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 DAKOTA RURAL ACTION**
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Appellee TransCanada Keystone Pipeline, LP ("Keystone") offers this brief in response to the arguments raised by Appellant Dakota Rural Action ("DRA") other than the common arguments made by DRA, the Yankton Sioux Tribe, Cheyenne River Sioux Tribe, Intertribal Council on Utility Policy, and the collectively-represented individual Appellants, to which Keystone has separately responded.

Statement of the Issues

1. Are any of the Commission's findings of fact clearly erroneous?

   In its discussion of the facts, DRA challenges many of the Commission's findings of fact as clearly erroneous. The Commission adopted the findings based on substantial evidence contained in the administrative record.

2. Does the public trust doctrine apply to require a heightened standard of proof before the Commission, independent of SDCL § 49-41B-27?

   The Commission did not accept DRA's argument that the public trust doctrine applies in this case to change the burden of proof.

3. Did the Commission abuse its discretion in denying DRA's motion to compel production of communications between Keystone's counsel and counsel for the Commission Staff?

   The Commission denied DRA's motion to compel.

4. Did the Commission abuse its discretion in excluding from evidence numerous DRA exhibits that were disclosed to Keystone only days before the evidentiary hearing?

   The Commission granted Keystone's motion to exclude multiple DRA exhibits that were not timely disclosed.

5. Was the Commission biased against DRA because Commissioner Fiegen read the transcript due to her absence from the hearing for medical treatment, because Commissioner Hanson was taking medication during the hearing, and because Governor Daugaard wrote a letter to the Commission in connection with a public-comment session in which he expressed support for the project?

   While all of these issues were raised in some way during the evidentiary hearing, none were the subject of a motion or a request for relief to the Commission.

Statement of the Case and Facts

Keystone relies on the facts and procedural history stated in its separate brief responding to common arguments raised by several Appellants, including DRA. Facts relevant to the issues addressed in this brief are included in the argument.

Argument

1. DRA's challenge to various findings of fact is without merit.

In its statement of facts, DRA argues that multiple findings of fact in the Commission's order accepting Keystone's certification are clearly erroneous. The Commission's findings are entitled to "great weight" and deference, meaning that the reviewing court must be "definitely and firmly convinced a mistake has been made." SDCL § 1-26-36; *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602. "[T]he fact that there may be substantial evidence in the record to support findings contrary to those made by the agency is not a reason for reversal. On the contrary, the inquiry is whether the record contains substantial evidence to support the agency's determination." *Nehlich v. South Dakota Comprehensive Health Planning Agency*, 290 N.W.2d 477, 478 (S.D. 1980).

a. Findings 18 and 20 are not clearly erroneous.

DRA challenges findings 18 and 20 as "interesting when viewed in the context of the record" because Meera Kothari testified that after Keystone withdrew its application for a special permit, it agreed to nevertheless adopt and adhere to the 59 special conditions that PHMSA had developed in connection with Keystone's application for a special permit. (DRA Br. at 3.) DRA argues that while Kothari testified that Keystone's adoption was voluntary, its compliance with the Final Environmental Impact Statement (FEIS) is mandatory, and the 59 special conditions are part of the FEIS. (DRA Br. at 3.) It is unclear, however, whether DRA contends that the findings are clearly erroneous. They are not. It is undisputed that Keystone stated that it would comply with the special conditions. (Tr. at 215; 302; 1105-06.) Kothari's statement that Keystone agreed to adhere to the conditions despite withdrawing the special permit application does not negate Keystone's commitment, which is what the Commission found.

b. Finding 25 is not clearly erroneous.

DRA challenges that part of Finding 25 addressing Heidi Tillquist's calculation of spill frequency in an area that could affect a High Consequence Area ("HCA"). DRA does not challenge the calculation, but Tillquist's qualifications. DRA's citation for its argument that Tillquist is not qualified to do a risk assessment is to a question whether she knew what a black swan event is. (Tr. at 850.) Tillquist answered no, and DRA offered no evidence in the record from which the Commission or this Court could somehow conclude from her answer that she is unqualified to do a risk assessment. Her resume amply supports her testimony. (Ex. 2004.)

DRA argues that the risk assessment is flawed because the engineering analysis that is done as part of the process is not completed yet. (DRA Br. at 4; Tr. at 825-26.) Tillquist testified that the engineering analysis was underway. (Tr. at 826.) The fact that the process

would not be completed until a later stage of construction does not establish a flaw in the risk assessment that was done.

DRA cites to Tillquist's testimony that one of the purposes of the risk assessment is "to help communicate to the public and to regulatory agencies," from which DRA argues that the risk assessment is just a public-relations tool. (DRA Br. at 4; Tr. at 846-47.) This testimony, which does not even address the calculation contained in the risk assessment, is not a basis for the Court to conclude that Tillquist's calculation was wrong. In fact, DRA called Dr. Arden Davis as a witness. He did not challenge Tillquist's spill frequency calculation, and testified that he did not conduct an independent risk assessment. (Tr. at 1808.)

Finally, DRA cites to the 14 leaks involving fittings at several pump stations that occurred during start up of the Keystone Pipeline because the fittings were not sufficiently tightened. (Tr. at 2285-86.) DRA argues that these leaks on starting of the Keystone Pipeline are inconsistent with Tillquist's analysis. (DRA Br. at 4-5.) There is no connection, however, between these spills and the spill frequency analysis involving HCA's stated in Finding 25, which states that a spill could affect an HCA no more than once in 460 years, the testimony DRA cites is not specific to HCA's. There is no basis to conclude that Finding 25 is clearly erroneous.

c. Finding 28 is not clearly erroneous.

In Finding 28, the Commission found that TransCanada has thousands of miles of pipe in operation that is coated with fusion bonded epoxy (FBE), and that there has been no evidence of external corrosion except for one instance in Missouri involving interference from another pipeline with the cathodic protection system. The Commission further found that Keystone discovered the problem in Missouri through its own in-line inspection program (Tr. at 293-94, 2315-16), and that in subsequent construction Keystone has been installing passive anodes to

protect the pipeline during construction from a similar incident of interference with the cathodic protection system. (Tr. at 265, 309-10.)[1] DRA responds to this finding by arguing that the Missouri incident proves that the Keystone Pipeline is not safe (DRA Br. at 7-9), but its argument is not a basis to conclude that any part of Finding 28 is clearly erroneous. DRA cites no evidence in the record of any instance in which the FBE coating has failed or there has been external corrosion; no evidence that Keystone did not discover the problem through its own in-line inspection; and no evidence that Keystone has not subsequently been installing passive anodes. Absent such evidence, the Court cannot conclude that Finding 28 is clearly erroneous.

DRA argues that Corey Goulet was insufficiently aware of the details of the Missouri incident (DRA Br. at 7-8), that Goulet attempted to minimize the Missouri incident (*id.* at 8), and that Meera Kothari's testimony that a similar situation could not occur on the Keystone XL Pipeline because there were no shared utility corridors was incorrect because of a crossing involving the Mni Waconi Project. (*Id.* at 9.) As indicated, this argument based on cross-examination is not directly responsive to Finding 28. It also fails to address any of the permit conditions. It is not evidence that Keystone cannot continue to meet the conditions on which the permit was granted.[2]

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[1] DRA's statement that no Keystone witness "ever explained whether the 'near miss' in Missouri caused TC to rethink its protocols as to whether cathodic protection would be immediately installed during construction of the proposed Project instead of waiting until a later date" (DRA Br. at 8) is directly contradicted by the record. Kothari testified as follows: "[A]s part of our new cathodic protection lines, we are installing sacrificial anodes at the test station, as Mr. Goulet explained yesterday or a couple of days ago that passive cathodic protection system. And so this is a learning based on that incident that we have incorporated into our designs moving forward for new construction projects." (Tr. at 1154.)

[2] DRA argues that while Kothari testified that there are no shared utility corridors in South Dakota, her testimony is refuted by the fact that the Keystone XL Pipeline will cross the Mni Waconi waterline. (DRA Br. at 9.) A pipeline crossing is not a shared utility corridor. Moreover, Kothari testified that Keystone worked with the Bureau of Reclamation, which had oversight responsibility for the Mni Waconi crossing, and that BOR's "requirements for that

DRA also argues that Keystone failed to properly protect the FBE coating on pipe that was sitting in a pipeyard, where some of it would be exposed to ultraviolet light. (DRA Br. at 9.) DRA quotes bits and pieces of testimony, but the issue was discussed in some detail by Kothari at pages 1163-80 of the transcript. Kothari testified that Keystone had applied a protective coating to pipe that was located in a certain pipeline that she was shown pictures of, and that the coating was typically applied "[a] year to 18 months" after manufacture as "a way to mitigate any potential degradation." (Tr. at 1176.) Kothari further testified that before pipe can be installed, Keystone has to prove that the FBE coating meets federal regulations. "So our regulations require us to ensure we have corrosion control on our pipe, and we have to prove that our pipe meets these corrosion controls before they are installed. And if they don't meet those requirements, then we simply recoat the pipe." (Tr. at 1179.) There was no contrary evidence before the Commission that Keystone would not follow this process, that the federal regulators would fail, or that the delay in constructing the Keystone XL Pipeline would affect the integrity of the FBE coating.

d. Finding 41 is not clearly erroneous.

DRA argues that Finding 41 is clearly erroneous based on the testimony of Sue Sibson. (DRA Br. at 10-11.) Sibson is a landowner on the Keystone Pipeline some of whose property has not been reclaimed to her satisfaction. In Finding 41, which addresses Keystone's ability to meet Condition 16(m) and Condition 49, the Commission found that Sibson's testimony does not establish that Keystone cannot meet the reclamation conditions. First, the Commission specifically addressed Sibson's concerns and testimony in Finding 41, to which DRA does not

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particular line, and those design requirements for cathodic protection as well as crossing designs were incorporated into our crossing design." (Tr. at 1187.) DRA offers no evidence or testimony that the Mni Waconi crossing presents any risk of the same cathodic protection issue that existed in Missouri.

directly respond. Second, DRA ignores Corey Goulet's testimony that reclamation on the Sibson property is not complete and that Keystone will continue its efforts until the Sibsons are satisfied. (Tr. at 306-07.) Out of 535 tracts of land on the Keystone Pipeline, reclamation continues on only 9 tracts. (Tr. at 306.) Given this undisputed fact, Finding 41 is not clearly erroneous.

e. Finding 43 is not erroneous, either as a finding or a conclusion of law.

In Finding 43, the Commission addressed testimony from multiple intervenors about the possible adverse effects on groundwater resources, shallow aquifers, rivers, and streams. The Commission found that the testimony was relevant to Keystone's burden of proof under SDCL § 49-41B-22 in the underlying docket, but was not relevant to Keystone's ability to meet any permit condition. DRA explicitly argues that the Commission erred as a matter of law because Keystone had the burden to prove that it would meet all of the elements of SDCL § 49-41B-22. (Tr. at 12.) DRA offers no authority in support of this argument, which Keystone has otherwise addressed in its common brief addressing the burden of proof.

f. Findings 44-48 are not clearly erroneous.

Findings 44-48 address the testimony of Dr. Arden Davis, a geologist who is retired from the South Dakota School of Mines and Technology. In Finding 44, the PUC found that Dr. Davis testified to concerns about the possible effects of a pipeline spill on aquifers, rivers, and groundwater along the right of way. The PUC concluded that the concerns, which were relevant to Keystone's burden under SDCL § 49-41B-22, did not specifically address any permit condition. In its brief, DRA does not mention or challenge this particular finding or conclusion.

In Finding 45, the Commission found that Dr. Davis's testimony did not challenge Heidi Tillquist's testimony about the likelihood of adverse impacts to the areas of concern, and that his testimony was therefore not sufficient to warrant any changes to findings of fact made in the

Commission's Amended Final Decision and Order. In its brief, DRA does not mention or challenge this particular finding or conclusion.

In Finding 46, the Commission addressed Keystone's obligation to treat the Ogallala aquifer in Tripp County and the wind-blown Sand Hills type material crossed by the proposed right of way as a hydrologically sensitive area, and found that Dr. Davis did not testify that such treatment was inappropriate or that Keystone could not meet that condition. In its brief, DRA does not mention or challenge this particular finding or conclusion.

In Finding 47, the Commission noted Dr. Davis's testimony about possible benzene exposures from a leak or spill, as well as Tillquist's testimony that such exposures at a level that would cause health concerns were unlikely because of the low persistence of benzene and expected emergency response measures. In other words, the Commission found that despite Dr. Davis's concern, he failed to respond to Tillquist's testimony establishing that a harmful exposure of that sort was not likely. In its brief, DRA does not mention or challenge this particular finding or conclusion.

In Finding 48, the Commission noted that Dr. Davis had relied in his testimony on a report referred to as the Stansbury report, and that Tillquist had specifically addressed flaws in the Stansbury report, to which Dr. Davis did not respond. In its brief, DRA does not mention or challenge this particular finding or conclusion.

Having failed to address any of the specifics of Findings 44-48, DRA instead argues that Dr. Davis testified that the pipeline route is in an area of high landslide potential, and that contrary testimony from Meera Kothari and Jon Schmidt was not credible. (DRA Br. at 13.) Dr. Davis testified that 150 miles of the route would travel through areas of Pierre Shale, which according to a USGS map are at high risk for landslides. (*Id.*) By contrast, Kothari testified that

only 1.6 miles of the route were high-risk landslide areas. (*Id.*). DRA entirely ignores the basis for Kothari's testimony, which was that the USGS map on which Dr. Davis relied was "an extremely high level map" based on a scale of 1 to 7 million, which was not intended for pipeline routing. (Tr. at 1097, 1101.) The legend expressly states that the map is not intended for site-specific decisions, like routing. (*See* http://landslides.usgs.gov/hazards/nationalmap/ ("because the map is highly generalized, owing to the small scale and the scarcity of precise landslide information for much of the country, it is unsuitable for local planning or actual site selection"). Thus, Keystone used this map only at the outset of the project, and then progressed through detailed engineering, field visits, and other site-specific work to refine the design and determine the best route. (Tr. at 1097-98.) Kothari's testimony is unrefuted that, using this process, only 1.6 miles of the pipeline route were in areas of high landslide potential. Dr. Davis specifically testified that he did not know the basis for Kothari's testimony. (*Id.* at 1810-11.) There is no basis in the hearing record for the Court to find either that the Commission's findings were clearly erroneous, or that Keystone is unable to meet any permit condition because of the testimony on which DRA relies related to landslide potential.

g. Finding 49 is not clearly erroneous.

In Finding 49, the Commission found that testimony related to the proximity of the Keystone XL Pipeline to the City of Colome's water well was an issue that had been addressed in Docket HP09-001. Despite that, the Commission heard evidence in the certification hearing that the route in the vicinity of the City of Colome's water well had been determined in consultation with DENR, that the route was moved 175 feet from the surface water protection area and 1,000 feet from the wellhead, and that Keystone met at the time with representatives of

the City of Colome. The Commission concluded that the issue does not affect Keystone's ability to meet the permit conditions.

DRA argues on appeal that Keystone's burden in the certification docket required that it prove, for a second time, compliance with SDCL § 49-41B-22. Keystone has addressed this argument elsewhere. DRA also argues that the Commission's finding ignores the fact that Brian Walsh and the Department of Environment and Natural Resources did not properly calculate the cone of depression in its analysis. (DRA Br. at 16.) This argument makes no sense. Keystone's undisputed compliance with DENR's direction regarding routing in this area cannot logically constitute evidence that Keystone cannot continue to meet any permit condition. Moreover, DRA presented no evidence that the cone of depression should have been included in the DENR's analysis. Walsh testified that "[w]e calculated the area based on a two-year time of travel and an estimation of how long it would take for contamination to travel—what distance it would go traveling two years from a point to the well." (Tr. at 2165.) DRA offers no evidence that DENR's methodology was flawed.

h. Findings 69-77 are not clearly erroneous.

In addressing Findings 69-77, DRA touts the expertise of Evan Vokes, a former TransCanada employee, but does not specifically respond to any of the facts stated in Finding 69, which establishes that while employed at TransCanda, Vokes was an engineer in training or a junior engineer, and that he was no longer a licensed professional engineer by the time of the hearing. DRA's discussion of portions of Vokes' testimony is reflected in the Commission's findings. DRA's recitation of Vokes' testimony about the Cutbank project and the Otterburne rupture states facts that are the same or similar to those found in Finding 71, which DRA does specifically address. DRA's recitation of his testimony about peaked pipe and manufacturing

defects is reflected in Findings 72-73. DRA's recitation of his testimony about welding inspection and the use of Weldsonix as a welding inspector states many of the same facts found in Findings 75-76. DRA does not mention or challenge Finding 70, which states that Vokes testified that TransCanada inspects 100% of the welds in its mainline pipe, even though federal regulations require inspection of only 15%.

Given this factual agreement, DRA must challenge the Commission's conclusion in Finding 77 that Vokes's testimony was insufficient to establish that Keystone cannot meet any permit condition and that it did not relate to any permit condition. DRA argues only that Vokes's testimony is relevant to Keystone's ability to comply with all laws and regulations, which is required by permit condition 1. DRA fails to cite any record evidence, however, to dispute the Commission's findings that Vokes offered no first-hand knowledge of any welding or inspection defects on the Keystone Pipeline, the Gulf Coast Project, or the Houston Lateral Project. (Finding 77.) DRA also failed to respond to the finding that Vokes had no knowledge "of any welding or inspection defects in South Dakota." (*Id.*) Given DRA's failure to respond, there is no basis for the Court to conclude that Findings 69-77 are clearly erroneous.

Thus, DRA's challenges to the Commission's factual findings are insufficient for the Court to conclude that any of the findings are clearly erroneous.

2. The public trust doctrine does not apply.

DRA argues in connection with the standard of review that the Commission was held to a higher standard based on the public trust doctrine. (DRA Br.at 19-20.) If this novel argument were to prevail, the Commission would be bound to some heightened standard, independent of SDCL § 49-41B-27, based on the public trust doctrine. The South Dakota Supreme Court recognized that doctrine, which concerns the ownership of water and land under navigable

waters, in *Parks v. Cooper*, a case concerning water use and ownership in Day and Clark counties. 2004 S.D. 27, ¶ 1, 676 N.W.2d 823, 824. The doctrine originated in the late nineteenth century with the United States Supreme Court decision in *Illinois Central R. Co. v. State of Illinois*, 13 S.Ct. 110 (1892), in which the Court held that the ownership of submerged lands "is held by the state, by virtue of its sovereignty, in trust for the public." *Id.* at 119. The doctrine was the basis for the South Dakota Supreme Court's conclusion in *Parks* that "the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public." *Id.* ¶ 46, 676 N.W.2d at 838.

The South Dakota Supreme Court has considered the doctrine only in connection with issues related to the ownership of water and the rights of riparian landowners. *Id.* ¶ 46, 676 N.W.2d at 838-39. The Court concluded in *Parks* that "the public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public." *Id.* ¶ 53, 676 N.W.2d at 841. The South Dakota Supreme Court has never held that the doctrine converts state administrative agencies into trustees or imposes a fiduciary duty on them to apply some undefined but heightened standard of scrutiny to issues involving natural resources. DRA does not explain how the doctrine could be used to establish that Keystone cannot continue to meet any of the permit conditions. The doctrine has no application whatsoever to this appeal.

Finally, DRA's argument is not supported by any authority and is therefore waived. *See, e.g.*, *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 15, 841 N.W.2d 250, 255 ("Because Niesche cites no authority for this novel proposition, it is waived."). The South Dakota Supreme Court has held that SDCL § 15-26A-60(6), which dictates the content of an appellant's brief, including an

argument as part of an appeal brief with "citations to the authorities relied on," requires that an appeal argument be supported by authority. *Kostel,* ¶ 34, 756 N.W.2d at 377. The statute governing briefing in an administrative appeal, SDCL § 1-26-33.3(4), contains the same language. Any argument for reversal that is not supported by authority is therefore waived.

3. Communications between Keystone's counsel and counsel for the Commission staff were not discoverable.

DRA argues that the Commission erred in entering an order on April 22, 2015, denying a motion to compel discovery from Commission Staff related to communications between counsel for the Commission Staff and counsel for Keystone. In seeking a reversal of the discovery order, DRA must show that the Commission abused its discretion. *Andrews v. Ridco,* 2015 S.D. 24, ¶ 14, 2015 WL 1955644. "'An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* (quoting *In re Jarman,* 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, 9).

DRA cites no caselaw in support of its argument, thus waiving the argument based on SDCL § 1-26-33(4). Instead, DRA contends that government should be open and transparent, and that regulatory capture is at issue. (DRA Br. at 29-30.) DRA's argument misunderstands the role of Commission Staff in the proceeding. Staff's role was to independently evaluate the technical merit of Keystone's application and to answer Commission questions related to the application. Staff was a party to the proceeding—it hired experts, conducted discovery, and participated in the entire docket, including the evidentiary hearing, as a party separate from the Commission. Staff was separately represented by counsel, just as the Commission was represented by John J. Smith, who also conducted the hearing on behalf of the Commissioners. The role of counsel for Staff was to advocate Staff's position before the Commission. Counsel for Staff did not speak for the Commission. Communications between counsel for Keystone and

counsel for Staff were therefore communications between two parties to a case. They were not communications between Keystone and the Commission.

Given this role in the proceeding, DRA cannot show that the Commission abused its discretion in not compelling production of discovery related to communications between counsel for two parties to the proceeding. The Commission's decision was not a "fundamental error of judgment" or a choice "outside the range of permissible choices."

4. The Commission did not abuse its discretion in excluding from evidence numerous DRA exhibits that were not timely disclosed.

DRA argues that the Commission erred in granting Keystone's motion in limine to exclude from evidence exhibits marked by DRA that had not been timely disclosed. More specifically, Keystone filed a motion in limine on July 10, 2015, prohibiting DRA from offering in evidence any exhibit disclosed on DRA's exhibit list dated July 7, 2015, that had not been timely disclosed in discovery. (Record at 9474-9450.) The evidentiary hearing was set to start on July 25, 2016. The basis for Keystone's motion was that DRA's exhibit list included 1,073 documents, all but 36 of which had not been produced in discovery despite Keystone's outstanding request served on December 18, 2014, that DRA produce all documents that it intended to offer as exhibits. (*Id*.) Included in DRA's exhibit list were: documents numbered 67-128 from Evan Vokes that were not previously produced; photographs numbered 397-409 taken by Sue Sibson, who testified as a witness for DRA; geologic reports numbered 1058-1062; and photographs taken by Vokes of pipeline construction in Texas numbered 1067-1073.(*See generally* Record at 9662-19792.) DRA asserted that the rest of the documents on its exhibit list came from Keystone's document production, but by disclosing documents for the first time on July 7, 2015, DRA was sandbagging. Its exhibit list was disclosed after Keystone had filed its rebuttal testimony. (Record at 9100-9106.)

Under SDCL § 15-6-26(e), a party must supplement its discovery responses at appropriate intervals. Under SDCL § 15-6-37(c), a party who without substantial justification fails to timely supplement its discovery responses, "is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." SDCL § 15-6-37(c)(1). As Keystone argued to the Commission, it prepared its defenses to DRA's claims based on DRA's document production and pre-filed testimony and would have been prejudiced at the hearing if DRA had been allowed to introduce hundreds of exhibits that had not been disclosed in discovery. Under SDCL § 15-6-37(c), DRA was required to provide substantial justification for its failure to timely supplement its document production. It made no effort to do so before the Commission, and its argument on appeal does not cite to the applicable statutory framework that guided the Commission's decision. DRA's one-paragraph argument on this issue (DRA Br. at 30) is entirely insufficient for this Court to conclude that the Commission abused its discretion in granting Keystone's motion.

5. Bias and other alleged irregularities.

Commissioner Fiegen did not personally attend the evidentiary hearing because of treatment for a medical condition. Commissioner Nelson announced that fact at the very outset of the hearing (Tr. at 7), and stated that in compliance with SDCL § 1-26-24, Commissioner Fiegen intended to read the transcript of the hearing and fully participate in the decision. After the hearing, Commission Fiegen filed a certification in the docket dated October 5, 2015, that she had read the official transcripts of the record of the evidentiary hearing. (Record at 29755.) In its argument on appeal, DRA does not discuss the statute based on which Commissioner Fiegen acted or the decision in *Huber v. Department of Public Safety*, 2006 S.D. 96, ¶ 18, 724 N.W.2d 175, 179-80, in which the South Dakota Supreme Court held that SDCL § 1-26-24 was not

violated when the department secretary responsible for making a licensing decision indicated on the record that he had reviewed the record before making the final decision. If anything, Commissioner Fiegen's certification was more than what was necessary. The statute applies when in a contested case "a majority of the officials of the agency who are to render the final decision have not heard the case or read the record." SDCL § 1-26-24. Here, Commissioner Fiegen did not constitute a majority of the Commission, and no statute requires that all of the Commissioners be personally present for the hearing.

DRA argues that its due process rights were violated because Commissioner Fiegen was unable to assess the credibility of witnesses due to her absence, but cites no authority in support of this argument and no instance involving witness credibility in which it thinks that Commissioner Fiegen's presence at the hearing would have made a difference in the outcome. DRA's unsupported argument is, based on SDCL § 1-26-33(4), waived and without merit.

DRA's argument about one day when Commissioner Hanson was nauseated for a short time due to pain medication that he was taking is similarly unsupported. The hearing transcript reveals that Commissioner Hanson himself raised the issue during the hearing because he observed during the hearing that some people in the hearing room were taking photographs of him, and he learned during a break that one of the individual Intervenors had posted a picture of Commissioner Hanson to his Facebook page saying that Commissioner Hanson was sleeping during the proceedings and not paying attention. (Tr. at 1838-40.) DRA's argument about this issue is specious. Commissioner Hanson's condition did not "create[] a public perception that the Commissioner was insufficiently engaged in the proceedings during the course of witness testimony." (DRA Br. at 31.) Rather, as demonstrated by the hearing record, one of the Intervenors used a photograph taken during the hearing in an effort to create the public

perception about which DRA now complains. The argument is also waived because it is not supported by any authority.

Finally, DRA argues that a letter from Governor Daugaard to Commissioner Nelson dated July 6, 2015, urging approval of the Keystone's certification petition indicates political support that improperly influenced the Commissioners and created a perception that the Commission was biased in favor of the project. The Governor's letter is part of the docket and was submitted in connection with the public input session held by the Commission on July 6, 2015. The Governor's comment is no different than those of other government officials who publicly supported the project.

DRA made no motion to the Commission about this issue, which came up at the evidentiary hearing through cross-examination of a Staff witness by Peter Capossela, who at the time was representing the Standing Rock Sioux Tribe. (Tr. at 1434-37.) Again, DRA cites no authority in support of this argument, and it can and should be denied as waived.

Under South Dakota law, the members of a school board "are afforded a strong presumption of good faith." *Riter v. Woonsocket School Dist.*, 504 N.W.2d 572, 574 (S.D. 1993). The same is true of other administrative officials, who "are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances." *Stofferhan v. Northwestern Bell Tel. Co.*, 461 N.W.2d 129, 133 (S.D. 1990). The test for disqualification in adjudicatory proceedings, which is a motion that DRA never even made to the Commission, is "whether an agency adjudicator has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* DRA makes no showing that any Commissioner prejudged the facts and the law sufficient to overcome the presumption that the Commissioners were objective and acted fairly. Its argument based on bias is entirely without merit.

Conclusion

DRA's challenges to the Commission's factual findings fall far short of establishing that the findings are clearly erroneous. DRA's legal arguments addressed in this brief are all summary in nature and fail for lack of supporting authority or basis in South Dakota law. Keystone respectfully requests that the Commission's order 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 Dakota Rural Action, to the following:

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