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 IN SUPPORT OF
MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

Under South Dakota law –

> No person may cause pollution of any waters of the state, or place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state.

SDCL §34A-2-21.

The federal Clean Water Act provides –

> Any owner, operator, or person in charge of any vessel, onshore facility or offshore facility… from which oil or a hazardous substance is discharged… may be assessed a Class I or Class II civil penalty…

33 U.S.C. §1321(b)(6)(A); *see also* 49 U.S.C. §60120 (PHMSA enforcement authority).

There is no doubt that the Freeman spill violated state and federal law, as well as conditions 1 and 31 of its South Dakota permit. Accordingly, evidence relating to the Freeman spill is material to the PUC determination of compliance with the permit conditions for the Keystone XL pipeline, within the meaning of SDCL §1-26-34. Such evidence was unavailable at the time of the hearing. The Appellants' motion should be granted.

In their opposition briefs, both TransCanada and the PUC staff rely on the requirement that the new evidence be "material" in order for the court to remand to the agency. However, their arguments contradict each other. TransCanada argues that there is no history of noncompliance with federal regulations. *Keystone's Brief in Opposition to Joint Motion*, p. 4 ("the Commission did not find a history and continuing pattern and practice by Keystone of non-compliance"). The PUC staff argues that the agency aptly considered all of TransCanada's prior violations, and certified the permit notwithstanding the history of noncompliance. *PUC Staff's Response to Joint Motion*, p. 3 ("The Commission heard testimony (on) potentially serious events such as corrosion… (and) previous leaks… Because the Commission heard similar testimony, it is not at all likely that the outcome would change").

However, TransCanada and the PUC staff overstate the materiality requirement. "A fact is material *if it tends to resolve* any of the issues that have been properly raised by the parties." 10A Wright, Miller and Kane, FEDERAL PRACTICE AND PROCEDURE, §2725.1 (emphasis added). The new evidence need not be dispositive, in order to be material. A fact is material if it "*might* affect the outcome." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added). "It is only when the disputed fact *has the potential to change the outcome* of the suit under the governing law… that the materiality hurdle is cleared." *Martinez v. Colon*, 54 F.3d 980, 984 (1st Cir. 1995) (emphasis added); *see also Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, ¶33; 714 N.W.2d 884, 895 (whether a communication was "unequivocal" deemed a material fact). It must be able to affect the outcome to the extent that "a reasonable jury could return a (different) verdict." *South Dakota State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶9, 616 N.W.2d 397, 401.

It is not disputed that the PUC heard evidence of prior non-compliance by TransCanada. *PUC Staff's Response to Joint Motion*, p. 3. None of the many prior oil spills occurred in South Dakota. There is serious concern with the amount of time taken for TransCanada to discover and remediate the Freeman spill, on rural South Dakota range land. *See Joint Memorandum of Law in Support of Joint Motion for Leave to Present Additional Evidence, Exhibit A*, PHMSA Corrective Action Order (local landowner discovered Freeman spill, not TransCanada detection system, initial estimate

of spill understated by factor of 100); and *Exhibit F*, Affidavit of Paul F. Seamans, ¶5 (TransCanada contractors still trying to locate precise location of spill two days after it was reported). Thus, the additional evidence on non-compliance issues to be introduced on remand offers important new aspects of problems already in the PUC record. *See Vilhauer v. Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990) (Additional evidence deemed material "as a result of the injury, not any new injury").

Unquestionably, the violation of law evidenced by the Freeman spill, in combination with the other TransCanada violations in the agency record, has a strong potential to affect the Commission's certification of compliance with conditions 1 and 31. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. In *Vilhauer v. Dixie Bake Shop*, *supra* at 846, the South Dakota Court affirmed the circuit court's acceptance of new evidence that included a federal agency's findings on the issue at hand – a worker's level of disability. That is precisely the situation here, where documentation from a federal agency, PHMSA, is material new evidence, unavailable at the time of hearing. *See Joint Memorandum of Law in Support of Joint Motion, Exhibit A*.

The determination of materiality is made with reference to the substantive law. *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45 at ¶17; 714 N.W.2d at 891. 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). Thus, the determination of whether evidence of TransCanada's violations of law at the Freeman spill are material to compliance with conditions 1 and 31, which require compliance with the Clean Water Act, 33 U.S.C. §1301 *et seq*. and SDCL 34A Chap. 2, Pipeline Safety Act, 33 U.S.C. §2701 *et seq.*, and other laws, is to be liberally interpreted in favor of protection of the environment. TransCanada and the PUC staff ask the court to invoke an unnecessarily narrow view of the PUC fact-finding role, for those conditions requiring compliance with state and federal environmental statutes.

Predictably, TransCanada downplays its numerous prior violations of law, as the testimony of a "disgruntled former Keystone employee," named Evan Volkes. *Keystone's Brief in Opposition to Joint Motion*, p. 4. Actually, the administrative record contains or makes reference to at least two prior spills and several PHMSA corrective action orders. *Joint Memorandum of Law in Support of Joint Motion, Exhibits C-D.*

Nevertheless, if the PUC was unpersuaded by Volkes' testimony, the additional evidence on remand will contain objective and authoritative evidence that may affect the outcome. *See Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶8, 762 N.W.2d 884, 891.

TransCanada also argues that federal pre-emption prevents the PUC from considering pipeline safety. *Keystone's Brief in Opposition to Joint Motion*, p. 6. That misses the point, because the state permit issued by the PUC incorporates by reference the federal statutes and regulations. Amended Final Decision and Order, S.D. Public Utilities Commission, HP 09-001 (2010), at 25, 31. PHMSA found that as a result of the Freeman spill, TransCanada violated the applicable federal regulations on pipeline welds, 49 CFR §190.233. *Joint Memorandum of Law in Support of Joint Motion, Exhibit A,* p. 3. Consequently, TransCanada also violated conditions 1 and 31 of the PUC permit, which require compliance with the federal regulation. Amended Final Decision and Order, S.D. Public Utilities Commission, HP 09-001, at 25, 31. The agency clearly possesses statutory authority to require compliance with the conditions it imposed on the TransCanada permit. SDCL §49-41B-27.

Finally, TransCanada and the PUC staff argue that the judicial review of agency decisions is to be expeditious under SDCL §1-26-33.6, and the remand will cause undue delay. *Keystone's Brief in Opposition to Joint Motion*, p. 7; *PUC Staff's Response to Joint Motion*, p. 4. That argument is specious, because upon remand under SDCL §1-26-34, the clock stops ticking. Remand to the agency for additional fact-finding of material evidence does not constitute deleterious conduct on the part of the circuit court, with respect to the timeliness of judicial review under SDCL §1-26-33.6.

Ultimately, the appellants' joint motion satisfies the letter and the spirit of SDCL §1-26-34, in order to remand to the agency to take additional evidence. Nothing in the opposition briefs changes that. The joint motion should be granted.

RESPECTFULLY SUBMITTED this 7th day of November, 2016

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