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 OF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION TO BRIEF OF APPELLANTS JOYE BRAUN, JOHN H. HARTER, TERRY AND CHERYL FRISCH, CHASTITY S. JEWETT, PAUL F. SEAMANS, ELIZABETH LONE EAGLE, DALLAS GOLDTOOTH, BRUCE BOETTCHER, GARY F. DORR, ARTHUR R. TANDERUP, AND WREXIE LAINSON BARDAGLIO

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The Notice of Appeal was filed on February 19, 2016

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PRELIMINARY STATEMENT

Appellants 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 Lainson Bardaglio will be referred to collectively as "Individual Intervenors." 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 §49-41B-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 administrative 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 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." Apx A41-A68. 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." Apx A2-A39. 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 a specific condition or conditions are referenced. Apx A26-A39. 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 and certain transcripts, 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

Appellants appealed to this Court from the Commission's Final Decision and Order; Notice of Entry in Docket HP14-001, issued January 21, 2016. Apx A41-A68. 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

I. Whether the Commission abused its discretion by accepting Keystone's certification that it continues to comply with all permit conditions, or in the case of prospective conditions, has the capability to comply with such conditions, although the federal Presidential Permit was denied by the U.S. Department of State?

The Commission's action in this case does not involve the exercise of discretion but rather a factual and legal determination of Keystone's compliance with the standard set forth in SDCL 49-41B-27. The Commission decided that Keystone would have the capability to comply with Condition 2 by making another application for a Presidential Permit in the future as it has already done once previously.

II. Whether the Commission abused its discretion by issuing the Final Decision and Order Finding Certification Valid and Accepting Certification when adequate evidence was presented to support the Decision? Apx A41-A68.

Adequate 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. Apx A41-A68. The specific evidence supporting each of the Commission's Findings of Fact is in the record. References to the transcript and record supporting each Finding of Fact and the rationale supporting the Commission's Decision are set forth in the Decision. Apx A41-A68.

III. Whether the Commission's April 17, 2015, Order Granting in Part Keystone's Motion for Discovery Sanctions was a proper exercise of the Commission's supervisory role over pre-trial procedure?

The Commission does not believe the rights of any Intervenor were prejudiced. The Commission's actions were appropriate given the parties' failure to comply. Further, a very significant process of discovery and pre-hearing motions and a nine day hearing with a large number of both individual and organizational Intervenor participants make it highly unlikely that meaningful evidence was omitted from the record in this case.

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Intervenors 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 Lainson Bardaglio 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." Apx A41-A68. The Commission granted intervention to all forty-two persons and organizations that applied for intervention. 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, Apx A41-A68, 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).

I.

THE COMMISSION DID NOT ABUSE ITS DISCRETION BY ACCEPTING KEYSTONE'S CERTIFICATION THAT IT CONTINUES TO COMPLY WITH ALL PERMIT CONDITIONS, OR IN THE CASE OF PROSPECTIVE CONDITIONS, HAS THE CAPABILITY TO COMPLY WITH SUCH CONDITIONS, ALTHOUGH THE FEDERAL PRESIDENTIAL PERMIT WAS DENIED BY THE U.S. DEPARTMENT OF STATE.

The Commission does not believe its responsibilities under SDCL 49-41B-27 involve an exercise of discretion but rather a factual and legal determination of whether the applicant has met the standard set forth in SDCL 49-41B-27 which 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)

This is a case of first impression regarding this statute. No previous filing under this statute has been contested before the Commission or appealed to the Circuit Court. The term "discretion" is typically characterized by specific language conferring discretion, see e.g. SDCL 49-41B-20, or

by the use of the word "may" in terms of the decision-making authority delegated to the agency. *In re Application of Benton*, 691 N.W. 2d 598, ¶ 20, (2005 S.D. 2) (citing *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 625 (S.D. 1993)). There is nothing in the language of SDCL 49-41B-27 indicating that the Commission has discretionary authority to disallow or reject a certification submitted by an existing facility permit holder[1]; rather, the Commission's role is to determine, based on the certification itself and other evidence presented in a case where the certification is contested, whether the certification should be accepted as valid and accurate.

Keystone submitted a Certification to the Commission signed by Corey Goulet, the president of Keystone Projects, the corporate entity in charge of constructing the Keystone XL Pipeline project under the permit issued in Docket HP09-001 for which the Certification was made. Keystone also submitted a Petition for Order Accepting Certification under SDCL § 49-41B-27 in support of the Certification and supporting Appendices. Based on the language of SDCL 49-41B-27 it is certainly arguable that nothing more needed to be done, absent the initiation of a proceeding by action of the Commission or the complaint of another person. The Commission, however, opened a docket for consideration of the certification, and ultimately, after the Certification was contested by Intervenors, Keystone presented testimony from seven witnesses and introduced a number of exhibits at the evidentiary hearing in support of the validity of the Certification.

[1] The Legislature has specifically delegated discretion to the Commission in several of the statutes found within SDCL Chapter 49-41B. See e.g. 49-41B-3(4): "Any other relevant information as may be requested by the commission."; 49-41B-12: "If the commission determines that an environmental impact statement should be prepared"; 49-41B-13: "at the discretion of the Public Utilities Commission"; 49-41B-14; "The Public Utilities Commission may require" and "The commission . . . may also request"; 49-41B-20: "at the discretion of the commission"; 49-41B-22.2: "the Public Utilities Commission may in its discretion decide"; 49-41B-23: "The Public Utilities Commission may waive"; 49-41B-24: "as the commission may deem appropriate"; 49-41B-25: "as the commission may deem appropriate"; 49-41B-33; "A permit may be revoked or suspended by the Public Utilities Commission"; and 49-41B-35: "Rules may be adopted by the commission."

With respect to the denial of Keystone's outstanding Presidential Permit application by the Department of State, the Commission determined that this does not demonstrate that the Project fails to continue to meet Condition 2 of the KXL Decision. Apx A26, #2. Condition 2 states that "Keystone shall obtain . . . all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State . . ." It does not state that Keystone "has obtained" a Presidential Permit. It is a prospective condition, and there is no evidence in the record demonstrating that Keystone will be unable to apply for and obtain a Presidential Permit in the future.

All major siting projects permitted by the Commission have required additional permits beyond those issued by the Commission, and the Commission has approved permits to construct for all recent siting dockets before all other jurisdictional permits/approvals were obtained. See e.g. Dockets HP09-001, HP07-001, EL13-020, EL13-028, EL14-061, and EL15-020. Permit applicants must be afforded the opportunity to seek permits and approvals from multiple jurisdictions and governmental agencies sequentially in order to avoid the impractical reality of having the dozens of permits and approvals required to construct and operate a linear project such as Keystone XL conducted simultaneously or in some form of multi-jurisdictional proceeding. Prospective conditions make sense. An absurd result would inevitably occur otherwise.

Keystone has previously had an application for a Presidential Permit denied, and this did not prevent Keystone from reapplying, which it did. If Keystone does not apply for and obtain a Presidential Permit in the future, it will not be able to construct the Project under the permit issued in Docket HP09-001, provided the Executive Orders cited in Condition 2 remain in force.

Lastly, the South Dakota Legislature considered Senate Bill 134 in the 2016 Legislative Session which would have amended SDCL 49-41B-24 to require that an applicant seeking a facility permit that requires a Presidential Permit must obtain such Presidential Permit before the Commission could grant such facility a permit to construct. The bill was defeated before the Senate Commerce and Energy Committee.[2]

The Commission's Decision, Apx. A41-A68, in this matter did not involve an exercise of discretion, but rather a decision based on the Certification filed by Keystone and the evidence introduced into the record by Keystone and the other parties. If the Court determines that an exercise of discretion was involved, the Commission did not abuse such exercise of discretion. The Commission's Decision validating and accepting Keystone's Certification should not be overturned because Keystone has not yet obtained a governmental permit that Condition 2 requires it to obtain in the future before commencing construction. Apx A26, #2.

II.

ADEQUATE 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.

As set forth above in response to Appellant's Issue 1., the Commission does not believe that its responsibilities in rendering a decision under SDCL 49-41B-27 involve an exercise of discretion but rather a factual and legal determination of whether the applicant has met the standard set forth in SDCL 49-41B-27 which 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

[2] See: http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=134&Session=2016

Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

The term "discretion" is typically characterized by the use of the word "may" in terms of the decision-making authority delegated to the agency. *In re Application of Benton*, 691 N.W. 2d 598, ¶ 20, (2005 S.D. 2) (citing *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann,* 498 N.W.2d 620, 625 (S.D.1993)). There is nothing in the language of SDCL 49-41B-27 indicating that the Commission has discretionary authority to disallow or reject a certification submitted by an existing facility permit holder, but rather the Commission's role is to objectively analyze the evidence presented by the parties and determine what result is in accord with the statute given such evidence. If the Court, however, determines that an exercise of discretion was involved in the Commission's decision-making process, the Commission did not abuse such exercise of discretion.

A central issue in this proceeding boils down to what is meant by the term "certify" in the statute 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. This proceeding is not, however, a retrial of the permit proceeding conducted in 2009 and 2010 in Docket HP09-001. 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), p. 275. 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" means 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," 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 and Order entered by the Commission. As set forth in 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*, 487 U.S. at 564-65, 108 S.Ct.at 2549, 101 L.Ed.2d at 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. at 217, 83 L.Ed. at 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. Apx A26-A39. 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 is essentially 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 is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Apx A26, #4. Conditions 7 through 9 require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Apx 27-28, #7, 8, and 9. Keystone XL appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline. 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 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. 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. Keystone presented evidence that compensation continues to be paid to compensate landowners for damage such as crop losses on the Keystone project. TR 306-307, 1975-1976 (AR 024304-024305, 026779-026780). There was no evidence that Keystone has not complied or cannot comply with this condition on Keystone XL. 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. As set forth above, 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. Intervenors simply did not provide any evidence indicating that Keystone does not currently comply with 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.

III.

THE COMMISSION'S APRIL 17, 2015, ORDER GRANTING IN PART KEYSTONE'S MOTION FOR DISCOVERY SANCTIONS WAS A PROPER EXERCISE OF THE COMMISSION'S SUPERVISORY ROLE OVER PRE-TRIAL PROCEDURE

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.*

In the cases where the Commission excluded specific types of evidence such as usufructuary and aboriginal rights (see June 15, 2015, Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights), the grounds for such exclusion were based on sound evidentiary legal principles, such as relevancy or lack of jurisdiction. For example, the Commission determined that it has no jurisdiction to adjudicate tribal rights. Such determinations are properly litigated in the courts of this state or in federal court. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). The Project will not cross any tribally owned property, land owned by the United States and held in trust for Indians, or any Indian reservation lands. TR 394 (AR 024392); Petition App. C, ¶ 54. No court has held that Native American Tribes have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route in South Dakota. Lastly, the issue of usufructuary

and aboriginal rights does not address whether Keystone continues to meet any of the KXL Conditions since no condition addresses this subject. Apx A26-A39.

With respect to the other discovery sanctions, the Commission does not believe the rights of any Intervenor were substantially prejudiced. Of the seventeen Intervenors who did not respond at all to discovery, twelve did not participate further in the case. Louis Grassrope appeared on the opening day of the hearing and presented an opening statement, but made no further appearance. TR 75 (AR 024033). Cheryl and Terry Frisch did not attend the hearing or otherwise participate in proceedings except for the introduction at the hearing by Intervenor Diana Steskal of a one paragraph affidavit signed by them. Ex 5004 (AR 029244). Intervenors Joye Braun and Chastity Jewett did appear at the evidentiary hearing and engaged in cross-examination. TR 1496-1497 (AR 026053 – 026054), 2045-2046 (AR 026849 – 026850), 2140-2141 (AR 026944 – 026945). With respect to the three Intervenors, John Harter, BOLD Nebraska, and Carolyn Smith, who were precluded from offering witnesses or evidence at the evidentiary hearing for inadequately responding to discovery, all of them participated in further proceedings in the case and participated in the evidentiary hearing. John Harter filed pre-filed rebuttal testimony which was received in evidence as Exhibit 1003 (AR 029109 – 029110) and presented oral rebuttal testimony, TR 2184-2237 (026988-027041), and conducted cross-examination of numerous witnesses, and BOLD Nebraska and Carolyn Smith conducted cross examination of numerous witnesses.

Despite the Appellant's argument that lesser sanctions could have been imposed, a very significant process of discovery and pre-hearing motions and a nine day hearing with a large number of both individual and organizational Intervenor participants make it highly unlikely that meaningful evidence was omitted from the record in this case. The authority of the Commission

concerning sanctions is flexible and allows the Commission "broad discretion with regard to sanctions imposed thereunder for failure to comply with discovery orders." *Chittenden & Eastman Co. v. Smith, supra.* The Commission's imposition of discovery sanctions was legally justified and did not result in substantial prejudice to Intervenors.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court 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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