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

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| 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 | ) | Case No. 32CIV16-33 |

**ON APPEAL FROM THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

**DOCKET NO. HP14-001**

# APPELLANT'S REPLY BRIEF

# FOR DAKOTA RURAL ACTION


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## INTRODUCTION

Dakota Rural Action ("**DRA**") is submitting this reply brief in response to the briefs filed by the South Dakota Public Utilities Commission (the "**PUC**") and TransCanada Keystone Pipeline, LP ("**TransCanada**") following DRA's appeal of the Final Decision and Order Finding Certification Valid and Accepting Certification (the "**Order**") entered on January 21, 2016 in favor of TransCanada in Commission Docket No. HP14-001. Because of the alignment of interests between the PUC and TransCanada, this reply brief encompasses DRA's replies to the briefs filed by both the PUC and TransCanada, as well as the separate brief submitted by TransCanada with respect to common issues raised by DRA and its fellow appellants.

As previously noted, this is an appeal 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**"), following TransCanada's petition for certification under SDCL § 49-41B-27. Under this statute, because construction of the KXL Pipeline had not commenced within four years of the date of the Original Permit, TransCanada was required to certify that it meets and could continue to meet the conditions upon which the Original Permit was issued.

This appeal is significant because, in addition to the core questions relating to the validity of the Order, it presents any number of questions of first impression that directly relate to interpretation of the statutes governing the operations of the PUC as a state regulatory authority – with respect to the PUC's role and responsibility, its accountability to the public interest, its operations, and the level of transparency under which it operates.



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A response to the arguments made by the PUC and TransCanada can be grouped into a number of key subjects, including:

1. The appropriate burden of proof that must be met with respect to TransCanada's petition for certification.
2. TransCanada's burden to demonstrate, via substantial evidence, that its proposed Project can either meet or continue to meet the conditions of the Original Permit.
3. The denial of the Presidential Permit required for the proposed KXL Pipeline.
4. The standard by which the PUC's Order should be viewed, particularly in light of the public trust doctrine's history and applicability.
5. The lack of transparency with respect to contacts and communications between the staff of a public regulatory body and the industry it purports to regulate.

This reply will briefly touch on each of these matters, reserving further discussion for the oral argument requested by both DRA and TransCanada.

## TRANSCANADA'S BURDEN OF PROOF

A key issue in this appeal concerns the burden of proof that TransCanada was required to meet in order to demonstrate that, under SDCL § 49-41B-27, it could comply with or continue to comply with the conditions set forth in the Original Permit. The Original Permit contained fifty separate conditions and multiple sub-conditions, each of which TransCanada had to certify that it could continue to meet.

It was good to see TransCanada acknowledge that it had the burden of proof. "… Keystone does not dispute it had the burden of proof under SDCL § 49-41B-27." *See*, Appeal Brief of TransCanada Keystone Pipeline, LP in Response to Common Arguments of Several Appellants,

p. 8. DRA previously noted that the South Dakota Supreme Court affirmed that "[h]e 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).

Where TransCanada misses the mark lies not in its attempt to distinguish the burden of persuasion from the burden of production as articulated in *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 42, 721 N.D.2d 438, 448 (S.D. 2006), but in its application of the respective burdens. Both TransCanada and the PUC appear to take the view that once a declaration is filed simply stating that they "certify" continued compliance with permit conditions under SDCL § 49-41B-27, their job is done, and the burden of production somehow magically shifts to the Appellants.

The PUC attempts to buttress this remarkable claim by citing extensively to Black's Law Dictionary for the proposition that the term "certify" as contained in SDCL § 49-41B-27 simply means an affirmation of sorts. If that is the standard of proof, TransCanada's case is entirely undone by the Certification filed by Robert Flying Hawk, Chairman of the Yankton Sioux Tribe, who certified to the PUC:

> On behalf of the Yankton Sioux Tribe, Chairman Robert Flying Hawk hereby certifies that the conditions upon which the South Dakota Public Utilities Commission granted the facility permit in Docket HP09-001 for the Keystone XL hydrocarbon pipeline (the "Project") under the Energy Conversion and Transmission Facilities Act are not and will not continue to be satisfied. TransCanada Keystone Pipeline, LP ("Keystone") is not in compliance with the conditions attached to the June 29, 2010 Amended Final Decision and Order in this docket, to the extent that those conditions have applicability in the current pre-construction phase of the Project. I further certify that it will not meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project. (*See*, ROA 031232).

The bottom line is that the burden of proof required of TransCanada in the proceedings before the PUC encompasses not only the burden of persuasion, but the burden of production. That is not the burden to be imposed on DRA or other Appellants. That burden falls squarely on

TransCanada as was intimated in the Order's Conclusion of Law No. 3, which stated that TransCanada has the burden to show that its certification is valid (ROA 031694). Were the Court to adopt the position being advocated by both TransCanada and the PUC, the requirements of SDCL § 49-41B-27 would be rendered meaningless.

TransCanada made a significant strategic blunder in attempting to shirk its burden of proof. During the course of the hearing before the PUC, TransCanada presented evidence relating to only six of the fifty conditions of the Original Permit (which contained 107 separate and distinct requirements), and the PUC staff's witnesses only presented evidence as to four conditions. This tremendous evidentiary gap was illustrated in the "tracking table of non-evidence" presented in connection with the Appellants' motion to dismiss upon conclusion of the evidentiary hearing before the PUC. As previously noted, this table tracked each and every condition of the Original Permit which had been the subject of testimony by TransCanada or PUC staff witnesses during the course of the proceedings, and clearly illustrated TransCanada's failure to meet its burden of proof (as well as the PUC staff's similar failure to effectively satisfy TransCanada's burden of proof for it) (ROA 027339).

**LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT THE PUC ORDER**

The question of burden of proof, discussed above, is inextricably tied to a discussion of whether TransCanada and the PUC staff failed to present substantial evidence to support TransCanada's petition for certification under SDCL § 49-41B-27. Because TransCanada had the burden of proof, which encompasses the burden of production, it (or the PUC staff acting on its behalf) had to present substantial evidence supporting certification.

DRA previously noted that the Court has the authority to reverse or modify the PUC's 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. The determination as to whether an administrative agency's decision is clearly erroneous hinges upon an examination as to the existence of substantial evidence in the record supporting that 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).

In effect, TransCanada and the PUC are advancing the novel position that because a conclusory statement was filed purporting to "certify" TransCanada's compliance with the Original Permit conditions, they are not required to present substantial evidence supporting their position. As noted above in the discussion of TransCanada's burden of proof, that is simply not correct, and such an interpretation would eviscerate the meaning of SDCL § 49-41B-27.

In its principal brief, DRA cited *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, 793 N.W.2d 816 (S.D. 2011) to clarify what is meant by substantial evidence. 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)).

TransCanada seeks to distinguish *M.G. Oil Co.* by noting that in such case, the Court encountered a situation where there was a dearth of evidence, and comparing it to the present case, which has a voluminous record. TransCanada misses the point. The question is not the size of the record generated by administration proceedings, but whether there was substantial evidence to support to the position being advocated by the petitioner. As noted above, TransCanada presented evidence relating to only six of the fifty conditions of the Original Permit (which contained 107 separate and distinct requirements), and the PUC staff's witnesses only presented evidence as to four conditions.

The size of the record generated in administrative proceedings is irrelevant. The question is whether TransCanada (or the PUC staff advancing TransCanada's position) presented substantial evidence supporting the petition for certification under SDCL § 49-41B-27. They did not. Hence, the Order is not supported by substantial evidence and should be reversed or vacated.

**DENIAL OF THE PRESIDENTIAL PERMIT OF THE KEYSTONE XL PIPELINE**

Because the proposed KXL Pipeline was designed to cross the border between the United States and Canada, Executive Order 13337 required the U.S. Secretary of State to determine whether or not the proposed Project served the national interest. This national interest finding was required in the context of the decision whether or not to grant a Presidential Permit. On November 6, 2015, the President determined that the KXL Pipeline would not serve the national interest and denied TransCanada's applcation for a Presidential Permit (ROA 031684). The Original Permit specifically required TransCanada to obtain a Presidential Permit.

Both TransCanada and the PUC advance the argument that the Original Permit's mandate for obtaining a Presidential Permit is purely prospective in nature, and attempt to convince this

Court that – notwithstanding the fact that the Presidential Permit has been denied – the prospect that TransCanada could at some point in the future obtain a Presidential Permit is sufficient. This argument lacks merit.

TransCanada first points to the fact that it has filed suit against the U.S. Secretary of State seeking a redetermination of the denial of the Presidential Permit. As TransCanada notes in its brief, its view is that the Presidential Permit was denied because the current administration sought to demonstrate its environmental and climate leadership in connection with the Paris COP 21 climate treaty negotiations. TransCanada makes the presumptive error that a permit is an entitlement. It is not, and the decision to deny the Presidential Permit because the proposed KXL Pipeline was not in the national interest falls directly within the scope of the President's foreign policy powers under Article II, Section 2, of the U.S. Constitution.

Due to the denial of the Presidential Permit, TransCanada cannot show it has and continues to comply with Condition 2 of the Original Permit. This inability to show compliance with a mandatory condition due to denial of a required Presidential Permit, alone, reflects the *ultra vires* act of the PUC in nevertheless granting certification with a clearly insufficient basis to do so.

Second, DRA noted that by issuing the Order in face of the denial of the Presidential Permit – on the presumption that maybe, perhaps, at some indeterminate time in the future TransCanada might get a Presidential Permit – creates a tremendous injustice to the landowners whose property is threatened by the proposed pipeline. The evidence was uncontroverted that the threat of pipeline impaired the free marketability of property (ROA 031601) and, hence, created an unjustifiable ongoing encumbrance of property owners' rights with respect to their property. DRA argued that this result deprived property owners of their due process rights. While TransCanada failed to respond to this point, the PUC elected to focus solely on whether substantive due process rights of

landowners had been violated, citing *Anderson v. Douglas County*, 4 F.3d 574 (8th Cir., 1993), a case originating in Minnesota, to suggest that only "truly irrational" government actions should be constrained by the substantive due process doctrine.

The PUC's position is not founded in constitutional jurisprudence. Substantive due process permits the Court to protect certain rights deemed fundamental from government interference. This power is derived from the due process clauses of the Fifth and Fourteenth Amendments to the Constitution, which prohibit the federal and state governments, respectively, from depriving any person of "life, liberty, or property, without due process of law." Because a fundamental right (in this case, landowners' property interests) is implicated by the PUC's Order, a higher level of scrutiny is warranted with respect to the effect of the PUC's Order on those rights.

The Fourteenth Amendment's protection of property "… has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' including statutory entitlements." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). "State laws which impinge on personal rights protected by the Constitution are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

In issuing its Order after the Presidential Permit had been denied, the PUC constrained landowners' fundamental property rights by, in effect, encumbering their property. Continuing such an encumbrance on the basis that TransCanada might, at some undetermined point in the future, obtain a required Presidential Permit, does not serve a compelling state interest. Interpreting SDCL § 49-41B-27 in a manner that permits a perpetual cloud on title for an undetermined amount of time does not pass the strict scrutiny mandated when fundamental property rights are implicated.

## STANDARD OF REVIEW AND THE PUBLIC TRUST DOCTRINE

The question of which standard of review to apply to a decision in this appeal has a number of facets. As noted above in the discussion concerning denial of the Presidential Permit, the fact that fundamental property rights of landowners along the route of the proposed KXL Pipeline are impacted requires application of a strict level of scrutiny with respect to interpretation of SDCL § 49-41B-27. This is in addition to the statutory basis for review of administrative agency decisions found in SDCL § 1-26-36, which has been discussed in depth in DRA's principal brief. There does not appear to be any dispute between the parties that 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).

However, DRA has urged that because the proposed KXL Pipeline poses risks to South Dakota's water resources, the PUC is held to a higher standard with respect to its decision-making process under the principles of the Public Trust Doctrine. TransCanada takes the position that the Public Trust Doctrine is inapplicable because no South Dakota court, to date, has held it to impose a higher fiduciary standard with respect to protection of water resources by administrative agencies. While discussing South Dakota's explicit recognition of the Public Trust Doctrine in *Parks v. Cooper*, 2004 S.D. 27 ¶ 46, 676 N.W.2d 823, 848 (S.D. 2004), where the South Dakota Supreme Court held that as a "matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine …", the position articulated by TransCanada in its brief presents a rather novel argument that, in effect, would preclude any case of first impression from being raised in South Dakota's courts. That is certainly not the case, as the *Parks* decision itself directly notes. The parties in this case are not precluded from raising matters of first impression. That should be evident to TransCanada in light of the absence of any authority

concerning interpretation and operation of the certification process set forth in SDCL § 49-41B-27.

DRA's suggestion is that the Public Trust Doctrine, as adopted in South Dakota by *Parks v. Cooper, Id.*, imposes a heightened fiduciary standard on the PUC in protecting South Dakota's environment and water resources from potential damage from a pipeline leak or spill. The *Parks* case does not exist in isolation. Once adopted by the Supreme Court, it is incumbent upon this Court, and others, to further explore and articulate its meaning and operation. That is a matter of first impression for this Court that deserves review. Otherwise, the Supreme Court's adoption of the Public Trust Doctrine is rendered meaningless.

**REGULATORY CAPTURE AND LACK OF TRANSPARENCY**

The argument advanced by DRA concerning regulatory capture of the PUC by an industry it purports to regulate is directly tied to questions of governmental transparency also raised on appeal. These questions came into play when DRA sought discovery of communications between TransCanada on one hand, and the PUC and its staff on the other. As noted, the PUC denied DRA's motion to compel discovery of these communications (ROA 004798-004799). DRA argued that disclosure of these communications was crucial in a number of respects as it related to the role of state regulatory agencies and whether those agencies serve the public interest.

DRA argued that state government should be open and transparent, and that transparency demands that communications between corporate applicants and their governmental regulators be available for public inspection. This is important with respect to public trust in the operations of regulatory agencies and as an important to check to the power of corporate interests who can bring significantly more resources to bear in influencing regulators than are available to average citizens.

This latter point is important to DRA, a nonprofit public interest organization that has a strong interest in ensuring that state and local governments operate in a fair, impartial, and transparent manner.

Like many states, South Dakota has open records laws with respect to public records. Public records are defined to "include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form remains a public record when maintained in any other form." SDCL § 1-27-1.1. Furthermore, "all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record …" SDCL § 1-27-1.

The PUC's position on this issue is interesting in that it draws the distinction between the PUC itself and its staff. While the distinction – in and of itself – is understood, there are a number of key points raised worth exploring. First, the PUC argues that it has a Chinese wall between the Commissioners and staff in order to maintain the independence of the Commissioners themselves, and that there are no *ex parte* communications between the Commissioners and TransCanada. Second, the PUC argues that its staff is a party to the proceedings. It is this second point that bears consideration because, while staff is indeed participating in proceedings the reality is that staff are still employees of a state regulatory agency and are accountable to the public.

As a regulatory agency, PUC staff is still accountable to the public and cannot hide behind so-called party status to attempt to cloak communications between a regulatory agency and the company and a company subject to its regulatory authority with the veneer of an attorney-client

communication. The position taken by the PUC in this regard is troubling and serves to increase the perception that bias exists in the process and that the agency is subject to regulatory capture. This is further exacerbated by disclosures during the evidentiary hearing that the "independent" witnesses engaged on behalf of the PUC to provide testimony were from an engineering firm that listed TransCanada among its clients. The cumulative effect of these issues is that by denying DRA's motion to compel discovery and thereby obtain disclosure of communications between the regulatory agency and TransCanada, the PUC has created a situation where the perception of bias is palpable and hard to overcome. On this basis, DRA urged a higher degree of scrutiny with respect to review of the PUC's Order.

## CONCLUSION

This appeal presents a number of issues of first impression, particularly with respect to interpretation of SDCL § 49-41B-27. This reply brief addresses a few of the core issues in contention, reserving further arguments for the oral arguments requested by the parties and scheduled in this appeal. Based, however, on the issues raised – including TransCanada's failure to meet its burden of proof, and failure to demonstrate that it could comply or even continue to comply with the conditions of the Original Permit as required under SDCL § 49-41B-27, the PUC's Order should be reversed and certification denied.

Respectfully submitted this 24th day of August, 2016.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2016, Dakota Rural Action's Appellant's Reply Brief was served upon the following via email in PDF format:

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