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

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IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	:	32CIV 16-33 **APPEAL BRIEF OF TRANSCANADA KEYSTONE PIPELINE, LP IN RESPONSE TO COMMON ARGUMENTS OF SEVERAL APPELLANTS**

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Appellee TransCanada Keystone Pipeline, LP ("Keystone"), offers this brief in these consolidated appeals, responding to common arguments raised by Appellants Dakota Rural Action, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Intertribal Council on Utility Policy, and the collectively-represented Individual Appellants. Keystone will respond to the individual arguments made by Appellants in four separate briefs.[1]

Statement of the Issues Briefed Herein

1. Did the Commission erroneously shift Keystone's burden of proof under SDCL § 49-41B-27 to the Appellants?

   The Commission held that Keystone had the burden of proof to show that it could continue to meet the conditions on which the Permit was granted, that Keystone met its burden, and that the Appellants failed to show that Keystone could not continue to meet the Permit conditions.

2. Are the Commission's findings of fact entered in support of its order accepting Keystone's certification supported by substantial evidence?

   After a nine-day evidentiary hearing at which 34 witnesses testified, the Commission entered findings of fact with citations to the record in support of its order.

[1] All of the arguments raised by the Cheyenne River Sioux Tribe are addressed in this brief, so there is no separate brief from Keystone addressing the Tribe's arguments.

3. Did the Commission err in dismissing the Appellants' joint motion to dismiss the certification proceeding after Keystone's application for a Presidential Permit was denied by the Department of State?

   The Commission concluded that the Permit condition requiring that Keystone obtain all applicable federal permits, including a Presidential Permit, before constructing and operating the pipeline was prospective in nature, and that Keystone could still obtain such a permit, in the absence of which it would be unable to construct and operate the Keystone XL Pipeline.

4. Did the Commission err in entering a procedural and discovery order at the outset of the case?

   The Commission entered an initial procedural and discovery order limiting discovery to (1) whether the proposed project continued to meet the 50 conditions attached to the Permit, and (2) the factual changes that had occurred since the Permit was issued, as identified in Keystone's tracking table filed as Appendix C.

Statement of the Case and Facts

TransCanada Keystone Pipeline LP, appellee, is a Delaware limited partnership, a wholly owned subsidiary of TransCanada Corporation. Based in Calgary, Alberta, TransCanada owns and operates power plants natural gas storage facilities, and nearly 45,000 miles of crude oil and natural gas pipelines in Canada, the U.S. and Mexico. TransCanada's shares are traded on the Toronto and New York Stock Exchanges.

In 2005, TransCanada began developing the Keystone project, anchored by two large capacity pipelines running from Hardisty, Alberta to Patoka, Illinois and the Texas Gulf Coast. Hardisty is a collecting point for oil produced in the Western Canadian Sedimentary Basin, the world's third largest oil reserve. The Keystone Pipeline, first operational in 2010, runs southeast from Hardisty to a point south of Winnipeg, then straight south across North and South Dakota to Steele City, Nebraska, just north of the Nebraska-Kansas border. From Steele City a segment runs east to a storage and refining complex at Patoka, Illinois. Another segment, called the Cushing Extension, runs south from Steele City to the nation's largest crude oil storage hub at

Cushing, Oklahoma. Finally, a segment runs from Cushing to the Texas Gulf Coast. The Keystone Pipeline is over 2,600 miles long.

South Dakota's Energy Facility Permit Act, SDCL Chap. 49-41B, requires that interstate energy facilities be permitted by the South Dakota Public Utilities Commission antecedent to construction. In 2007 Keystone applied for, and the Public Utilities Commission issued, a construction permit for the Keystone Pipeline. The 30-inch diameter line was constructed in 2008 and 2009 and became operational in 2010, transporting nearly 600,000 barrels of crude oil per day through South Dakota. The line enters South Dakota north of Britton in Marshall County and exits near Yankton. More than one billion barrels of Western Canadian crude oil have been safely transported through South Dakota on the Keystone Pipeline in its six years of operation.

In 2008 TransCanada announced its plan to construct the Keystone XL Pipeline from Hardisty, Alberta to Steele City, Nebraska, following a more direct route across Alberta, Montana, South Dakota and Nebraska. The 36-inch diameter pipeline is designed to transport approximately 830,000 barrels per day, entering South Dakota in Harding County northwest of Buffalo and exiting southeast of Winner.

Even though the proposed Keystone XL pipeline does not pass through Indian Country or cross any tribally – owned lands, Keystone personnel attempted to engage the Rosebud, Cheyenne River and Standing Rock Sioux tribes during the early years of the project. All the South Dakota tribes, acting through their tribal councils, enacted resolutions opposing the XL Pipeline, and refused to meet with Keystone personnel or to discuss the project.

The proposed pipeline crosses the Mni Wiconi pipeline in central South Dakota. The Mni Wiconi is a federally-funded rural water pipeline system emanating on the Missouri River at

Pierre, held in trust by the federal government but operated by the Oglala Sioux Tribe. Put in service in the 1990s, it now serves four reservations and the non-tribal Lyman-West River Rural Water System. Keystone secured crossing agreements for the XL Pipeline from the federal government.

In 2009 Keystone applied to the SD PUC for a permit to construct and operate the Keystone XL Pipeline. The case was docketed as HP09-001. Following a contested case hearing, the SD PUC granted Keystone a permit in 2010. The Amended Final decision and Order dated June 29, 2010, is referred to herein as "the Permit." The Permit contained fifty conditions, about half of which were prospective, in the sense that they addressed construction and operational matters.

In 2010 Keystone modified its XL Pipeline design to include the Bakken Marketlink. Located at Baker, Montana, just west of the North Dakota border, the Bakken Marketlink on-ramp allows for loading and transport of up to 100,000 barrels per day of Montana and North Dakota produced Williston Basin crude oil through the pipeline.

Both the Keystone and the XL pipelines require so-called Presidential Permits because they cross the international border between the US and Canada. By executive order, the Department of State is tasked with the responsibility for reviewing cross border pipeline proposals and recommending whether the President grant the permit. In 2009 the State Department found the Keystone Pipeline was in the national interest and granted a permit for construction of the Keystone Pipeline.

In September 2008 Keystone applied for a Presidential Permit for the proposed XL pipeline. The State Department started its review as President Obama came into office. For several years President Obama took no action on the 2008 Keystone XL Presidential Permit

application. In late 2011Congress passed a statute requiring the President to act within 60 days. When the deadline loomed, President Obama denied a permit for the Keystone XL Pipeline, citing inadequate time to consider issues regarding the route in Nebraska. In 2012, Keystone reapplied and followed a new state statutory process to revise the route in Nebraska.

The Department of State studied the proposed Keystone XL Pipeline at great length. Five draft, final, and supplemental environmental impact statements were prepared, consistent with the National Environmental Policy Act. In South Dakota alone, the environmental review involved public meetings and input sessions, public hearings, including a public meeting in Pierre attended by more than 450 people, consultation with all affected Indian tribes, biological, archeological, paleontological, and historical surveys of the proposed route, and extensive public comment at multiple stages of the process. The final version of the environmental impact statement and supporting documents, commonly called the Final Supplemental Environmental Impact Statement or FSEIS, runs many thousands of pages. Ultimately, the FSEIS found that the proposed XL project had no significant environmental impact. The State Department also took extensive comment on whether the project was in the national interest but made no determination on whether to grant a Presidential permit for several years.

Because Keystone's application for a Presidential Permit remained pending, by 2014 construction had not begun. If construction is not completed within four years following permit issuance, SDCL § 49-41B-27 requires that Keystone certify to the PUC that it can still "meet the conditions on which the permit was issued." In September 2014, Keystone filed a certification with the Commission that it could meet the 2010 permit conditions. (Record at 45-209.) The certification was supported by a petition asking the Commission to accept the certification and two important appendices. The first, Appendix C, is a tracking table of changes that examined

each relevant permit condition and described what, if any, changes relative to that condition had occurred in the intervening four years. The second, Appendix B, is a four-year compilation of quarterly reports including the status of compliance with each condition. These documents are all included in the appendix to this brief. (App. at 0001-02, 0009-38, 0039-43.)

The Commission opened a new docket, HP14-001, for the certification proceeding. Forty-three persons, tribes, and environmental groups intervened. Forty-two were allowed party status. Following extensive discovery and motion practice, the Commission conducted a nine – day contested case hearing in July and August of 2015, including a Saturday session and an extension of the originally scheduled hearing dates. Ten lawyers representing interveners participated in the hearing. Another dozen interveners appeared on their own behalf. Twenty-six witnesses testified and thousands of pages of exhibits were received. Extensive findings of fact and conclusions of law were proposed, argued, and entered. In the end, the Commission found that Keystone's certification was correct, in effect extending the life of the 2010 Permit. (Record at 31668-31695.)

In November 2015, after the conclusion of the certification hearing but before the Commission's written order was entered, Secretary of State Kerry recommended that the President reject Keystone's application for a Presidential Permit. President Obama immediately denied the permit, not because of the efficaciousness of the project, but because a permit arguably would send the international community the wrong signal about US leadership on climate change issues. In January 2016, Keystone filed suit in federal court in Texas, asserting that the denial was unconstitutional and seeking to enjoin affected federal agencies from enforcing the purported denial of border crossing authority. TransCanada also has filed a claim in arbitration under the North American Free Trade Agreement, charging the President's denial

was a breach of the free trade agreement and seeking damages. The federal suit and the NAFTA claim are pending.

The Commission entered its final order approving the certification petition on January 21, 2016. Two tribes, an environmental group, a tribal utility agency, and thirteen individuals appealed from the Commission's 2015 decision. After the Commission assembled and filed the administrative record, five appeal briefs were submitted. The appeals were consolidated by Judge Barnett on April 15, 2016. Keystone offers this and associated briefs in response.

Standard of Review

SDCL § 49-41B-30 recites that any party may obtain judicial review of the PUC decision by filing an appeal in the Circuit Court. The statute then provides that the "review procedures shall be the same as that for contested cases under chapter 1-26," the South Dakota Administrative Procedures Act.

SDCL § 1-26-36 directs that the reviewing court "give great weight" to the findings made and inferences drawn by the Commission on questions of fact, and reverse or modify only if "substantial rights of the appellant have been prejudiced because the administrative findings are . . . clearly erroneous in light of the entire evidence in the record." If the PUC has discretion with respect to its decision, the statute directs that reversal or modification is appropriate only if the decision is "arbitrary or capricious or characterized by abuse of discretion."

The South Dakota Supreme Court has confirmed the legislative directive in SDCL § 1-26-36. In *Knapp v Hamm & Phillips Co., Inc.*, 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788 the Supreme Court recited the standard of review for administrative appeals. The Court said:

> SDCL 1-26-37 establishes the standard of review used in administrative appeals. According to the statute, the applicable standard of review varies "'depending on whether the issue is one of fact or one of law.'" *Martin v. Am. Colloid Co.*, 2011 S.D. 57, ¶ 8, 804 N.W.2d 65, 67 (quoting *Darling v. W. River Masonry, Inc.*, 2010

> S.D. 4, ¶ 10, 777 N.W.2d 363, 366). "[A]ctions of the agency are judged by the clearly erroneous standard when the issue is a question of fact." *Id.* (citing *Darling*, 2010 S.D. 4, ¶ 10, 777 N.W.2d at 366). "[A]ctions of the agency are fully reviewable when the issue is a question of law." *Darling*, 2010 S.D. 4, ¶ 10, 777 N.W.2d at 366 (citing *Orth v. Stoebner & Permann Constr., Inc.*, 2006 S.D. 99, ¶ 27, 724 N.W.2d 586, 592). Jurisdictional issues are questions of law and are reviewed de novo. *Martin*, 2011 S.D. 57, ¶ 8, 804 N.W.2d at 67. *See O'Toole v. Bd. of Trs. of S.D. Ret. Sys.*, 2002 S.D. 77, ¶ 9, 648 N.W.2d 342, 345. Finally, "[w]e review statutory questions de novo, as they are questions of law." *Fredekind v. Trimac Ltd.*, 1997 S.D. 79, ¶ 4, 566 N.W.2d 148, 150 (citing *Permann v. Dept. of Labor, Unemp. Ins. Div.*, 411 N.W.2d 113, 117 (S.D. 1987)).

In summary, the Circuit Court must give the Commission's findings of fact great weight, and judge them by the clearly erroneous standard. Questions of law are fully reviewable. Reversal is allowed only if substantial rights of the Appellants are prejudiced by the Commission's decision. SDCL § 1-26-36.

Argument

1. The Commission correctly determined that Keystone had the burden of proof.

All of the Appellants argue that the Commission erred in placing the burden of proof on them rather than on Keystone. (*See* Yankton Sioux Tribe Br. at 10; Cheyenne River Br. at 5-6; COUP Brief at 3-4; DRA Br. at 23-24; Individual Appellants' Br. at 14.) Keystone agrees this is an issue of law, subject to de novo review.

The Court should consider the issues of burden of proof and sufficiency of the evidence in the context proposed by the Cheyenne River Sioux Tribe: (1) which party had the burden of proof under SDCL § 49-41B-27; (2) what did the burden require of that party; and (3) did the party meet its burden. (*See* Cheyenne River Br. at 5.)

First, Keystone does not dispute it had the burden of proof under SDCL § 49-41B-27. The Commission's final order stated this plainly. "Under SDCL § 49-41B-27, Keystone has the

burden of proof to show that its certification is valid." (Final Order, Conclusion of Law ¶ 4, App. at 0070.) Keystone never disputed the Commission's order and does not dispute it now.

Second, the fact that Keystone had the burden of proof does not mean that Appellants had no burden in the proceeding. Rather, as the South Dakota Supreme Court has held, the term "burden of proof" encompasses two distinct elements: "'the burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 42, 721 N.W.2d 438, 448 (Zinter, J., concurring). The burden of persuasion rests with the party having the affirmative side of an issue and does not change, but the burden of going forward with the evidence may shift. *Id.* After Keystone submitted its certification, accompanying documents and testimony per SDCL § 49-41B-27, the Appellants, as challengers to Keystone's certification, bore the burden of offering sufficient evidence to show that Keystone's certification was invalid because Keystone could not in fact meet some of the permit conditions. Keystone did not rest on its certification, but also presented direct testimony and exhibits at the hearing.

The concept that the burden of going forward with the evidence can shift is hardly novel. It exists in all cases in which a presumption arises. *See* SDCL § 19-11-1 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast"). It exists in cases involving allegations of a confidential relationship and undue influence. *See, e.g., In re Estate of Duebendorfer*, ¶ 32, 721 N.W.2d at 446-47. It exists in employment cases involving allegations of retaliatory discharge. *Johnson v. Kreiser's, Inc.*, 433

N.W.2d 225, 227-28 (S.D. 1988) (when employee makes prima facie case of retaliatory discharge, burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the employment action). It exists in family-law cases involving a defense of inability to pay alimony, which shifts the burden of proof to establish inability to pay. *Rousseau v. Gesinger*, 330 N.W.2d 522, 524 (S.D. 1983). It exists in workers compensation cases involving the odd-lot doctrine. *McClaflin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 7, 631 N.W.2d 180, 183 (burden of persuasion remains with claimant, but when claimant makes prima facie case, burden shift to employer to show availability of regular work). And it exists in every civil case when a party seeking summary judgment meets its initial burden, shifting the burden to the non-moving party to identify facts disputing the moving party's allegations. *Dakota Indus. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514 (under SDCL § 15-6-56(e), "once the moving party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations").

The Yankton Sioux Tribe argues that ARSD 20:10:01:15.01 contradicts Keystone's argument. (Yankton Sioux Tribe Br. at 12.)[2] The administrative rule provides that the burden of proof and the burden of going forward with the evidence both rest with the petitioner, "unless otherwise ordered by the commission." Here, the Commission issued no explicit orders relating to the burden of proof other than the statements by various Commissioners throughout the proceeding that Keystone had the burden of proof.

The Commission ultimately concluded that Keystone met its burden of proof. (Final Decision and Order, Conclusions of Law ¶¶ 8-9, App. at 0027.) The Commission's final decision does not indicate that it shifted any burden to the Appellants other than the conclusion

[2] The Individual Appellants make this same argument. (Individual Appellants' Br. at 19.)

of law that Keystone having met its burden, the Intervenors failed to establish any reason why Keystone cannot continue to meet the conditions. (*Id.* ¶ 10.) That conclusion is not contrary to the administrative rule. Even if the Commission had explicitly stated that the burden of going forward with the evidence shifted to the Appellants after Keystone filed its certification and presented its direct testimony, that would not be contrary to the rule. Rather, it would be consistent with both the rule and SDCL § 49-41B-27, which places the burden on Keystone to "certify." South Dakota law is clear that an agency cannot adopt a rule in contravention of a statute. *Paul Nelson Farm v. SD Department of Revenue*, 214 S.D. 31, ¶ 24, 847 N.W.2d 550, 558. What matters most in this appeal is the meaning of the statute, not the administrative rule.

The Yankton Sioux Tribe also argues that the Commission's decision in another unreported certification proceeding 16 years ago supports its argument. (Yankton Sioux Tribe Br. at 15.) The decision, *In re Filing by North States Power Company*, 2000 WL 36322410 (Mar. 20, 2000), indicates that on February 15, 2000, Northern States Power filed a certification with the Commission for the construction of improvements to a combustion turbine facility. The Commission considered the certification at meetings on February 29, 2000, and March 14, 2000, and then issued its order accepting the certification on March 20, 2000, or within 45 days after the certification was filed. The decision says nothing about the burden of production. What it indicates is that by opening a new docket for Keystone's certification petition and allowing intervention, voluminous discovery, and a lengthy contested-case hearing, the Commission treated Keystone differently, gave far more process to the Appellants, and imposed a heavier

burden on Keystone than it did in the only known previous certification filing under SDCL § 49-41B-27.[3]

2. Keystone's burden was to "certify" under SDCL § 49-41B-27.

As the Commission correctly concluded, the Permit granted by the Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order. (Final Decision and Order, Conclusion of Law ¶ 2, App. at 0069.) The Commission also correctly concluded under SDCL § 49-41B-27 that the permit granted in Docket HP09-001 has not lapsed or expired, so that "Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22," the statute that establishes what Keystone needed to prove to obtain the initial permit. (*Id.*, Conclusion of Law ¶ 3, App. at 0070.) None of the Appellants challenge these legal conclusions.

Accordingly, Keystone's burden of proof under SDCL § 49-41B-27 is necessarily different than what it had to prove in the original proceeding to obtain a permit to operate and construct the Keystone Pipeline. The certification statute 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.

SDCL § 49-41B-27. There are no reported cases addressing this statute. This Court's review of the Commissioner's interpretation of SDCL § 49-41B-27 is therefore deferential. "When faced with an agency's interpretation of a statute that it administers, 'so long as the agency's

[3] There are no reported cases construing the certification process called for by SDCL § 49-41B-27, and as long-serving PUC general counsel John Smith noted at the outset of this case, the only certification proceeding ever conducted by the PUC is the Northern States Power proceeding cited by Yankton Sioux, which was not contested.

interpretation is a reasonable one, it must be upheld.'" *Mulder v. South Dakota Department of Social Services*, 2004 S.D. 10, ¶ 5, 675 N.W. 2d 212, 214 (quoting *Emerson v. Steffen*, 959 F. 2d 119, 121 (8th Cir. 1992)).

The plain language of the statute provides that Keystone must "certify" that it can continue to meet the "conditions" on which the permit was granted. The Court must give the language of the statute its ordinary and plain meaning. *See, e.g., Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." BLACK'S LAW DICTIONARY at 275 (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." (*Id*. at 153.) These are narrow and precise terms. An agency may not "'enlarge the scope of the statue by an unwarranted interpretation of its language.'" *Paul Nelson Farm v. South Dakota Department of Revenue*, 2014 S.D. 31, ¶ 24, 847 N.W. 2d 550, 558 (quoting *In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W. 2d 394, 400).

Thus, Keystone's burden in this case was to verify in writing or to affirm as true that it can continue to meet the conditions on which the permit was granted. As stated by the Commission, Keystone's burden was to prove "that its certification is valid." (Final Decision and Order, Conclusion of Law ¶ 4.)[4] DRA asserts in its brief that Keystone submitted a petition "alleging that it continues to meet the conditions." (DRA Br. at 24.) That is incorrect. Keystone "certified," not "alleged." The certification under oath by a senior officer of the company complied with SDCL § 49-41B-27. Keystone further presented six witnesses who offered direct

[4] DRA calls the certification "self serving" and "conclusory." (DRA Br. at 27.) Given the attachments, it was not conclusory. All evidence that a party submits is self-serving. The South Dakota Supreme Court has held that a "self-serving" evidentiary objection is not valid "simply because a party who is also a witness has a manifest interest in the litigation." *Donat v. Johnson*, 2015 S.D. 16, ¶ 17, 2015 WL 1354535 (S.D. 2015).

evidence in support of its petition for acceptance of its certification. If the Appellants believed their own argument, they would not have cross-examined Keystone's witnesses and would not have called any of their own.

3. Keystone met its burden and the Appellants failed to meet theirs.

a. Keystone met its burden.

Keystone's certification, testimony, and evidence were sufficient to meet its burden to prove the validity of its certification under SDCL § 49-41B-27. Keystone submitted a certification signed under oath by Corey Goulet, the President of Keystone Projects. (App. at 0001-0002.) Attached to the certification was a quarterly report, marked as Appendix B, that discussed the status of each condition. (App. at 0009-0038.) Remarkably, none of the Appellants mention Appendix B in their briefing and they similarly ignored it before the Commission, despite it being important evidence in support of the certification. Coupled with Appendix C, the tracking table of factual changes in circumstances since the permit was granted on June 29, 2010, Keystone fully explained the circumstances attendant to the passage of four years in its initial filing. (App. at 0039-0043.)

The measure of Keystone's burden before the Commission was a preponderance of the evidence. *In re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605. As already discussed, the standard of review on appeal is, with respect to conclusions of law, de novo, and with respect to findings of fact, whether the findings are clearly erroneous or not supported by substantial evidence. Substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9). Sufficient evidence is not "'a large or considerable amount of evidence.'" *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-

65 (1988)). Rather, it is enough evidence "'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id.*

1. Evidence related to current conditions

The Commission concluded that Keystone met its burden through the certification signed by Corey Goulet, the documents appended to the certification, and the testimony of its witnesses establishing that none of the factual changes since the permit issued in 2010 affected Keystone's ability to meet the conditions on which the permit was granted. (Final Decision and Order, Conclusion of Law ¶ 8, App. at 0070.) The factual changes since June 29, 2010, are stated in the Commission's Findings of Fact ¶¶ 10-30. Except for DRA, none of the Appellants challenges any of these specific findings as clearly erroneous or not supported by substantial evidence. DRA's challenges are addressed in a separate brief.

The Commission addressed Keystone's ability to meet current conditions in Findings of Fact ¶¶ 32-77. Except for DRA, none of the Appellants challenges any of these specific findings as clearly erroneous or not supported by substantial evidence. Some of the Appellants argue that Keystone failed to submit affirmative evidence on most of the conditions. The individual Appellants, for instance, include a table in their brief (a "tracking table of non-evidence" according to DRA (DRA Br. at 25)) which they claim shows that no witness testified to most of the conditions. (Individual Appellants' Br. at 15-17.) This argument entirely ignores the documents filed with and incorporated into the certification, especially Appendix B.

The Cheyenne River Sioux Tribe argues more broadly that Keystone failed to submit "any substantial evidence" about its ability to meet the permit conditions because its direct witness testimony was conclusory or non-existent. (Cheyenne River Br. at 15.) This is demonstrably untrue, as evidenced by the certification, Appendix B, Keystone's direct

testimony, and the testimony of Keystone's witnesses on cross-examination. The hearing transcript is 2,507 pages; the evidentiary hearing took nine days; and seven witnesses testified for Keystone. Keystone relied on the pre-filed testimony that its witnesses presented, and so almost all of its witness testimony at the hearing was cross-examination by the Interveners. Meera Kothari, Keystone's chief engineer for the Keystone XL Pipeline, was cross-examined for 13 hours. Presumably the Interveners were not asking questions about issues that they thought were irrelevant to the single issue before the Commission. When the Appellants have failed to challenge the Commission's specific factual findings, their broad-brush argument that Keystone failed to present "any substantial evidence" is without merit.

Several of the Appellants (Cheyenne River Br. at 12-13, 15; Individual Appellants' Br. at 15; DRA Br. at 27) attempt to liken this case to the decision in *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, 793 N.W.2d 816 (S.D. 2011), in which the South Dakota Supreme Court affirmed a decision reversing the Rapid City Council's decision not to issue a conditional-use permit for an on-sale liquor establishment. The Council denied the permit because it would cause a concentration of similar uses, so as to cause blight or otherwise substantially diminish property values. *Id.* ¶ 8, 793 N.W.2d at 820. The Supreme Court affirmed the circuit court's finding that there was insufficient evidence in the record to support the denial, noting that "[t]he City Council left virtually no factual record for the circuit court or this Court to examine its decision." *Id.* ¶ 21, 793 N.W.2d at 824. The Supreme Court agreed that the decision was "'so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.'" *Id.* ¶ 22, 793 N.W.2d at 823 (quoting *Johnson v. Lennox Sch. Distr.*, 2002 S.D. 89, ¶ 10 n. 2, 649 N.W.2d 617 621 n.2).

Here, by contrast, the Commission conducted a secondary certification proceeding following a permit hearing that occurred in 2009. The certification proceeding took 16 months and created a 31,425-page record, not including a nine day evidentiary hearing at which 26 witnesses testified. The Commission entered a 28-page decision, 78 findings of fact and 13 conclusions of law. It is nonsense to suggest that *M.G. Oil*, a case involving "virtually no factual record" for review, is precedent for this Court to conclude that Keystone somehow failed to present sufficient evidence that it could continue to meet the conditions on which the permit was granted.

2. Evidence related to prospective conditions

Most of the conditions attached to the 2010 Keystone XL permit are prospective in nature. They require that Keystone do something in the future, like condition 11 ("Keystone shall conduct a preconstruction conference prior to the commencement of construction") or condition 12 ("[o]nce known, Keystone shall inform the Commission of the date construction will commence"). The Commission in its findings of fact identified the conditions that, like these examples, are prospective. (Final Decision and Order, Finding of Fact ¶ 31, App. at 0062 (identifying Conditions 1-3, 5 6.a-6.f, 11-14, 16.1-16.p, 17, 18, 19.a, 20-34.a, 35-40, 41.b, and 42-48 as prospective conditions).) The Commission then concluded that there was no evidence in the record that Keystone could not satisfy any of these conditions.

The logic of the Commission's decision is clear. With respect to a condition requiring that Keystone do something in the future in connection with the construction or operation of the pipeline, Keystone was unable to prove its compliance with that future condition when the permit was issued on June 29, 2010, just as it was unable to prove its compliance as of the date of the certification, because the condition relates to future events. Keystone can do no more than

verify its promise to comply with the future condition and establish that no factual change has occurred that would prevent its future compliance.

Thus, the Commission considered whether any of the factual changes since June 29, 2010, affected Keystone's ability to meet these conditions in the future and concluded, in Finding of Fact ¶ 31, that they did not. (App. at 0062.) None of the Appellants specifically challenge this finding. Rather, the Appellants argue abstractly that Keystone was required to offer evidence that it could meet these conditions in the future, but fail to explain how Keystone could prove its ability to satisfy a future condition other than by showing that nothing has changed that would affect its ability to meet that condition since it was issued by the Commission, which is what Keystone said in its certification, Appendix C to its petition, and its direct testimony. The Commission therefore correctly concluded that "Keystone is as able today to meet the conditions as it was when the permit was issued as certified to in the Certification signed by Corey Goulet. No evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future. Keystone offered sufficient evidence to establish that Keystone can continue to meet the conditions." (Final Decision and Order, Conclusion of Law ¶ 9, App. at 0070.)

The Individual Appellants argue that by finding that some conditions are prospective, the Commission "enervated the entire reason the legislature included section 27 in the statute" and that the finding "renders the entire certification under SDCL § 49-41B-27 to be meaningless." (Individual Appellants' Br. at 14.) Aside from the hyperbole, this argument has an other-worldly quality when one considers the conditions that the Commission found are prospective. For example, condition 11 requires a preconstruction conference prior to the commencement of construction. The Individual Appellants' brief does not suggest what evidence Keystone should

have presented that it is able to comply with this condition in the future. For another example, condition 16.a requires that Keystone separate and segregate topsoil from subsoil in agricultural areas, and 16.b. requires that Keystone repair any damage to property that results from construction activities. Not only do the Individual Appellants not suggest what evidence Keystone should have presented on this issue, but Keystone addressed all of the prospective conditions in Appendix B to its certification, which the Individual Appellants do not mention.

Some of the conditions are inapplicable to certification. Condition 4 provides that the Permit is not transferable. Conditions 7-9 require the appointment of a public liaison and the submission of quarterly reports to the Commission by the liaison, which has been done. The reports are public record, filed in Docket HP09-001. The Individual Appellants nevertheless include these conditions in their "tracking table of non-evidence" and argue that their due process rights were violated because Keystone produced no evidence as to them.

The three conditions that the Individual Appellants mention do not support their cause. Condition 10 requires that Keystone contact local emergency responders before beginning construction. Keystone presented evidence at the hearing that it has already started making those contacts and will continue. (Tr. at 317.) Keystone's ability to comply with this condition was not challenged. The second is Condition 36, which requires that Keystone develop an emergency response plan prior to operation. This is a prospective condition. It is also one about which Keystone has a track record, since it previously filed an emergency response plan for the currently-operating Keystone Pipeline in eastern South Dakota. The third is Condition 34, which requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas ("HCA's"). Keystone's witnesses testified that this process is ongoing. (Tr.

at 662.) There is no evidence in the record that would support a finding that Keystone is unable or unwilling to comply with these conditions.

The Individual Appellants conclude their argument with a brief suggestion that because the Commission improperly applied the burden of proof, their due process rights were violated. (Individual Appellants' Br. at 19.) The brief cites to *Daily v. City of Sioux Falls*, 2011 S.D. 48, 802 N.W.2d 905. *Daily* involved a constitutional challenge to the administrative appeals process adopted by the City of Sioux Falls that governed appeals from the assessment of civil fines for, among others, the violation of city zoning ordinances. The Individual Appellants do not discuss the constitutional analysis employed in *Daily* and do not make a constitutional argument on appeal. Their citation to *Daily* is entirely insufficient to establish that after a nine-day evidentiary hearing and a 16-month proceeding, they have been denied due process, especially given the Commission's clear statement that Keystone bore the burden of proof.

b. The Appellants failed to prove that Keystone could not meet any condition.

As indicated, the Appellants deny that they had any burden as a matter of law, and so, except for DRA, do not specify what evidence the Commission failed to consider establishing that Keystone cannot meet any permit condition. They have therefore failed to articulate any reason why the Commission erred in adopting Conclusion of Law ¶ 10, that "the Interveners failed to establish any reason why Keystone cannot continue to meet the conditions on which the permit was issued."

4. The Commission did not err in refusing to dismiss the certification proceeding.

On November 9, 2015, all of the Intervenors jointly moved to dismiss the petition for certification and to revoke the 2010 permit issued in Docket HP09-001 because the Department of State denied Keystone's application for a Presidential Permit a week earlier. By order dated

December 29, 2015, the Commission denied both motions.[5] (Record at 31643-31644.) Condition 2 requires that Keystone obtain all applicable federal, state, and local permits, including a Presidential Permit from the United States Department of State. Appellants argue that after the permit was denied by the President on November 6, 2015 (Record of Decision at 3),[6] Keystone cannot comply with Condition 2, and the certification proceeding must therefore have been dismissed.

The procedural history of the federal permitting process is helpful in understanding this issue. Keystone first submitted an application for a Presidential Permit on September 19, 2008, over seven years ago. The initial permit application was denied due to the Department of State's inability to complete its review by a Congressionally-mandated deadline. Keystone refiled a revised application on May 4, 2012. The Department of State issued a Final Supplemental Environmental Impact Statement on January 31, 2014, finding that construction and operation of the project would not have significant environmental impacts, including impacts with respect to greenhouse gas ("GHG") emissions.

The basis for the President's 2015 denial was that, even though "the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States," the Project "would undermine U.S. climate change leadership and thereby have an adverse impact on encouraging other [international] States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement." (*Id*. at 29, 31.)

[5] The Appellants challenge the denial of the motion to dismiss, but not the motion to revoke the permit issued in Docket HP09-001.

[6] The Record of Decision is available at http://www.keystonepipeline-xl.state.gov/documents/organization/249450.pdf

TransCanada's President and Chief Executive Officer issued a statement on November 6, 2015, that "TransCanada and its shippers remain absolutely committed to building this important energy infrastructure project." Since then, TransCanada has started a lawsuit alleging that the denial of the Presidential Permit exceeded the President's constitutional authority and seeking to enjoin the relevant government agencies from enforcing the purported denial of the border crossing authority. The litigation is filed in the United States District Court for the Southern District of Texas. S*ee TransCanada Keystone Pipeline, LP v. Kerry*, Civ. 16-0036. The complaint was filed on January 6, 2016. Cross-motions for summary judgment are pending.

As Keystone has already argued, many of the permit conditions are prospective in nature. Condition 2 of the 2010 permit is one of them. Keystone must at some time in the future obtain all applicable permits and thereafter comply with them. The condition does not impose a deadline for obtaining any of the permits. Logically, the permits must be obtained before Keystone can begin construction and operation of the Keystone XL Pipeline. With respect to the certification under SDCL § 49-41B-27, there is nothing in the statute requiring that Keystone have complied with all permit conditions at the time of certification. Similarly, nothing in state law required that Keystone have obtained all federal permits when the original permit was granted by the Commission in 2010.

The Commission granted the 2010 permit without Keystone having obtained a Presidential Permit. Keystone has filed two Presidential Permit applications with the Department of State. Nothing prevents Keystone from filing another application and obtaining a Presidential Permit. Alternatively, Keystone may prevail in the pending Constitutional litigation. Keystone, as TransCanada CEO Russ Girling has publicly stated, remains "absolutely committed" to this project. Nothing in the record establishes that Keystone will abandon the

project. Because Condition 2 is prospective, Keystone must comply with the condition before beginning construction and operation. If Keystone were never able to satisfy the condition, then it obviously could never begin construction and operation of the Keystone XL Pipeline. Commissioner Nelson made this point at the hearing on January 5, 2016. (Record at 31651-31667.)

The Appellants argue that because the Presidential Permit has been denied, the Commission's denial of the motion to dismiss is arbitrary and capricious. To the contrary, because the condition is prospective, the denial is not itself evidence that Keystone cannot at some future time comply with Condition 2. The original permit granted in 2010, is conditional—it requires that before constructing and operating the Keystone XL Pipeline Keystone must satisfy each condition. As with all of the prospective conditions in the permit, the certification statute does not require evidence of present compliance with a future condition. The Commission therefore did not err in denying the motion to dismiss.

5. The Commission did not abuse its discretion in entering a procedural order defining the scope of discovery.

The Cheyenne River Sioux Tribe, DRA, and the Yankton Sioux Tribe argue that the Commission erred in entering a procedural order on December 17, 2014, defining the scope of discovery. (App. at 0072-73.) Because there are no reported decisions addressing SDCL § 49-41B-27 and because of the variety of issues raised by the Intervenors in their applications for intervention before the Commission,[7] Keystone filed a motion on October 30, 2014, asking the Commission to define the scope of discovery. Keystone asked that discovery be limited to: (1)

[7] The Court should also recognize that the Intervenors included many ardent opponents of the Keystone XL Pipeline, which since 2010 has become a highly-politicized project. Keystone expected the certification proceeding would be used as a vehicle to try to politicize, stop or delay the project, and based on the intervention petitions, that efforts would be made to turn the certification proceedings into a retrial of the underlying permit application.

whether the proposed project continued to meet the 50 conditions contained in the amended final decision and order dated June 29, 2010; or (2) the changes to the findings of fact identified in Keystone's tracking table of changes attached to the certification as Appendix C. (App. at 0039-0043.) The Commission entered an order dated December 17, 2014, granting this motion, although the Commission also included a statement that "it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

a. The Appellants conducted extensive discovery under this order.

The Appellants challenging the December 2014 order do not discuss the discovery that was conducted before the Commission. There were 42 Intervenors. (App. at 0045.) In just the first round of discovery, 17 Intervenors served written discovery on Keystone. Keystone answered 856 interrogatories and requests for production of documents. (Record at 5238-6303 (see Taylor Aff. ¶ 7, Ex. E).) In the second round, Keystone responded to 180 interrogatories and document requests, not including subparts. (*Id.*) In fact, the Commission imposed no limit on the number of interrogatories and document requests that could be served. DRA, the Yankton Sioux Tribe, and the Cheyenne River Sioux Tribe all served extensive written discovery. DRA and the Yankton Sioux Tribe later moved to compel additional information from Keystone, and their motions were granted in part by the Commission by orders dated April 17, 2015. (Record at 4708-4709, 4710-4711, 4712-4713.) After Keystone complied with the Commission's order, several intervenors, including DRA, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe filed a joint motion dated April 24, 2015, seeking a continuance of the hearing date because Keystone's document production had been so extensive that they could not timely

process all of the information provided, which was granted, resulting in a three-month delay in the hearing date. (Record at 5075-5095, 5137-5138.)

The procedural order at issue was a discovery order. In general, a trial court's rulings on discovery matters are reviewed for abuse of discretion. *See Anderson v. Keller*, 2007 S.D. 89, ¶ 5, 739 N.W.2d 35, 37-38. The extent of discovery permitted to a party is generally within a court's discretion. *State v. Bucholz*, 1999 S.D. 110, ¶ 27, 598 N.W.2d 899, 904-05. Under ARSD 10:10:01:01.02, the rules of civil procedure apply to proceedings before the Commission. It follows that the Commission's order addressing the scope of discovery in this case was a matter within the Commission's discretion. For the following reasons, the Commission did not abuse its discretion.

b. A certification proceeding is not a reconsideration of the permit.

Keystone asked that discovery be tailored to the scope of the proceeding under SDCL § 49-41B-27. Many of the 42 Intervenors, only three or four of whom were parties to the original permit proceeding in Docket HP09-001, saw the certification proceeding as an opportunity to relitigate Keystone's right to a permit in the first place. In its brief opposing Keystone's motion, DRA captioned its argument on this issue as follows: "Thorough Re-Examination of the Keystone XL Pipeline Permit is Warranted." (Record at 1000-1009, 1190-1203.) DRA expressly argued that the Commission had the authority to revoke or suspend the permit under SDCL § 49-41B-27, and that discovery therefore had to be broadly construed. (*Id.* at 1196.) This effort was apparent from the beginning of the case, causing Commissioner Hanson to note early on, at a hearing on December 9, 2014, that the certification docket was not a new permit proceeding. (Record at 1432-1527.) The Commission correctly rejected this argument and

determined instead that the scope of the proceedings under SDCL § 49-41B-27 is limited by the terms of the statute.

The logic of the Commission's decision on this issue starts with the finality of the permit that was issued in Docket HP09-001. No one appealed the 2010 order granting the permit. An unappealed order is final and entitled to preclusive effect. *Jundt v. Fuller*, 2007 S.D. 62, ¶ 12, 736 N.W.2d 508, 513. The Commission's administrative rules do not provide for reconsideration of a final order, and the South Dakota Supreme Court has held that an agency may not reconsider a final decision in a contested case. "Nothing in South Dakota's Administrative Procedures Act authorizes an administrative agency to reconsider a decision in a contested case." *Id.* ¶ 7, 736 N.W.2d at 512. While the Commission has the inherent authority to correct a decision that appears to be erroneous, that authority ends when the appeal time has run. "Once an agency's adjudication has become final it is no longer subject to reconsideration." *Id.* Thus, the certification proceeding under SDCL § 49-49B-27 is not a substitute for an appeal, and it was not an opportunity for the Intervenors to ask the Commission to reopen the permit, including the 50 conditions, four years after the Commission granted Keystone a permit to construct and operate the Project.

The Cheyenne River Sioux Tribe argues on appeal that the decision in *Jundt v. Fuller* is not factually analogous because it did not involve a certification under SDCL § 49-41B-27. (CRST Br. at 19.) The proposition stated in *Jundt*, however, is that an agency is not authorized to reconsider a decision in a contested case. That principle applies here, regardless of the facts of *Jundt*. Moreover, the Tribe's argument that this proceeding differs from *Jundt* because the "Appellants did not ask the PUC to reconsider or otherwise challenge the initial permit proceeding" (CRST Br. at 20) is false, as demonstrated by both DRA's argument to the

Commission cited above and the joint motion made by the Intervenors to revoke Keystone's permit after the Department of State denied the Presidential Permit application.

The Appellants' primary objection to the Commission's ruling is plainly stated by the Cheyenne River Sioux Tribe. "[B]y granting TransCanada's Motion to Define Scope of Discovery and adopting the reasoning proffered in the motion, the PUC seems to assert that it [has] handcuffed itself to its initial permit decision in perpetuity." (*Id.*) Clearly, the Appellants wanted to use the narrowly-drawn certification statute as a way to relitigate the permit. The Commission correctly limited the scope of this proceeding.

c. The certification statute is narrowly drawn.

The certification statute required that Keystone certify that the Project "continues to meet the conditions on which the permit was issued." SDCL § 49-41B-27. Significantly, the statute does not provide that after four years the permit expires. In some states, permits do expire or lapse. *See, e.g.*, Minn. Admin. Rule 7850.4700 (if construction or improvement of a route or site has not commenced within four years after the permit was issued, "the commission shall suspend the permit"). Had the South Dakota Legislature wanted permits issued under SDCL Ch. 49-41B to lapse or expire after four years, it could have so provided. It did not, and the Commission has not adopted an administrative rule providing that a permit lapses if construction has not commenced within four years of its issuance. Instead, the legislature adopted SDCL § 49-41B-27, which requires certification that the permittee can continue to meet the permit conditions. Moreover, a permit granted under South Dakota law may be revoked or suspended by the Commission only for certain enumerated conditions, including misstatements of material fact in the application, failure to comply with the terms or conditions of the permit, or violation of any material provision of Chapter 49-41B. SDCL § 49-41B-33.

Because the permit has not expired and the Amended Final Decision and Order was not appealed and is entitled to preclusive effect, the scope of the certification proceeding was necessarily narrower than whether the permit should have been granted in the first place. The Commission correctly and reasonably applied the plain language of the statute.

d. The "conditions" referred to in the statute are the permit conditions.

The Cheyenne River Sioux Tribe argues that the meaning of "conditions" in SDCL § 49-41B-27 includes not only the permit conditions, but also the surrounding conditions on which the permit was granted. (CRST Br. at 24.) This argument is not materially different in effect than the Commission's discovery order, which allowed discovery regarding both whether Keystone can continue to meet the permit conditions and "the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C." (Order, Dec. 17, 2014, at 2, App. at 0045.) In filing its certification, Keystone itself identified changes in the underlying facts related to the Keystone XL Pipeline since the permit was granted on June 29, 2014, and the Commission's order allowed discovery related to changes in the factual circumstances related to the project. Certainly there was evidence at the hearing about what is different today than in 2010.

The Appellants offer no evidence that they were prejudiced by the order. Having ignored that reality, the Appellants' argument is again shown for what it is—an argument that the certification statute should be construed as an opportunity for them to relitigate the 2010 permit. Stripped of this pretense, the Appellants' argument that "conditions" means "all factual circumstances since the permit was granted in 2010" is not consistent with the plain language of SDCL § 49-41B-27. The question is not whether anything has changed since 2010. Obviously there have been some changes in underlying fact, as indentified in Keystone's tracking table of

changes. (App. at 0039-0043.) Instead, the question is whether those changes affect Keystone's ability to meet the conditions on which the permit was granted. The logic of the certification statute presumes that some things might have changed in four years. If not, there would be no purpose served by the statute.

As Commissioner Nelson noted at the hearing on December 9, 2014, "conditions" is used elsewhere in SDCL Ch. 49-41B. (Transcript at 14-15 (Record at 1432-1527).) In SDCL § 49-41B-24, the legislature stated that the Commission has 12 months to decide a permit application and that it must make 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 may deem appropriate." SDCL § 49-4B-24. As Commissioner Nelson noted, this clear reference to "conditions" as the conditions attached to the permit indicates that the "conditions" referred to in SDCL § 49-41B-27 are the permit conditions. (*Id.* at 14-15.) Indeed, the clear statutory language refers to "the conditions upon which the permit was issued." Thus, consistent with the Cheyenne River Sioux Tribe's argument that the statute must be read in the context of SDCL Ch. 49-41B, the Commission's interpretation of the plain language of SDCL § 49-41B-27 is consistent with the chapter as a whole. It is an eminently reasonable interpretation, and must therefore be upheld. *See Mulder*, ¶ 5, 675 N.W.2d at 214.

Conclusion

The common arguments about the burden of proof, the denial of the Presidential Permit, and the Commission's procedural order addressing discovery share an underlying theme, which is that the certification statute presented the Appellants with an opportunity to relitigate the Permit. The Commission gave the Appellants great leeway throughout the proceeding, which

was the epitome of a fair opportunity for them to be heard. Their common arguments do not support reversal. Keystone respectfully requests that the judgment be affirmed.

Request for Oral Argument

Keystone respectfully requests oral argument to address the issues briefed by the parties.

Dated this 20th day of July, 2016.

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Certificate of Service

I hereby certify that on the 20th day of July, 2016, I served electronically and by United States first-class mail, postage prepaid, a true and correct copy of Appeal Brief of TransCanada Keystone Pipeline, LP in Response to Common Arguments of Several Appellants, to the following:

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