the FSEIS record. With respect to the Evan Volkes' emails and communications concerning the Houston Lateral events, the PHMSA notices and other documents, and the pipe and inspection issues, Mr. Volkes testified concerning those matters at some length during the hearing. It is highly unlikely that any of the documents that were precluded would have materially influenced the outcome of the hearing and the Commission's Decision.

E.

THE PROCEEDINGS CONDUCTED BY THE COMMISSION WERE HANDLED FAIRLY AND COMPETENTLY AND COMPORTED WITH STATE LAW, AND THE COMMISSION DID NOT ACT WITH BIAS IN RENDERING ITS DECISION

DRA points to the vote by Commissioner Fiegen in favor of the Decision as a grounds for reversal. Shortly before the commencement of the hearing, Commissioner Fiegen was diagnosed with breast cancer, and she was not able to attend the evidentiary hearing. SDCL 1-26-24 permits an administrative official to participate in decision making if he or she has either "heard the case or read the record." *Huber v. Department of Public Safety*, 724 N.W. 2d 175, 2006 S.D. 96. On October 5, 2015, Commissioner Fiegen filed a certification attesting to the fact that she had read the official transcripts of the record for the evidentiary hearing from July 27 through August 1, 2015, and continuing August 3 through August 5, 2015. AR 029755. Commissioner Fiegen also listened to the hearing via the Commission's website feed. As her comments in post-hearing motion transcripts demonstrate, she was very aware of what had transpired at hearing and what the parties' evidence demonstrated. See e.g. AR 031100-031169. Furthermore, a majority of the Commission voted to approve the Decision even if Commissioner Fiegen hadn't voted in favor of approval.

DRA also asserts that Commissioner Hanson's capability to participate in decision making should be questioned because of a health condition. As to Commissioner Hanson's issue regarding pain from his degenerated hip condition, the questions and comments of Commissioner Hanson during the evidentiary hearing record clearly reflect that Commissioner Hanson was acutely aware of what was occurring at the hearing. And with respect to bias because of a comment letter from Governor Daugaard and Commissioners Nelson and Fiegen having been appointed to their positions by the Governor, the Commission would point out that the Commission received hundreds of comments from citizens of all walks of life, all of which

are set forth on the Commission's website, and that both Chairman Nelson and Commissioner Fiegen were elected by the citizens of South Dakota in 2012.

Furthermore, the South Dakota Supreme Court has consistently held that new theories may not be argued or reviewed for the first time on appeal. *Alvine Family Ltd. Partnership v. Hagemann*, 2010 SD 28, ¶ 21, 780 N.W.2d 507, 514, (citing *Boever v. Bd. of Accountancy,* 526 N.W.2d 747, 750 (S.D. 1995). See also *Mortweet v. Eliason*, 335 N.W.2d 812 (S.D. 1983); *Ward v. Viborg School Dist. No. 60-5,* 319 N.W.2d 502 (S.D. 1982); *Weaver v. Boortz,* 301 N.W.2d 673 (S.D. 1981); *Estate of Assmus,* 254 N.W.2d 159 (S.D. 1977); *In re Estate of Grimes,* 87 S.D. 187, 204 N.W.2d 812 (1973).

In *Pearson v. Adams,* 279 N.W.2d 674, 676 (S.D. 1979) (citations omitted) the Court stated:

> On appeal, the record and the transcript, if included in the record, imparts an absolute verity and is the sole evidence of the trial court's proceedings. While all parties are expected to protect themselves on the record, and all parties are obligated to see that the settled record contains all matters necessary for the disposition of the issues raised on appeal, the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant.
>
> If the record is incomplete or incorrect, the remedy is by appropriate action or proceedings in the trial court to secure a correction thereof.

The settled record, the exhibits contained therein, and the hearing transcripts do not contain any allegation by DRA that the Commission was acting subject to "regulatory capture." Appellant did not raise the issue of "regulatory capture" in any of the documents and pleadings in the settled record, nor at the evidentiary and motion hearings held before the Commission. The Commission asserts that DRA failed to preserve its "regulatory capture" as an appealable issue for review.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court to affirm the Decision and adopt the Commission's findings of fact and conclusions of law as this Court's findings of fact and conclusions of law.

Dated this 19th day of July, 2016

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