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

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-001, TRANSCANADA KEYSTONE P IPELINE, LP	* * * * * * * * * * *	CIV NO. 16-33, 16-34, 16-36, 16-37, 16-38, 16-39 **YANKTON SIOUX TRIBE'S OPENING BRIEF**

COMES NOW Yankton Sioux Tribe, by and through its counsel Thomasina Real Bird (Fredericks Peebles & Morgan LLP), and hereby submits Yankton Sioux Tribe's Opening Brief. In support of its appeal, the Yankton Sioux Tribe ("Yankton" or the "Tribe") asserts as follows.

I. BACKGROUND

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Keystone") filed an application with the Public Utilities Commission ("Commission") in Docket HP-09-001 requesting a permit for a project to construct a pipeline through South Dakota to transport tar sands. Pursuant to South Dakota law, Keystone was required to provide key information including a description of the nature and location and the purpose of the proposed pipeline to the Commission in its permit application in order for the Commission to make an informed, sound decision on the project. SDCL 49-41B-11. The Commission issued its *Amended Final Decision and Order* ("*2009 Final Decision*") on June 29, 2010, based on that information. As a part of its *Final Decision*, the Commission issued a detailed list of its findings of fact and conclusions of law that led to the decision. Through the *2009 Final Decision*, the Commission issued a permit authorizing construction of the project ("2009 Project") as that project was described and defined in the findings of fact contained in the *2009 Final Decision*.

On September 15, 2014, after more than four years had passed since the issuance of the permit for the 2009 Project described in the *2009 Final Decision*, Keystone filed a new *Petition* with the Commission in Docket HP14-001. The subject of the *Petition* is a project for a tar sands pipeline ("2014 Project"). In conjunction with this new *Petition*, Keystone submitted a *Certification* asserting that the conditions upon which the Commission granted the facility permit in Docket HP 09-001 continue to be satisfied. The *Petition* requests that the Commission issue an order accepting its *Certification* pursuant to SDCL 49-41B-27. As an appendix to the *Petition*, Keystone submitted a "Tracking Table of Changes" that identifies thirty (30) findings contained in the *Final Decision* and, for each finding, sets out a new, different finding. *See Petition for Order Accepting Certification*, Appendix C.

Over the course of approximately eleven months, the Parties filed motions and exchanged discovery in preparation for the final evidentiary hearing which was held over the course of two weeks from July 27, 2015 to August 1, 2015; August 3, 2015 to August 4, 2015; and August 6, 2015 to August 7, 2015. The Commission issued its *Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry* (*"2016 Final Decision*" or *"Final Decision"*) on January 21, 2016.

On February 19, 2016, the Yankton Sioux Tribe filed a *Notice of Appeal* with the Circuit Court. The Tribe filed its *Statement of Issues* and submitted its *Order for Transcripts* on February 29, 2016. The Tribe submitted its *Amended Order for Transcripts* on March 17, 2016. On April 3, 2016, the Tribe, Keystone, and several parties who had intervened in HP14-001 and who had appealed the *2014 Final Decision* filed *Motions and Stipulation for Consolidation and Extension of Time to File Opening Briefs*. On April 15, 2016, the Court issued an *Order* consolidating Case Numbers 32CIV16-33, 32CIV16-34, 32CIV16-36, 32CIV16-37, 32CIV16-38, 32CIV16-39, and granting an extension of time to file opening briefs until May 16, 2016.

II. STANDARD OF REVIEW

The standard of review for administrative appeals is generally governed by SDCL 1-26-36. *Choice Hotels Int'l, Inc. v. S.D. Dep't of Rev. & Regulation*, 711 N.W. 2d 926, 928 (S.D. 2006); *Foltz v. Warner Transp.*, 516 NW 2d 338, 341 (S.D. 1994). With respect to issues of fact, deference is granted to the agency decision. *Choice Hotels*, 711 N.W. 2d at 928. The clearly erroneous standard of review is generally applied to factual issues. *Id*. An agency decision may be reversed or modified if one of the six statutory criteria spelled out in SDCL 1-26-36 is met.[1]

The Court is to review questions of law *de novo*. *Id*.; *see also Pooled Advocate Trust v. S.D. Dep't of Soc. Servs.*, 813 N.W. 2d 130 (SD 2012). "Under SDCL 1-26-36, questions of law are fully reviewable, with no deference given to the agency's conclusions of law." *Foltz*, 516 N.W. 2d at 340. In addition, "[w]hen factual determinations are made on the basis of documentary evidence, however, we review the matter de novo, unhampered by the clearly erroneous rule." *Brown v. Douglas Sch. Dist.*, 650 N.W. 2d 264, 268 (S.D. 2002).

III. PROCEDURAL ISSUES

A. THE PUC ERRED BY DENYING THE YANKTON SIOUX TRIBE'S MOTION TO DISMISS FILED DECEMBER 2, 2014, ERRED BY DENYING THE JOINT MOTION *IN LIMINE*, AND ERRED BY TAKING INCONSISTENT POSITIONS WITH REGARD TO THE TRACKING TABLE OF CHANGES THEREBY DENYING YANKTON ITS SUBSTANTIVE RIGHT TO DUE PROCESS IN THE PROCEEDING.

Yankton filed a *Motion to Dismiss* early in the pendency of the case before the Commission arguing Keystone's *Petition* must be dismissed pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. Yankton argued that Keystone has never received a permit from the Commission for the project described in Keystone's *Petition*, the relief requested

[1] SDCL states that the "court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative finding, inferences, conclusions, or decisions are: 1) In violation of constitutional or statutory provisions; 2) In excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) affected by other error of law; 5) clearly erroneous in light of the entire evidence of the record; or 6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

in the *Petition* cannot be granted, and Keystone has failed to state a claim upon which relief can be granted. In support of its motion, Yankton stated that Keystone asked the Commission to accept its certification that the project described in the *Petition*, the 2014 Project, continues to meet the conditions upon which a permit was issued in Docket No. 09-001. And although the *Petition* might mislead the reader to believe that the project referenced therein is the same project that was permitted in Docket 09-001, appendix C to the *Petition* clearly identifies thirty (30) differences between the two projects. Appendix C is a "Tracking Table of Changes" and it lists thirty (30) findings of fact made by the Commission in Docket No. 09-001 regarding the 2009 Project that do not apply with respect to the 2014 Project and, in an adjacent column, presents an "update" containing new and revised language that does apply to the 2014 Project. The point that the Commission went to the trouble to make each of the findings in Docket 09-001 demonstrates that each of the 09 findings of fact was key to the Commission's decision and key to the 2009 Project itself. Deviation of a project from these findings therefore constitutes a new, separate project. Accordingly, Yankton asked the Commission to dismiss Keystone's *Petition* which would have, then, required Keystone to submit a new *Petition* for its new Project.

Following a hearing held on January 8, 2015, the Commission voted to unanimously deny the *Motion to Dismiss* "concluding that the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and a thorough opportunity to **investigate the facts** and proceed to evidentiary hearing if necessary." *Order Granting Motions to Join and Denying Motions to Dismiss* dated January 8, 2015 at 1. (emphasis added). In other words, at this point, the Commission announced its decision to deny the motion to dismiss and announced that it would be taking testimony on the findings of fact and inferring the testimony could include those updates to the findings of fact contained in the Tracking Table of Changes.

Next, the Commission denied a *Motion to Preclude* and by denying the *Motion to Preclude* recognizing that it did not have authority to amend the previous findings of fact. On May 26, 2015, the Yankton Sioux Tribe ("Yankton") and Indigenous Environmental Network ("IEN") filed a *Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact*, seeking to preclude the amendment of the findings of fact contained in the *Final Decision*. During oral argument, Keystone indicated that it had no intention of seeking an amendment to the findings of fact. Staff for the Commission agreed with Yankton and IEN that amendment of the findings of fact was not available because the Commission does not have authority to amend its previous *Final Decision*. The Commission found that it has no legal authority to amend the *Final Decision*, but because it also found that Keystone does not seek to amend the findings of fact, the Commission denied the motion.

Later, Yankton and other movants jointly filed a *Motion in Limine* challenging the pre-filed testimony of Keystone's witnesses that solely referenced the Tracking Table of Changes. Yankton argued that the certification process neither requires nor permit the consideration of update, changes, amendments, additions, or other alterations to findings of fact contained in a permit and the Commission confirmed as such when it denied the Motion to Preclude Improper Relief. Logically, this means that the Commission should not consider any pre-filed testimony that contained evidence in support of the Tracking Table of Changes (since the Commission does not have authority to amend the Findings of Fact). *Joint Motion in Limine to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact* dated July 10, 2015. The Commission denied the motion and agreed with Keystone by "**[f]inding that the testimony at issue [testimony that only referenced the Tracking Table of Changes]** is relevant to the proceeding and that amending the findings of fact in Docket HP09-001 is not requested." *Order Denying Joint Motion In Limine to Exclude Evidence Pertaining to Keystone's Proposed Changes*

to Findings of Fact. (emphasis added).

In another twist and apparent change of position, when the issue came to the forefront during the evidentiary hearing and the Commission was faced with a motion to strike filed by Dakota Rural Action, Commission Chairman Nelson questioned why no party had brought an appropriate motion timely to challenge the pre-filed testimony on the grounds that it only concerned the Tracking Table of Changes (and not a single Condition of the permit). Evidentiary Hearing Tr. p. 470, ln. 11 – p. 473 ln. 25. Commissioner Chairman Nelson: "Throughout the entirety of that questioning exactly what you have said is rolling around in my mind but nobody challenged it at that time and I think now is too late to do that." *Id.* at p. 472, ln. 11-13. However, Yankton and other movants **did just that** prior to the commencement of the evidentiary hearing when it filed its July 10, 2015 *Motion in Limine to Exclude Evidence Pertaining to Keystone's Proposed changes to Findings of Fact* and such point was made to the Commission immediately following Chairman Nelson's question as to why nobody question it at the time. *Id.* at p. 473, ln 6 – 25. However, the Commission denied the oral motion of Dakota Rural Action notwithstanding itself questioning why the Commission was allowing the testimony that solely relied on the Tracking Table of Changes. *Id.* at p. 472, ln. 20-21.

The contrary and inconsistent ruling and commentary provided by the Commission on the subject of the Tracking Table of Changes and the role the Commission would allow it to have in the case amounts to arbitrary and capricious decision making, constitutes an abuse of discretion, and are a clearly unwarranted exercise of discretion. Yankton's substantive rights to a clear procedure containing all of the trappings of due process have been negatively affected by the Commission's inconsistent position and rulings concerning the Tracking Table of Changes. Moreover, the denial of the *Motion to Dismiss* was in error and the denial of the *Motion In Limine* was in error. Remarkably, the Commission issued 78 **new** findings of fact on January 21, 2016 despite

previously recognizing that the commission has no authority to amend the Findings of Fact issued in the 09-001 docket.

B. THE COMMISSION ERRED IN REQUIRING THE SUBMISSION OF PRE-FILED TESTIMONY PRIOR TO THE CONCLUSION OF DISCOVERY.

The Commission committed a blatant and prejudicial error by requiring the submission of pre-filed testimony prior to the conclusion of discovery. Common sense dictates that before counsel can clearly and finally formulate its arguments and strategy in a case, it must first have an opportunity to review discovery. On April 3, 2015, the Commission issued an *Order Granting in Part Motion to Amend Procedural Schedule*, establishing a schedule in which prefiled direct testimony was to be filed and served (by all parties other than the Rosebud Sioux Tribe) no later than April 2, 2015. Final discovery responses were to be served by April 17, 2015, after the service of final discovery responses. *Id.* Although the Commission amended the procedural schedule by order on May 5, 2015, it did not alter the dates on which prefiled direct testimony and final discovery responses were due. *See Order Amending Procedural Schedule*, May 5, 2015. This means that the parties were forced to solicit direct testimony from their witnesses prior to having an opportunity to review the discovery to which they were entitled. This severely limited the parties' abilities to present their cases through direct testimony and violated the parties' due process rights. Because this decision by the Commission constitutes a question of law, it must be reviewed *de novo*. Under that standard, the Court must find that the action of the Commission to require submission of prefiled testimony was a prejudicial error and must be reversed.

C. THE COMMISSION ERRED IN REQUIRING THE SUBMISSION OF PRE-FILED TESTIMONY AS A PREREQUISITE FOR PRESENTING TESTIMONY AT THE EVIDENTIARY HEARING.

The Commission committed another prejudicial error by departing from the rules of procedure and requiring that parties submit prefiled testimony for each witness in order to for that

witness to be allowed to testify at the evidentiary hearing. ARSD 20:10:01:22.06 provides that testimony shall be prepared in written form, filed with the Commission, and served on the parties prior to the hearing when ordered by the Commission. In this instance, the Commission issued no order requiring pre-hearing submission of written testimony. The Commission did include dates for filing prefiled testimony in its scheduling orders, *see Order Granting in Part Motion to Amend Procedural Schedule* of April 3, 2015, however it never issued an order requiring submission of prefiled testimony. The Commission simply provided a deadline for filing prefiled testimony, should a party opt to do so. Excluding witnesses without prior notice to the parties that prefiled testimony is a requirement – that it has been ordered – violated the parties' rights and unjustly curtailed their cases by excluding relevant evidence without legal grounds. As a question of law, whether the Commission erred in making the decision to preclude these witnesses from testifying must be reviewed *de novo*. The Commission's decision violated the rights of the parties and violated the law. It must therefore be reversed.

D. THE COMMISSION ERRED BY ISSUING THE ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE.

As a matter of law, the Commission committed prejudicial error by issuing its December 7, 2014, *Order Granting Motion to Define Issues and Setting Procedural Schedule*. On October 30, 2014, before a prehearing scheduling conference had even been ordered, Keystone filed a *Motion to Define the Scope of Discovery Under SDCL 49-4 I B-27.* At that time, no party to the matter had sought discovery. The issuance of an order limiting the scope of discovery in this matter was inappropriate and improper under the law. Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. Such rules are found in SDCL Chapter 15-6, and include rules governing discovery. *See* SDCL 15-6(V). The scope of discovery is already defined in SDCL 15-6-26(b)(1) to include

"any matter, not privileged, which is relevant to the subject matter involved in the pending action…" and includes information that is "inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *See also In the Matter of the Application of Native American Telecom, LLC,* TC11-087, WL 11078169 (S.D.P.U.C.) (May 4, 2012). "This phraseology implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 20 (S.D.1989) (citing 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2008 (1970)). Keystone's *Motion to Define the Scope of Discovery under SDCL § 49-41B-27* (October 30, 2014) asked the Commission to issue an order "[t]hat the scope of the discovery be limited to certain matters" under SDCL 15-6-26(c)(4), essentially seeking a protective order. However, as stated above, SDCL 15-6-26(c) imposes clear requirements on a party seeking a protective order that the party must fulfill before a protective order can be issued. Keystone failed to fulfill those requirements. As argued by the Tribe, Keystone failed to certify that it conferred in good faith or attempted to confer with other affected parties in an effort to resolve the dispute, as required by SDCL 15-6-26(c). Keystone also failed to show good cause for the issuance of a protective order. *See Keystone's Motion to Define the Scope of Discovery under SDCL § 49-41B-27*, October 30, 2014. In addition, it was improper for Keystone to seek a protective order before any party had sought discovery because no dispute existed to necessitate such an order. "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders, quash subpoenas, and grant terms when appropriate." *Public Entity Pool for Liability v. Score*, 658 N.W.2d 64, 72 (S.D. 2003), *citing* SDCL 15–6–26(c), 37(a)(4), 45(b) and 45(d)(1).

Furthermore, the order limiting discovery defeated the purposes of discovery. The South

Dakota Rules of Civil Procedure intentionally provide for a broad scope of discovery, and like the Rules themselves, that intention for broad discovery applies here. "The scope of pretrial discovery is, for the most part, broadly construed." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), *citing Bean v. Best*, 80 N.W.2d 565 (S.D. 1957). The Supreme Court has explained that "broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Id.*, *citing* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970). The Commission's order effectively narrowed the issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court. As a matter of law, this decision must be reversed.

IV. BURDEN OF PROOF AND SUBSTANTIVE EVIDENCE

A. THE COMMISSION ERRED IN ITS *FINAL DECISION* BY PLACING THE BURDEN OF PROOF ON THE INTERVENING PARTIES RATHER THAN ON KEYSTONE, AND BY CONCLUDING THAT THE INTERVENING PARTIES FAILED TO ESTABLISH ANY REASON WHY KEYSTONE CANNOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE PERMIT WAS ISSUED.

The Commission committed reversible error by placing the burden of proof on the intervening parties to show that the permit should not be granted, rather than on the petitioner. Pursuant to ARSD 20:10:01:15.01, in a contested case proceeding such as HP14-001, the "petitioner has the burden of proof going forward with presentation of evidence unless otherwise ordered by the commission." As the petitioner, Keystone had the burden of proof as to factual allegations which formed the basis of the petition. *Id.* A plain reading of the rule required the Commission to place the burden of proof on Keystone. The Commission issued no order to alter this standard. Notwithstanding the rule, the Commission time and time again ruled in favor of Keystone on the ground that the intervenors had failed to meet some nonexistent burden of proof. This is contrary to the plain language of the statute and to the purpose of SDCL 49-41B-27, which

required Keystone to certify to the Commission that the proposed project continues to meet the conditions upon which the original permit was issued.

In its post-hearing brief, one of the Yankton Sioux Tribe's arguments was the following two-premise argument: 1) If Keystone has the burden of proof, it did not meet that burden and the Commission is required to deny Keystone's petition; and 2) Keystone does have the burden of proof. Other intervenors made this same point. Conspicuously neither Keystone nor Staff contested the first premise of that argument. Instead Staff and Keystone each provide only one responsive argument and both those responsive arguments have at their core the assertion that although Keystone is the petitioner, Keystone does not have the burden of proof. Because they are wrong on that legal issue, and because they present no other argument in the alternative, the Commission should have denied Keystone's petition.

Staff's argument is that Keystone prevails because Keystone submitted a document entitled a "certification," which contains a conclusory assertion that the permit conditions are being met and will continue to be met. Staff claims that Keystone's "certification," even if false, creates an irrebuttable presumption in favor of Keystone. Staff Post-Hearing Brief at 18. That argument is so plainly unsupportable that not even Keystone agreed with Staff's position. Instead, Keystone provides a slightly more nuanced assertion that by the mere act of labeling a document a "certification" and then filing that document, even if the document is false, Keystone has created a rebuttable presumption in its favor, shifting both the burden of production and the burden of proof to intervenors. Keystone Post-Hearing Brief at 3.

As will be discussed in section IV B, *infra*, even if we were to assume, arguendo, that filing a document entitled a "certification" shifts the burden of proof, the intervenors would have met their burden of proof. But the Commission cannot properly even reach that issue because, simply,

Keystone cannot shift its burden to opposing parties by the mere filing of a conclusory document which it calls a "certification."

Other than in rare contexts not applicable here, each and every party seeking any sort of order or relief from an adjudicatory body has the burden to produce the evidence which supports its request and then the additional burden to prove its entitlement to the relief it requests. A plaintiff has the burden of proof in a civil case. *E.g., Mettler v. Williamson*, 424 N.W. 2d 670 (S.D. 1988). A prosecutor has the burden in a criminal case. *E.g., State v. Wilcox*, 204 N.W. 369, 48 S.D. 289 (1925) ("It is a cardinal rule in criminal prosecutions that the burden of proof rest with the prosecutor."). On nearly every motion, the movant-- whether plaintiff, petitioner, defendant, respondent, or third party-- has the burden of proof on that motion. *E.g., Boylen v. Tyler*, 641 N.W. 2d 134 (S.D. 2002); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W. 2d 259 (S.D. 1985). This is a cornerstone of adjudication in countries which provide due process. There is absolutely no basis here to relieve the Petitioner of the burden of all petitioners—to prove that it is entitled to the relief it seeks from this adjudicatory body.

This obvious point is further established by the South Dakota statutes applicable to this body when this body is acting as an adjudicator. The burden is on the Petitioner. SDCL §49-41B-22. This legal rule is even more clearly stated in Administrative Rule of South Dakota 20:10:01:15.01. Rule 20:10:01:15.01 is one of the Commission's General Rule of Practice, and it applies in every contested case proceeding. The rule requires:

> In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner <u>has the burden of going forward with presentation of evidence</u> unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or <u>petitioner has the burden of proof as to factual allegations which form the basis of the</u> complaint, counterclaim, application, or <u>petition</u>. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

S.D. Admin. R. 20:10:01:15.01 (adopted under authority of SDCL §§49-1-11(2),(4), 49-34A-4,

implementing SDCL §§49-1-11(2), (4); 49-34A-61) (emphasis added). This is the on-point rule, which the Commission is required to enforce, and it defeats the argument which Keystone and Staff make in their post-hearing briefs.

Rule 20:10:01:15.01 discusses both components of the burden of proof: the burden to produce evidence, and the ultimate burden to show that the weight of all evidence produced favors the petitioner. Under this rule, as is also generally the case, both components of the burden of proof lie with a petitioner. Here, Keystone attempts to shift both components of the burden to the intervenors. In its decision the Commission should have found that Keystone has both burdens, and that Keystone's failure to meet either burden provides an independent basis for denying Keystone's petition.

The burden of production must lie with Keystone. In order to reach the correct decision on issues before it and to meet its obligations to the people of South Dakota and the companies that come before the Commission, the Commission needs to be presented with the relevant facts. Nearly all of those facts are in the possession of the petitioning companies, and therefore the burden to produce evidence must be on the companies. *E.g.*, *Davis v. State*, 2011 S.D. 51, 804 N.W.2d 618, 628 (S.D. 2011); *Eite v. Rapid City Area School Dist. 51-4*, 739 N.W.2d 264 (S.D. 2007); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001) (in a civil suit for alleged unlawful arrest, because the information is in the possession of the police officer, the officer has the burden to produce evidence showing why he had probable cause to arrest). Here, Keystone did not produce any evidence on several key issues, yet it now asserts it should prevail on those issues because, it asserts (incorrectly, as discussed *infra*), the intervenors also did not produce evidence on those issues. The Commission should have rejected that argument, and should have, therefore, required Keystone to present evidence in support of all of its claims.

The burden of proof must also lie with Keystone. Contrary to Keystone's sole argument, even if the burden of production shifts in a case, the burden of proof always remains with the petitioner. The South Dakota Supreme Court has repeatedly and consistently held that even in the rare situations where the burden of production shifts as a case progresses, the burden of proof does not shift—it always remains with the petitioner.

> For many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion-the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production-a party's obligation to come forward with evidence to support its claim.
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> *Director, Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 272, 114 S.Ct. 2251, 2255, 129 L.Ed.2d 221, 228 (1994). " 'It is generally said that the burden of production may pass from party to party as the case progresses while the burden of persuasion rests throughout on the party asserting the affirmative of an issue.' " *Hayes v. Luckey,* 33 F.Supp.2d 987, 990 (N.D.Ala.1997) (citation omitted).

Davis v. State, 804 N.W.2d at 628 (quoting *Gordon v. St. Mary's Healthcare Ctr.*, 617 N.W.2d 151, 157-58 (S.D. 2000). *See also Eite*, 739 N.W.2d 264.

Even if it stood alone, without all of the other consistent authorities cited herein, Rule 20:10:01:15.01 would defeat Keystone and Staff's arguments. Surely if Keystone or Staff had any basis for arguing that Keystone does not have the burden clearly imposed upon it under Rule 20:10:01:15.01, they would have provided that argument to the Commission in their post-trial briefs. Glaringly, their post-trial briefs do not even cite this on-point rule, let alone provide an argument for their attempt to evade Keystone's burden.

The Commission's own prior precedent is in accord with all of the authorities discussed above. *In re Northern States Power Co. for Confirmation of Angus C. Anson Combustion Turbine Facility*, 2000 Westlaw 36322410 (S.D.P.U.C. March 20 2000) (hereinafter *In re NSP*). In *In Re*

NSP, the Commission was interpreting SDCL §49-41B-27, the same statute that Keystone claims imposes the burden of proof on intervenors. Like Keystone, NSP had previously obtained a permit for regulated construction activities but then had not commenced that construction within four years of issuance. NSP submitted a "certification" and other information to the Commission and asked the Commission to accept that certification. The Commission determined that it had jurisdiction to decide whether or not to accept the certification. The Commission accepted the certification based upon a finding that the certification was acceptable. Contrary to Staff's new interpretation of the SDCL 49-41B-27, the Commission, in *In re NSP*, based that finding upon the certification "and the information provided to it by NSP."

The law imposing upon Keystone the burden of proof on the factual allegations in its petition is so clear that even Keystone, when it started this contested case, acknowledged its burden. In its own petition in this matter, Keystone set forth its factual allegations and then Keystone concluded its petition with a request that the Commission find that that Keystone still meets the conditions contained in the prior permit. Keystone petitioned for the following relief:

> The attached Certification, together with this petition and the supporting appendices provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL §49-41B-27.

Petition for Order Accepting Certification Under SDCL §49-41B-27; Petition, §III (emphasis added). As is clear from Keystone's own petition, Keystone understood that it was "necessary" for Keystone to provide facts supporting a finding that the project continues to meet the conditions, and it further understood that it could not meet its burden merely by submitting a conclusory "certification." Keystone has, and has previously acknowledged that it has, the burdens of production and proof of the core factual assertion in its petition, i.e. its assertion that it continues to meet the conditions. ARSD 20:10:01:15.01; Petition, §III. Like every other petitioner, plaintiff,

or movant, Keystone has the burden to show that it is entitled to the finding that it requested, and it has expressly acknowledged that such findings are a prerequisite for the relief that it has requested from the Commission—acceptance of its "certification."

Keystone unquestionably did not meet its burden of proof. Now that it has plainly failed to produce evidence or prove the factual allegations set forth in its petition, its only possible argument is its current desperate and bald assertion that it does not have the burden which every petitioner, plaintiff, or movant has. As a matter of law, Keystone is wrong. As a matter of law, the Commission's staff is wrong. The Commission therefore should have denied Keystone's petition.

As discussed above, one of Staff's, Keystone's, and the Commission's key errors or omissions is that they do not even discuss the applicable Administrative Rule, and they ignore the well-known general rule that every petitioner, plaintiff, or movant has the burden of proof. Instead of correctly asserting to the Commission that it should apply the same burden of proof that every other adjudicatory body applies, Staff urged the Commission to commit an obvious legal error based upon Staff's convoluted rationalization that all Keystone had to do was file a document in which Keystone claimed, in conclusory language, that it was "certifying" that it was in compliance and would continue to be in compliance with all 50 conditions which the Commission imposed. This is an odd argument coming from the Commission's own staff, as it appears to abdicate to the regulated entities this body's primary role under South Dakota law.

> The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled.

SDCL §49-41B-1. But Staff asserts that if someone files a conclusory "certification," even if that certification is wholly unsupported by evidence or is false (both of which are the case here) the Commission's hands are tied. As also discussed above, Keystone provides only a slightly varied argument that its labeling of a document as a "certification" shifts the burdens of production and proof to intervenors. The Commission's support of both Staff's and Keystone's positions on this point is clear error.

Where both of these parties and the Commission err is that they incorrectly assume the core fact that Keystone is required to prove—that the document which it labeled a "certification" is in fact a certification as that term is used in SDCL §49-41B-27. Keystone is petitioning for the Commission to accept the document as a certification, and the central question that the Commission must decide is whether it must accept the document as such.

As Staff correctly notes, "certify" means to authenticate or verify in writing. But Staff and Keystone fail to analyze the next step in the legal analysis: what do "authenticate" or "verify" mean? Instead of analyzing that question, Keystone and Staff assumed an answer, and their assumed answer-- that Keystone is not required to prove anything to the Commission—is wrong. The central element in the definitions of both "authenticate" and "verify" is that the allegedly authenticating or verifying document must prove the allegations contained in the document. *Black's Law Dictionary* defines "verify" as "to prove to be true; to confirm or establish the truth or truthfulness of, to authenticate." *Black's Law Dictionary* (14th ed. 2014). Black's defines "authenticate" in the current context as "to show (something) to be true or real." *Id.* Therefore Keystone and the Commission's arguments circle back to the exact same question: has Keystone proven that the assertions in the document which is labeled a "certification"—that Keystone is in

compliance and will remain in compliance with all 50 conditions—are true.[2] If Keystone had shown those assertions were true, then the document constitute the certification required by South Dakota statute. But here, because Keystone failed to show the allegations to be true, the document cannot be accepted as a certification.

Keystone petitioned for this Court to accept the document which Keystone labeled as a "certification." But Keystone failed to meet its burden to show that the document was true. Keystone's petition therefore must be denied.

Because the Commission misplaced the burden of proof contrary to law, the proceedings were fundamentally unjust and the Commission's decision must be reversed.

B. THE PUC ERRED IN ITS FINAL DECISION, FINDINGS OF FACT, BY FINDING THAT KEYSTONE CERTIFIED THAT IT REMAINS ELIGIBLE TO CONSTRUCT THE PROJECT UNDER THE TERMS OF THE 2010 PERMIT AND THAT KEYSTONE MET ITS BURDEN OF PROOF THROUGH MERELY SUBMITTING A SIGNED CERTIFICATION, AND SUBMITTING DOCUMENTS WITH ITS PETITION.

The "certification" does not constitute evidence and is insufficient to prove continued compliance with the 50 conditions. In conjunction with its *Petition*, Keystone submitted a filing captioned "certification" with the Commission when it initiated this action. This document consists of a sworn statement by Corey Goulet, President of the Keystone Pipeline business unit, attesting that Keystone certifies that the conditions upon which the 2010 permit was granted continue to be satisfied. In addition to the flaws with relying on this statement to meet its burden which are cited above, this statement constitutes a legal conclusion rather than factual evidence. This Commission has previously precluded such statements from being offered as evidence (Tr.

2 As discussed above, Keystone and Staff rely upon logically flawed "form over substance" arguments. If it were willing to use such arguments, the Yankton Sioux Tribe could rely upon a logically sound "form over substance" argument that the document labeled a certification must be rejected because, as is undisputable, the document, standing alone, does not prove that Keystone is in compliance or that it will remain in compliance. But the core purpose of the statutes at issue is to provide that this body determines, on the merits, based upon all of the evidence presented in the lengthy hearing in this matter, whether or not Keystone has met its burden of production and of proof that it is in compliance and will remain in compliance.

643 ln 19 – 644 ln 13; 681 ln 19-20; 1297 ln 21– 1298 ln 1; 1721 ln 17-18; 2292 ln 8-13), and it erred by not doing so with respect to the certification document.

Furthermore, Mr. Goulet's statement is a broad, sweeping statement with respect to the conditions and it does not specifically address even one of the 50 conditions or how the project continues to comply with any of those conditions. This blanket statement is void of any substance and provides no probative value with respect to whether or not Keystone actually meets the conditions.

Finally, as he was forced to admit when cross-examined about his certification, Mr. Goulet lacks the personal knowledge necessary to be able to provide a credible opinion regarding each of the 50 conditions. As mentioned above, Corey Goulet, President of Keystone Projects, filed a two page "certification" document stating that "Keystone is in compliance with the conditions attached to the June 29, 2010 Amended Final Decisions and Order" and that "Keystone certifies that it will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project." Certification at 1. Mr. Goulet provided extensive testimony during the evidentiary hearing held in this case and was asked multiple questions regarding Keystone's ability to meet and comply with permit conditions.

Surprisingly, Mr. Goulet's sworn testimony reveals multiple instances of lack of personal knowledge concerning Keystone's ability to meet and comply with permit conditions. For example, Mr. Goulet was asked questions concerning condition 1 and he answered that <u>he was not personally familiar</u>. Tr. 153 ln 17-18. He was asked about conditions 6, 7, and 34 and, similarly, Mr. Goulet stated <u>he was not aware if Keystone did or did not take certain actions concerning those conditions</u>. Tr. 155 ln 10-13; 156 ln 1-5; 156 ln 6-9; 170 ln 10-13; 170 ln 14-17; 170 ln 8-10. With respect to Condition No. 6, Mr. Goulet stated that he did not even know whether Keystone considers the Yankton Sioux Tribe to be a local unit of government – so how could he possibly

know that Condition No. 6 was met? For many of these questions Mr. Goulet deferred to someone else. *Id.*; Tr. 201 ln 13-24; 204 ln 4-13; 253 ln 3-8; 262 ln 25; 263 ln 6. When asked about Condition No. 10, Mr. Goulet responded that he "do[es] not have personal knowledge of [whether Keystone has contacted Yankton Law enforcement." Tr. 176 ln 1-5. When asked specifically about portions of Keystone's "Tracking Table of Changes," Mr. Goulet could not answer questions concerning the Bakken Marketlink Pipeline. Tr. 184 ln 17 – 185 ln 1; 240 ln 7-8; 243 ln 17-18. When questions about the process Keystone undertakes for its permitting from the Army Corp of Engineers and concerning high consequence areas, Mr. Goulet could not answer the question and states that another witness "may" know. Tr. 253 ln 3-8. In response to a question concerning Condition No. 35, Mr. Goulet stated that he did not know what Keystone is doing to comply with that condition. Tr. 262 ln 25 - 263 ln 6. Mr. Goulet's own sworn testimony is inconsistent with the "certification" filed by Keystone in this case. His testimony also reveals deficiencies in Keystone's ability to rely on the "certification" as grounds to shift the burden of proof or production in this case which preclude such a shift. Mr. Goulet's "certification" is a broad, inaccurate legal conclusion for which he admittedly lacks sufficient knowledge. It is neither sufficient to meet Keystone's burden of proof nor to shift the burden of proof in this case to the intervenors.

If merely filing a document labeled "certification" is sufficient to meet the burden of proof intended by SDCL 49-41B-27, then the burden would have shifted by to Keystone upon Yankton's filing of a certification to the contrary. On October 30, 2015, Yankton filed a "certification," much like that filed by Keystone. Yankton's "certification" consists of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that Keystone does not meet all 50 permit conditions. If a sworn statement from the Keystone president is adequate evidence to shift the burden to intervenors, then a sworn statement from the chairman of an intervening tribe must as a

matter of equal protection be adequate to shift the burden back to Keystone. This is dictated by logic and fairness.

The PUC erred in concluding that Keystone met its burden of proof through merely submitting a signed certification.

C. THE COMMISSION ERRED IN ITS *FINAL DECISION*, CONCLUSIONS OF LAW, BY CONCLUDING THAT KEYSTONE IS AS ABLE TODAY TO MEET THE CONDITIONS OF THE PERMIT AS IT WAS WHEN THE PERMIT WAS ISSUED, AND BY BASING ITS DECISION REGARDING CERTIFICATION ON WHETHER KEYSTONE CONTINUES TO BE ABLE TO MEET THE REQUIREMENTS IMPOSED BY THE 2010 PERMIT.

The Commission committed reversible error by basing its decision on whether Keystone is "able" to meet the requirements imposed by the 2010 permit. The Commission therefore used the incorrect standard to make its determination. SDCL 49-41B-27 requires a utility to "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." (Emphasis added.) The statute does not permit a utility to merely show that it is able to meet such conditions. As a matter of common sense and logic, the ability to do something is not the same as actually doing something. However, the Commission accepted alleged proof of Keystone's ability to meet conditions as satisfactory to fulfill the requirements of SDCL 49-41B-27. In the *Final Decision*, Conclusions of Law, the Commission 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." (Emphasis added.) The Commission therefore based its decision on a faulty standard. Because the Commission failed to apply the proper standard in issuing the *Final Decision*, that decision must be reversed as a matter of law.

V. PRESIDENTIAL PERMIT DENIAL

A. THE PUC ERRED BY ACCEPTING KEYSTONE'S CERTIFICATION DESPITE THE FACT THAT THE PRESIDENTIAL PERMIT FOR THE PROJECT, A PREREQUISITE FOR CONSTRUCTING THE PIPELINE AND A CONDITION OF THE 2010 PERMIT, WAS DENIED, AND BY DENYING THE JOINT MOTION TO DISMISS FILED NOVEMBER 9, 2015, AND ISSUING THE ORDER DENYING MOTION TO DISMISS ON DECEMBER 29, 2015.

Yankton hereby adopts by reference and incorporates herein the reasoning supplied by Appellants Joye Braun, John H. Harter, Terry and Cheri Frisch, Chastity S. Jewett, Paul F. Seamans, Cindy Myers, RN, Elizabeth Lone Eagle, Dallas Goldtooth, Bruce Boettcher, Gary F. Dorr, Arthur R. Tanderup, and Wrexie Lainson Bardaglio in Appellants' legal issue no. 1.

VI. TRIBAL RIGHTS

A. THE COMMISSION ERRED IN ITS *FINAL DECISION*, FINDINGS OF FACT, BY ASSERTING THAT PAGE 11 THE RECORD OF CONSULTATION IN THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ESTABLISHES THAT THE STANDING ROCK SIOUX TRIBE WAS CONSULTED BY THE DEPARTMENT OF STATE.

The Commission erred in its *Final Decision* by finding that page 11 of the State Department's Record of Consultation, found at Appendix E to the Final Supplemental Environmental Impact Statement ("FSEIS"), constitutes proof that the Standing Rock Sioux Tribe was consulted by the Department of State. A number of federal laws and executive orders, including the National Historic Preservation Act and Executive Order 13175, require federal agencies to conduct meaningful consultation with Indian tribes that may be affected by a proposed federal undertaking. This duty is grounded in inherent tribal sovereignty and the federal trust responsibility to Indian tribes. In order for the proposed project to be constructed in compliance with federal law, the State Department is required to meaningfully consult with affected tribes, including the Standing Rock Sioux Tribe. As part of the FSEIS, the State Department compiled a table listing dates of "Letters," "Telephone," "Emails," "Faxes," and "Meetings" pertaining to each tribe it interacted with during the FSEIS process. Other than dates, no information is given

regarding the purported interactions. The document is void of any evidence indicating that actual consultation occurred, let alone *meaningful* consultation. A date simply does not show that an interaction was meaningful. The Commission therefore erred in its Finding No. 57 that the State Department's Record of Consultation proves that the Standing Rock Sioux Tribe was consulted.

B. THE COMMISSION ERRED BY ISSUING THE ORDER GRANTING MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS ON JUNE 15, 2015, BY PRECLUDING THE INTRODUCTION OF TESTIMONY REGARDING ABORIGINAL AND TREATY RIGHTS, AND BY FAILING TO CONSIDER TRIBAL ABORIGINAL AND TREATY RIGHTS IN ITS *FINAL DECISION*.

Finally, the Commission erred by precluding testimony regarding and consideration of aboriginal and treaty rights. The Commission was entitled and obligated to hear all arguments regarding the proposed project so that it had all the facts to make its decision. Moreover, all parties to the case were entitled to present their concerns and any relevant evidence to the Commission as a matter of due process. On May 26, 2015, Keystone filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination. Keystone based its motion on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project's route. All three of these allegations were made in error and should have been rejected.

While the Commission certainly lacked jurisdiction to adjudicate land use rights in this matter for purposes other than its own determination on permit certification, the Commission just as clearly *did* have authority to take those claims and rights into account when it makes the certification determination. Although tribes' assertion of those rights in the proceedings did pertain to the route of the proposed pipeline, the impact on those rights was a permissible consideration for the Commission under Chapter 49-41B. While the Commission is restricted

from selecting or altering the route, it is both relevant and necessary that the Commission consider factors tied to the location of a proposed project when it makes a decision pursuant to SDCL § 49-41B-27. Under Keystone's and the Commission's logic, the Commission would be unable to hear all relevant facts about the disadvantages of a proposed project because many of those are directly related to the route. The Commission would be restricted to considering only broad concerns about the project as a whole, unable to consider potential impacts to specific locations such as rivers, residential areas, or specific hazards. This is clearly not the case. The legislature enacted SDCL Chapter 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. SDCL § 49-41B-1. To ensure that new facilities will produce minimal adverse effects on the environment and upon the citizens, the legislature requires that a "facility may not be constructed or operated in this state without first obtaining a permit from the commission." *Id.* This cannot be done without giving consideration to the environment and citizens in the vicinity of a proposed project's route. Finally, Keystone's allegation that Yankton and other tribes do not have usufructuary rights to the land along the proposed project route (inherently asking the Commission to make a determination that the tribe's do not have such rights) is not only false but absurd given that Keystone claimed the Commission lacked authority to make that determination. Keystone therefore provided no valid basis for its motion, which the Commission should have denied.

Though the Commission cannot route a facility, it can deny a permit. SDCL 49-41B-36 directs that "[n]othing in this chapter is a delegation to the commission of the authority to route a transmission facility." However, "SDCL 49-41B-20 grants the PUC the authority to approve or to disapprove permit applications, <u>including the proposed route</u>." *In re Nebraska Pub. Power Dist. Etc.,* 354 N.W.2d 713, 721 (S.D. 1984) (emphasis added). Furthermore, if an application is disapproved based on the route, "the applicant can revise the route and seek PUC approval. SDCL

49-41B-22.1 through 49-41B-22.2." *Id.* Thus, while Commission cannot accept a proposed reroute submitted by another party or propose a reroute itself, it is clearly within the Commission's authority to deny a permit – and therefore to deny permit certification - for reasons relating to the proposed route.

Yankton's usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. The Commission is authorized to consider Yankton's concerns with respect to its usufructuary rights regardless of whether those rights have been identified as such in court. While the South Dakota Supreme Court has made clear that the Commission cannot exercise *purely* judicial functions, it does not and cannot prohibit the Commission from interpreting the law. To do so would preclude the Commission from functioning as an administrative tribunal. Because the Commission's decision to preclude relevant testimony and evidence violated the Tribe's due process rights and severely impaired its ability to fulfill its duties under SDCL Chapter 49-41B, the Commission's decision must be reversed.

C. THE PUC ERRED IN ITS *FINAL DECISION* BY FAILING TO TREAT TRIBES AS LOCAL UNITS OF GOVERNMENT, AND BY FINDING THAT NO PERMIT CONDITION REQUIRES THAT KEYSTONE CONSULT WITH TRIBES ABOUT THE PROJECT.

The South Dakota Legislature before approving a proposed trans-state transmission line shall find that each of the following criteria has been met:

> (4) That the proposed trans-state transmission line and route will not unduly interfere with the orderly development of the region with <u>due consideration having been given to views of the governing bodies of affected local units of government</u>.

SDCL 49-41B-4.2. (emphasis added).

In this case, the Commission failed to treat any tribe as local units of government and failed to include any permit condition requiring that Keystone consult with tribes about the Project. As a governmental unit for a region and group of people likely to be affected by the proposed pipeline, the Yankton Sioux Tribe is clearly a local unit of government for purposes of the Project. Those

conditions do not specify municipalities, yet Keystone clearly considered them to be local units of government. In fact, the Legislature did not specify any particular type of unit of government. The fact that tribes are not specified is irrelevant. Keystone even acknowledged this by alleging compliance with Condition 34 through its testimony that Keystone sought out local knowledge from tribes, though it failed to prove its statement.

The PUC erred in its *Final Decision* by failing to treat tribes as local units of government and by finding that no permit condition requires that Keystone consult with tribes about the Project.

VII. CONCLUSION

For the foregoing reasons, the Yankton Sioux Tribe respectfully requests that the Court reverse the Commission's *Final Decision* and direct the Commission to issue an order denying Keystone's certification.

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