STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL DISTRICT

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	CV 16-33

JOINT REPLY BRIEF OF JOYE BRAUN, JOHN H. HARTER, TERRY AND CHERI FRISCH, CHASTITY S. JEWETT, PAUL F. SEAMANS, ELIZABETH LONE EAGLE, DALLAS GOLDTOOTH, BRUCE BOETTCHER, GARY F. DORR, ARTHUR R. TANDERUP AND WREXIE L. BARDAGLIO

I. The Energy Conversion and Transmission Facilities Act, Administrative Procedures Act and PUC Regulations Require Proof of Compliance with the Permit Conditions

In South Dakota, "[w]e give environmental statutes a liberal – not narrow – construction." *State ex rel Miller v. DeCoster*, 596 N.W.2d 898, 902 (S.D. 1999). "Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating from the same subject." *Becker v. Pfeifer*, 1999 S.D. 17, ¶9, 588 N.W.2d 913, 916 *quoting Taylor Properties, Inc. v. Union County*, 1998 S.D. 90, ¶14, 583 N.W.2d 638, 641.

The appellees point out that the PUC certification requirement in section 27 of the Energy Conversion and Transmission Facilities Act, SDCL §49-41B-27, has not been interpreted by the South Dakota Court. *Reply Brief of Appellee S.D. PUC to Brief of Appellants Joye Braun et al.*, at 6. They contend that the use by the legislature of the word "certify" means the burden of proof for certification is extremely lenient. *Appeal Brief of TransCanada Keystone XL Pipeline, LP in Response to Common Arguments of Several Appellants*, at 13 ("The certification under oath by a senior officer of the company complied with §49-41B-27"). Their arguments are confusing, because

TransCanada states that a signed letter with no competent evidence is sufficient for certification under the statute, *id.,* yet it acknowledges that substantial evidence is required for affirmance, *id*. at 12, while also arguing that the burden of proof shifted to intervenors to disprove compliance. *Id*. at 20 ("Appellants failed to prove that Keystone could not meet any conditions"). The appellees' arguments miss the mark, because the *only* evidence in the record with respect to the Presidential Permit is that it was denied, and that TransCanada cannot comply with condition 2.

Notwithstanding the lack of guidance from the South Dakota Court, section 27 of the statute may be reasonably and readily construed in a manner that is consistent with the Energy Conversion and Transmission Facilities Act as a whole, SDCL Chap. 49-41B; the PUC regulations, ARSD Chap. 20:10:01; and the Administrative Procedures Act, SDCL Chap. 1-26. *See City of Rapid City v. Estes*, 2011 S.D. 75, ¶12, 805 N.W.2d 714, 718 ("To determine legislative intent, this Court will take other statutes on the same subject matter into consideration, and read the statutes together").

The PUC regulations govern rules of practice before the agency, and include provisions for pleadings, intervenors' right to appear, discovery and subpoenas. ARSD §§20:10:01:02 - 20:10:01:17. The regulations explicitly impose the burden of proof on the petitioner: "petitioner has the burden of proof of factual allegations which form the basis of the… application or petition." ARSD §20:10:01:15.01. The regulations also incorporate the requirements of the South Dakota Administrative Procedures Act for the conduct of contested cases before the PUC. ARSD §20:10:01:15.

Accordingly, the hearing procedures and evidentiary requirements prescribed in the APA apply. SDCL §§1-26-18, 1-26-36. The burden of proof on TransCanada is a preponderance of evidence that it can demonstrate continuing compliance with all permit conditions attached to the 2010 permit. *In re Setliff*, 2002 S.D. 58, ¶13, 645 N.W.2d 601, 605. On judicial review, the PUC will be affirmed only if the record includes substantial evidence that TransCanada has or can comply with all permit conditions. *Therkildsen v. Fisher Bev*., 545 N.W.2d 834, 836 (S.D. 1996); §49-41B-27.

The bottom line remains that the Department of State denied TransCanada's request for a Presidential Permit for the pipeline border crossing. 80 Fed. Reg. 76611. Consequently, all evidence points to non-compliance with permit condition 2. *cf. Reply*

Brief of Appellee S.D. PUC to Brief of Appellants Joye Braun et al., at 8 ("[T]here is no evidence in the record demonstrating that Keystone will be unable to apply for and obtain a Presidential Permit in the future').

Under appellees' theory, the *possibility* that at some point in the future there will be a new application to the State Department and a different decision on that application constitutes sufficient evidence for certification. If that were to occur, TransCanada could apply to the South Dakota PUC for a new permit at some point in the future. However, the mere possibility that the company will re-apply for the federal permit, and that the new application may be granted, does not constitute substantial evidence for certification of the 2010 permit. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, ¶15, 812 N.W.2d 816, 821-822 ("the [trial court's] use of the substantial evidence review was correct").

TransCanada opines accurately in its brief that the substantial evidence standard is lenient. *Appeal Brief of TransCanada in Response to Common Arguments*, at 12. Nevertheless, all of the evidence in the record points to non-compliance with condition 2, and accordingly TransCanada failed to meet its burden of proof for that condition. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, ¶15, 812 N.W.2d at 821.

TransCanada argues that the *M.G. Oil Co.* case, which affirmed a writ of mandamus overturning a city decision for lack of substantial evidence, is inapposite because of the flawed fact-finding by Rapid City in that case. *Appeal Brief of TransCanada Keystone XL Pipeline, LP in Response to Common Arguments*, at 16. But the South Dakota Court confirmed that an agency decision lacking substantial evidence in support of its findings will not survive judicial review – precisely the situation here, with respect to compliance with condition 2 requiring the Presidential Permit. *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, ¶15, 812 N.W.2d 816, 821-822.

The agency's own conduct undermines the argument advanced by appellees that certification of the permit is a mere formality, complied with by a letter, and expressions of intent or hope that it can comply in the future. The agency attempted to conduct itself in accordance with APA hearing procedures, but on appeal the agency and permittee suggest that the applicable evidentiary requirements do not apply. *Brief of TransCanada in Response to Common Arguments*, at 13-14. They argue that there is some lesser burden

because of the word "certification," and that TransCanada's burden was to merely say "we certify" and to promise to comply later. *Id.*

That may work for a condition on re-seeding trenches after construction; it does not work for a required federal regulatory permit that has already been denied. On the record before the Commission, the agency clearly cannot certify in any meaningful sense that TransCanada complies with the requirement in condition 2 that it can obtain the Presidential Permit from the State Department.

The appellees attempt to invoke the "plain meaning rule" of statutory construction to argue that the legislature's use of the word "certify" in SDCL §49-41B-27, suggests a diminishment of the evidentiary burden for compliance with the permit conditions. *Appeal Brief of TransCanada Keystone XL Pipeline, LP in Response to Common Arguments of Several Appellants* at 13. The argument is self-defeating, because they concede that "certify" means "attest," which in turn means "(1) To bear witness; testify (2) To affirm to be true or genuine, to authenticate by signing as a witness." BLACKS LAW DICTIONARY (10th ed. 2014) at 153.

Significantly, on page 13 of its brief, TransCanada quoted only part of the definition of "attest" – the second definition, which references "in writing." TransCanada omitted the primary definition of "attest" in its quotation. Nevertheless, the primary definition of "attest" requires that they *bear witness and testify*, *id.*, which of course is done for the purpose proving the factual allegations in the petition, as required by the PUC regulations, ARSD §20:10:01:15.01, and the overall regulatory framework for PUC contested cases. §§20:10:01:02 - 20:10:01:17; SDCL §1-26-18.

The appellees urge this court to uphold the agency's narrow and strained interpretation of SDCL §49-41B-27, characterizing most permit conditions as prospective and requiring no proof of compliance. *Reply Brief of Appellee S.D. PUC to Brief of Appellants Joye Braun et al.*, at 15-17. By their logic, the statutory requirement that "the utility must certify... that such facility continues to meet the (permit) conditions," SDCL §49-41B-27, is satisfied by filing a document which uses the word "certify," and then presenting testimony expressing an intent to comply with the permit conditions in the future. *Brief of TransCanada In Response to Common Arguments*, at 13. That reads section 27 right out of the statute.

"We should not adopt an interpretation of a statute that renders the statute meaningless, when obviously the legislature passed it for a reason." *Zubke v. Melrose Tp.*, 2007 S.D. 43, ¶14, 731 N.W.2d 918, 922. "We assume that the legislature intended no part of its statutory scheme be rendered mere surplusage." *Peters v. Great Western Bank, Inc.*, 2015 S.D. 4, ¶8, 859 N.W.2d 618, 622 *quoting Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶6, 620 N.W.2d 198, 201. "A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Wheeler v. Farmers Mut. Ins. Co. of Nebraska*, 2012 S.D. 83, ¶21, 824 N.W.2d 102, 108.

The appellee's argument ignores these important principles. They urge this Court to adopt an interpretation of SDCL §49-41B-27 that diminishes the permittee's obligation to produce evidence of ability to comply, and minimizes the PUC role to merely accepting promises. *See e.g. Reply Brief of Appellee S.D. PUC to Brief of Appellants Joye Braun et al.*, at 14 ("Mr. Goulet testified that Keystone intended to fully comply with and 'meet' such prospective conditions at the appropriate time"). The argument that the certification requirement is merely pro forma ignores the statutory scheme and the reality of the record before the agency. *See Argus Leader v. Hagen*, 2007 S.D. 96, ¶15, 739 N.W.2d 475, 480 ("In construing a statute, we presume that 'the legislature did not intend an absurd or unreasonable result' from the application." cite omitted).

The agency's ignoring the import of the denial of a requisite federal permit, and instead giving evidentiary weight to speculative promises of obtaining that permit in the future, is arbitrary and capricious and an abuse of discretion. "A ruling or decision of an administrative agency is upheld unless its decision is clearly erroneous in light of the entire record." *Application of Leo's Bus Service*, 342 N.W.2d 228, 230 (S.D. 1984). That is the case here, where the only evidence in the record regarding compliance with permit condition 2 is the State Department denial of the required Presidential Permit. Accordingly, the Final Order and Decision should be reversed.

II. The Exclusion of Witnesses was Unwarranted and an Abuse of Discretion

The PUC argues that the exclusion of intervenors for lack of discovery responses "was a proper exercise of the commission's exclusionary role." *Reply Brief of Appellee*

S.D. PUC to Brief of Appellants Joye Braun et al., at 18. It cites *Schwartz v. Palachuk*, 1999 S.D. 100, 597 N.W.2d 442, as precedent for the extreme sanction. *Id*. The sanction of exclusion was deemed a proper exercise of discretion where, "he ignored the mandate of the statute, a court order to compel, numerous follow-up letters from Luce and a direct final admonishment from the trial court." *Schwartz v. Palachuk*, 1999 S.D. 100, ¶23, 97 N.W.2d at 447.

Nothing like that happened here. There was no order to compel, and no opportunity to cure. "Although the trial judge's latitude in penalizing failure to comply is broad, it is not limitless." *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979) (reversing discovery sanction of exclusion). "These drastic remedies should be applied only in extreme circumstances." *Id.* In South Dakota, the discovery sanction of exclusion is deemed an abuse of discretion in cases where, as here, "[t]he record does not indicate that consideration was given to the imposition of less severe sanctions." *Id.* Reversal and remand are called for.

TransCanada contends that it followed the statutory procedure for the extreme sanction, even though there was no consideration of a lesser sanction, or opportunity to cure. Its evidence of prior consultation with intervenors is one letter sent to the affected intervenors. *Brief of TransCanada in Response to Individual Intervenors*, at 4. The record is devoid of any other effort to compromise or prompt compliance, prior to the imposition of extreme sanctions. *See Chittenden & Eastman Co. v. Smith*, 286 N.W.2d at 316. Consequently, TransCanada is incorrect when it argues: "The PUC discovery order is expressly authorized by statute." *Id*. at 2. The courts only invoke the remedy of exclusion when there are willful and repeated violations for which lesser sanctions were deemed inadequate. *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316; *see also SEC v. Razmilovic*, 738 F.3d 14 (2nd Cir. 2013) (trial court must generally consider lesser sanction).

The PUC's bold statement that "The Commission's imposition of discovery sanctions was legally justified and did not result in prejudice to Intervenors," *Reply Brief of Appellee S.D. PUC to Brief of Appellants Joye Braun et al.*, at 21, is wrong on the law, the impact on the rights of Intervenors, and the integrity of the fact-finding process. TransCanada's level of compliance with the permit conditions affects South Dakota

ranchers such as Paul F. Seamans, landowners such as John H. Harter, and Cheyenne River Reservation community members such as Elizabeth Lone Eagle. Yet the Commission excluded their testimony. AR-298. Testimony and documentary evidence on issues such as permit conditions and their economic impact on ranching operations, community concerns with the conditions for protecting the water table in Colome, or the Cheyenne River crossing near Howes, was never given by excluded intervenors, nor heard and considered by the Commission.

The Commission failed to follow the proper procedures for issuing extreme discovery sanctions, and the sanctions were unjustified and prejudicial. The Final Order should be reversed and remanded.

RESPECTFULLY SUBMITTED this 25th day of August, 2016

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Certificate of Service

The undersigned hereby certifies that, on this day, I served the afore Joint Reply Brief via electronic mail to –

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