BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	HP14-001 ROSEBUD SIOUX TRIBE'S POST TRIAL BRIEF

Comes now the Rosebud Sioux Tribe, by and through counsel and submits the following post trial brief in accordance with the PUC's order issued following the evidentiary hearing on the matter of the Certification for the Permit to Construct the Keystone XL Pipeline in South Dakota on docket HP14-001.

Evidentiary Hearing Closing Session

At the close of the evidentiary hearing in Docket HP14-001, the Standing Rock Sioux Tribe, joined by each of the intervenors, moved to deny certification of the permit. The motion asserts that the applicant failed to provide substantial evidence of its ability to comply with the amended conditions and failed to meet its burden of proof as a matter of fact and as a matter of law. TR at 2451 and 2. To support the claim that the petition was factually deficient, interveners referred to the record which shows that Keystone had only presented testimony and evidence that touched on 6 of the 107 total permit conditions (50 base conditions plus 57 sub-conditions). The record further revealed that Staff testimony and evidence only touched on 6 of the 107 total permit conditions as well. The majority of testimony and evidence admitted to the record consisted of future promises to perform and to comply with permit conditions rather than actual factual evidence such as draft Emergency Response Plans, Worst Case Spill Scenario calculations for high consequence areas, or draft Integrity Management Plans. Interveners argued that the evidence presented did not satisfy the substantial evidence requirement of the Administrative Procedures Act.

As a matter of law Interveners argued that Keystone cannot demonstrate the ability to comply with the recent changes to federal regulations under the Clean Water Act which constitute a change in law. All of the waterways that were surveyed were surveyed before the new Clean Water Act Regulations went into effect and thus, Keystone is unable to comply with the law at this point in time.

In response to the motion to deny certification of the permit, Keystone argued the following: 1.) procedural reasons why the motion should not be considered at this time, 2.) the Clean Water Act regulations and 3.) the merits of Keystone's case. Of particular importance in Keystone's response as well as the proceedings as a whole, was Keystone's continued tactic of burden shifting, by claiming that Keystone satisfied its burden of proof at the time they filed the certification when Mr. Taylor states "Final Point. The merits of what's gone on over the last nine days. The applicant met its burden of proof for certification in the written submission's that were filed nearly one year ago." (TR at p. 2466 line 14.) Regarding the applicant's burden of proof Mr. Taylor went on to state that "[u]nder the statute, we could have said we certify and at that moment the burden of proof shifts to anyone who wants to contest that certification to come forward with affirmative proof that there are Conditions in our permit issued in 2010 that we cannot meet. And they have to provide permanent proof of that." (TR at p. 2467 line 3) Certainly there is nothing in the law that supports Keystone's misplaced logic in understanding the burden of proof.

These statements are a marked difference from Keystone's position as enunciated in opening statements when Mr. Taylor stated "We are here today to meet Keystone's burden of proof. That is, certifying that the project continues to meet the 50 conditions on which the permit was issued and that it can be constructed and operated accordingly." TR at p. 67 line 17. Mr. Taylor went on to state that "we'll offer the testimony of seven witnesses, five of whom are direct witnesses, two of whom are rebuttal. We will present exhibits that meet that burden of proof. The testimony of our witnesses, many of whom you've heard before, will conclusively demonstrate that the project will continue to meet the 50 conditions on which the permit was issued." TR at p.68 line 25. Not only are these two positions regarding the applicant's burden of proof contradictory, they are irreconcilable with each other. These statements mark the first time

during this nearly yearlong proceeding that Keystone asserts that they have satisfied their burden of proof simply by certifying their petition.

Consistent with PUC Staff's practice throughout the proceedings, PUC Staff took no position on the issue. Commissioner Hanson initiated the Commissioners discussion of the motion by making a Motion to Deny the Motion for Dismissal. During the Commission's deliberative process Commissioner Hanson presented his thoughts regarding his understanding of the burden of proof in this case. Commissioner Hanson stated that "when you contend the substantial evidence needs to be presented, in my view substantial evidence was originally presented, a permit was granted and it was approved." (TR t p.2475 line 10). Commissioner Hanson went on to discuss his opinion of the law that the only time the applicant has a burden of proof is at the original permit application proceeding. He states "So clearly the discretion there is given to the Commission, and clearly the Applicant has met their certification requirement, unless proof to this commission is shown that they do not meet one or more of the Conditions that were set forth in our original order granting the permit." (TR at p. 2478 line 3)

After little discussion, the PUC adopted Keystone's position on the burden of proof and placed the burden of proof on the interveners to show that "unless proof to this commission is shown that they do not meet one or more of the Conditions that were set forth in our original Order granting the permit" then the Applicant has met their burden of proof. Following commissioner discussion, the PUC voted to deny the Interveners motion to deny certification and left the parties with the following direction: to tell the Commissioners which particular conditions cannot be met. (TR at p. 2479 line 10).

The Burden of Proof

At issue in this case is the interpretation and application of SDCL 49-41B-27 (the certification statute) and the appropriate burden of proof under 49-41B-27, 1-26-36 and administrative rule 20:10:01:15.01. The holdings from *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (1996) and *Helms v. Lynns*, 542 N.W.2d 764 (1991) and *In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota* (Aberdeen City Vicinity) (F-3111) 318 N.W.2d 118 are determinative of the issue. The burden of proof rests with the applicant throughout the duration of a contested case such as this. PUC

Administrative Rule 20:10:01:15.01 establishes the burden in contested case proceedings. It provides:

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

This burden may only be altered upon an order of the Commission. The record is void of any PUC order that relieves the applicant from going forward with the presentation of evidence. Furthermore the Commission cannot orally change the burden of proof at the conclusion of evidentiary hearing. To do so, would necessarily violate the due process rights afforded to the parties under the Administrative Procedures Act.

SDCL 49-41B-27 "Construction, expansion, and improvement of facilities" provides that "[u]tilities 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***."

The PUC must also examine SDCL 1-26-36 which provides "[w]eight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;

(5) Clearly erroneous in light of the entire evidence in the record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The South Dakota Supreme Court examined the meaning of SDCL 1-26-36 in *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (1996), when it said: "Our standard of review of factual issues is the clearly erroneous standard." The Court went on to elaborate stating "under this standard, we must determine whether there was substantial evidence to support the Department's finding." Quoting *Helms vs Lynn's, Inc.,* 542 NW 2d 764, 766 (SD 1996). Furthermore, in regards to the meaning of SDCL 1-26-36 the Court stated that "the question is not whether there is substantial evidence contrary to the agency finding, but whether there is substantial evidence to support the agency finding." *Therkildsen v. Fisher Beverage.*

In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota, an opinion originating from a Public Utilities Commission original proceeding, the Court defined substantial evidence to mean "such relevant and competence evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." A reviewing court will not look at whether the record contains sufficient evidence to support a different finding, rather the record must reflect substantial evidence to support the agencies actual decision.

When viewed in this light, if the PUC issues a decision that confirms the applicant has proven that it has met the requirements of SDCL 49-41B-27, then that decision will be based on evidence of only 6 of 107 total conditions from the original amended permit. Additionally, switching the burden from the Applicant to placing the burden on the interveners to establish that there are certain conditions that can no longer be satisfied, is a decision that is an error of law as well and cannot be supported. The PUC has erred as a matter of law in applying the certification statute to require that any party other than the applicant carry the burden of proof.

In order to reach a conclusion that will be supported by law, the PUC must examine what evidence Keystone put on within the meaning of "substantial evidence." How exactly the Commission will go about doing this and performing any analysis remains unclear. This could be accomplished through a two-step analysis of the applicant's case. Has the PUC identified a formula or basis for determining what substantial evidence is? There is nothing in the record to

indicate what number of conditions would show a threshold level of substantial evidence. As a part of its analysis, the PUC must determine how much evidence the applicant presented in total.

Fortunately, in this case, the evidence presented can easily be quantified for these purposes: here there are 107 total permit conditions and Keystone presented evidence on 6 of those conditions. Had Keystone decided to present evidence on 53 and a half conditions, the PUC would have had half of the total conditions to consider throughout the decision making process. Without looking at the quality of the evidence presented, can the PUC affirmatively state that where an applicant presents evidence of only 6 of 107 total permit conditions, is that enough evidence for a reasonable person to accept as sufficiently adequate to support a conclusion that the conditions upon which the permit for the facility was granted continue to exist? If six conditions are enough to consider, then the PUC should examine the substance of that evidence. If evidence of only six conditions are not enough to say there may be substantial evidence, then the Commission may stop here and deny the petition.

Introduction

Keystone was granted a permit from the PUC under the Energy Conversion and Transmission Facilities Act in 2010 on docket HP09-004 for the construction and operation of the KXL pipeline through South Dakota. SDCL 49-41B-27 requires a permittee to certify to the Commission that the Project continues to meet the conditions upon which the permit was issued if construction has not commenced within 4 years of the issuance of the permit.

For numerous reasons, Keystone has not been able to commence construction within the statutorily required time period. Paramount among those reasons is the fact that Keystone has not been able to secure the necessary federal permits and permissions required to cross an international border consistent with the requirements of Executive Order 11423 of August 16, 1968 and Executive Order 13337 of April 30, 2004 and other federal laws including but not limited to compliance with the Hazardous Pipeline Safety Act of 1979, the Pipeline Safety Improvement Act of 2002, the Clean Water Act and the National Historic Preservation act. In conjunction with the original application in this proceeding, Keystone filed for a presidential permit, compliance with which is required by Condition (2 and 3). This application for a presidential permit was denied. In 2012, Keystone applied for a ***new*** presidential permit, for a

different project, which has not been issued or approved and whose requirements (if granted) were never considered as a part of the original PUC permit. Clearly a determination of which permit and environmental impact requirements actually apply to the permit from HP09-001 for the PUC to review is required. For example, the Inter Tribal Council on Utility Policy attempted to introduce testimony from Dr. James Hanson regarding the issue of climate change which is a requirement for NEPA consideration in the 2012 presidential permit application. The PUC denied admittance of the testimony on climate change on the grounds that it was not related to a condition of the existing permit or its requirements, which would have been the 2008 application for a presidential permit. If the FSEIS generated from the 2012 presidential permits applies to this case, then the PUC clearly abused its discretion by excluding this evidence. Through this ruling the Commission denied itself the opportunity to hear relevant evidence regarding an important issue in the case. This is but one example of improper application of the law and the resulting exclusion of evidence based on the same.

Despite the fact that Keystone has not been able to secure the required federal permits nearly 8 years from filing the original applications, the fact that one presidential permit was denied and they are still waiting for approval of a second presidential permit application, Keystone insists that the conditions upon which the facility was issued still exist today and that they can satisfy the requirements of SDCL 49-41B-27. Yet, along with its certification petition, Keystone submitted Appendix C: "Tracking Table of Changes" containing 30 identified changes to the original permit conditions.

Keystone sought to narrow the issues and control the direction of the case as demonstrated by its Motion to Define the Scope of Discovery. By Order dated December 17, 2014, the PUC limited discovery to "only discovery regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order, Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystones Tracking Table of Changes attached to the petition as Appendix C, 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 and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed. This is not an order that changes the burden of proof

consistent with the provisions of administrative rule 20:10:01:15.01. This is simply an order that limits the scope of what subjects are discoverable leading up to the evidentiary hearing.

The Evidence Presented

In determining whether or not the applicant has met its burden of proof and otherwise satisfied the requirements of the law, the PUC must consider the evidence actually presented at the hearing. As stated earlier, Keystone presented evidence on only 6 conditions out of a possible 57 conditions. The RST asserts that evidence presented on such a minimal number of subjects is not sufficient to determine if this evidence is substantial. However, if the Commission determines whether evidence is substantial based on this amount of evidence, in making the substantial evidence determination the Commission must consider the evidence presented as well as what evidence was not presented.

A comparison of the requirements of Amended Permit Condition One, with the record, shows that there are many unaddressed requirements under this condition. One example is that Keystone must demonstrate that the project remains in compliance with the requirements of the Endangered Species Act as well as SDCL 34A-8-3 "Lists of endangered and threatened species promulgated--Basis for determination." SDCL 34A-8-3 requires the State Department of Game Fish and Parks to list state protected species. Not one of Keystone's witnesses presented a shred of evidence demonstrating that the requirements of the Endangered Species Act or SDCL 34A-8-3 are still satisfied. There are many state and federally protected species designated as threatened, endangered or candidates for such designation, along the pipeline corridor. The following chart is illustrative of these species in the counties along the pipeline route which require affirmative evidence presented by Keystone to demonstrate that this condition of the permit remains unchanged. By not presenting any evidence on this subject, it is impossible for the Commission to issue an order granting certification that satisfies the requirements of the law.

County	**Number of State and Federal Threatened or Endangered Species by common name and scientific name**	**Status FE = Federally Endangered, FT = Federally Threatened, PE = Proposed Endangered (Federal), PT = Proposed Threatened (Federal) C = Federal Candidate, SE =**

		State Endangered, ST = State Threatened.
1. Butte County	1.Finescale Dace, *Chrosomus neogaeus*	SE
	2. Longnose Sucker, *Catostomus catostomus*	ST
	3. Greater Sage-Grouse, *Centro cercus urophasionus*	C
	4. Whooping Crane, *Grus Americana*	FE, SE
	5. Northern River Otter, *Lontra canadensis*	ST
	6. Swift fox, *Vulpes velox*	ST
2. Haakon County	1. Sturgeon Chub,*Macrhybopsis gelida*	ST
	2. Interior Least Tern, *Sternula antillarum athalassos*	FE, SE
	3. Whooping Crane, *Grus Americana*	FE, SE
	4. Northern River Otter, *Lontra Canadensis*	ST
	5. Swift Fox, *Vulpes velox*	ST
3. Harding County	1. Sturgeon Chub,*Macrhybopsis gelida*	ST
	2. Greater Sage-Grouse,*Centrocescus urophasianus*	C
	3. Peregrine Falcom, *Falco peregrines*	SE
	4. Swift Fox, *Vulpe velox*	ST
4. Jones County	1. Sturgeon Chub,*Macrhybopsis gelida*	ST
	2. Whooping Crane, *Grus Americana*	FE, SE
5. Lyman County	1.Pallid Sturgeon*Scaphirhynchus albus*	FE, SE
	2.Shovelnose Sturgeon*Scaphirhynchus platorynchus*	FT

	3.Sturgeon Chub *Macrhybopsis gelida*	ST
	4.False Map Turtle *Graptemys pseudogeographica*	ST
	5.Sprague's Pipit *Anthus spragueii*	C
	6.Whooping Crane *Grus Americana*	FE, SE
	7.Black-footed Ferret *Mustela nigripes*	FE, SE
	8.Northern Long-eared Bat*Myotis septentrionalis*	LT
	9. Northern River Otter *Lontra canadensis*	ST
	10. Swift Fox *Vulpes velox*	ST
6. Meade County	1. Banded Killifish Fundulus diaphanus	SE
	2. Longnose Sucker Catostomus catostomus	ST
	3. Sturgeon Chub Macrhybopsis gelida	ST
	4. American Dipper Cinclus mexicanus	ST
	5. Interior Least Tern Sternula antillarum athalassos	FE, SE
	6. Sprague's Pipit Anthus spragueii	C
	7. Whooping Crane Grus americana	FE, SE
	8. Northern Long-eared Bat Myotis septentrionalis	LT
	9. Northern River Otter Lontra canadensis	ST
	10. Swift Fox Vulpes velox	ST
7. Perkins County	1. Sprague's Pipit, *Anthus spraguii*	C
	2. Whooping Crane, *Grus Americana*	FE, SE
	3. Swift Fox, *Vulpes velox*	ST

8. Tripp County	1. American Burying Beetle Nicrophorus americanus	FE
	2. Blacknose Shiner Notropis heterolepis	SE
	3. Northern Pearl Dace Margariscus nachtriebi	ST
	4. Northern Redbelly Dace Chrosomus eos	ST
	5. Sturgeon Chub Macrhybopsis gelida	ST
	6. WhoopiNg Crane Grus americana	FE, SE
	7. Northern River Otter Lontra canadensis	ST

Amended Permit Condition 41 requires Keystone to follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service (USFWS) and SDGFP. Condition 41 also requires compliance with the Endangered Species Act. Because Keystone has presented no evidence on continued compliance with the requirements of the Endangered Species Act, the Commission cannot issue an order granting certification.

Another aspect of demonstrated compliance with Amended Permit Condition One is the fact that Keystone failed to submit any evidence regarding the socio-economic factors. This fact is highlighted by RST witness Paula Antoine's testimony which focuses in part on addressing specific findings of fact relating to the socio-economic factor considerations from Findings of Fact 107, 108, 109 and 110. The testimony also addresses Keystone's withdrawn application for a Special Permit and asserts that Keystone has presented no evidence to certify that these conditions remain the same. Amended Permit Condition One requires compliance with all laws, which includes SDCL 49-41B-22. As pointed out in the testimony, there was no evidence presented that from a socio-economic standpoint, that the project would not (i) pose a threat of serious injury to the socioeconomic conditions in the project area, (ii) substantially impair the health, safety or welfare of the inhabitants in the project area; or (iii) unduly interfere with the orderly development of the region. The testimony also points out that there was no communication with the Rosebud Sioux Tribe regarding any aspect of the project, and no testimony to show that the project will not have more than minimal effects in the areas of agriculture, commercial and industrial sectors, land values, housing, sewer and water, solid waste

management, transportation, cultural and historic resources, health services, schools, recreation, public safety, noise and visual impacts. Antoine's testimony also addresses the document that forms the underlying basis for these findings, Michael Madden's report "Assessment of Socioeconomic Impacts Expected with the Keystone KX Pipeline Project." No witness for the applicant or PUC Staff attempted to rely on this report as evidence to show that this condition and FOF 107, 108, 109 and 110 remain unchanged. Without the ability to examine the evidence, the Commission cannot issue an order granting certification. Even if Madden's report had been introduced, it would still have been inadequate to address current socio-economic factors. The report does not recognize the close proximity of the Rosebud Sioux Tribe Reservation to the project route, particularly the tribal communities of Ideal and Winner Housing area as well as the proximity of the White River Crossing to Rosebud Sioux Tribal land. The report does not address or include the unique jurisdictional landscape which is in close proximity to the project area and how these factors are socioeconomic aspects of the amended permit conditions. It follows, that where the applicant has presented no evidence, the Commission is not presented with substantial evidence upon which to issue an order that grants certification.

Also addressed in the testimony is Keystone's demonstrated ability to comply with the "Special Permit" if issued by PHMSA. The only evidence presented by Keystone addressing its ability to comply with the requirements of the "Special Permit" is that Keystone withdrew its request for a "Special Permit" and that these requirements will be replaced by "59 additional conditions as set forth in the FSEIS, Appendix Z." (Kothari Direct testimony Page 4, question 11.) The testimony states that all of these requirements are new requirements that were never considered by the Commission. The Tribe concedes that this statement may not be entirely accurate. Even so, the premise remains unchanged because there are several requirements from the Appendix Z that were never considered by the Commission in HP09-001. Because they were never considered, there is no underlying basis to rest a decision on related to Keystone's ability to satisfy those conditions. Clearly, under this analysis, the conditions upon which the facility was issued do not continue to remain the same.

One example is the requirement of SCADA systems. When the Amended Permit Conditions and Order was issued, there was no requirement for the pipeline to have a SCADA system. One of the Special PHMSA 59 requirements is the installation and use of a SCADA system. Because this requirement was not part of the underlying information the Commission

considered when issuing the permit, there was no evidence presented regarding the new SCADA requirements in HP-09-001. It necessarily follows that when no new evidence was presented regarding Keystone's ability to comply with this requirement, the Commission cannot issue an order granting certification.

Federal Register Vol.77 No. 116, Friday June 15, 2012, provides notice of intent to conduct a Supplemental Environmental Impact Statement regarding the Keystone XL pipeline. The Commission took judicial notice of the Supplemental Environmental Impact Statement. There are several differences in this Notice and the initial Notice referenced in Amended Permit Condition 2. This notice of intent is not the Federal Register Notification that the Amended Permit Conditions required compliance with. A key difference is the additional requirement that the new environmental impact statement take into account the impacts that could occur relating to issues of Environmental Justice. Because this was not a part of the proceedings in HP09-001, Environmental Justice concerns were not considered by the Commission nor were Environmental Justice concerns a part of the amended permit conditions. Thus, another new requirement exists to show that Keystone cannot certify that it continues to meet the conditions upon which the facility was granted. Additionally, Keystone presented no evidence related to Environmental Justice and its ability to comply with the new requirements.

Keystone's evidence consisted of nothing more than promises to comply with future conditions. They have presented no actual evidence for the Commission to examine in its analysis. Furthermore, a condition of the underlying permit has changed when there are new federal requirements in place today that were not part of the original proceeding and thus not considered by the Commission.

Excluded Evidence

By order dated July 22, 2015 the PUC took judicial notice of the following items: 1) the evidentiary record in HP09-001, 2) the Final Environmental Impact Statement, 3) the Final Supplemental Environmental Impact Statement and 4) SDCL Chapter 49-41B. Presumably, judicial notice was taken of these items because the Commission felt these items possessed evidentiary value or were otherwise relevant to the certification proceeding. Curiously, the Commission issued several other orders excluding evidence whose subject matter was related to

requirements of the Final Environmental Impact Statement and the Final Supplemental Environmental Impact Statement: the 2009 and 2012 Notices of Intent to Prepare an Environmental Impact Statement.

The PUC issued several orders excluding evidence leading up to the evidentiary hearing. By Order dated July 22, 2015 the PUC excluded Jennifer Galindo's rebuttal testimony and Waste Win Young's direct testimony. This exclusion was in error as a matter of law. Galindo is an archeologist for the Rosebud Sioux Tribe's Tribal Historic Preservation Office. Young is the Standing Rock Sioux Tribe witness and issues associated with the exclusion of Young's testimony fall outside the scope this section.

Galindo's rebuttal testimony addresses the adequacy of compliance with the requirements of Amended Permit Conditions One and Three, which include operating within the confines of the National Historic Protection Act and the veracity of the State PUC witness Olson who would have testified that she was satisfied with Keystone's ability to comply. (based on prefiled testimony that was later withdrawn because PUC Staff did not call Olson as a witness) The Commission ruled that the testimony at issue was beyond the Commission's jurisdiction and not relevant to the proceeding. There are several reasons why this exclusion was erroneous. First, compliance with the requirements of amended permit condition one requires the applicant to present evidence demonstrating their ability to comply with the requirements of many federal laws, including but not limited to the National Historic Preservation Act. Because the permit requires a showing of the ability to comply with NHPA, any testimony on that subject is necessarily relevant to these proceedings. The second reason that the exclusion order is erroneous is that during hearings such as these, the Commission as a routine matter examines the ability of parties to comply with laws that are ultimately beyond the Commissions jurisdiction. Although this phrase was used throughout the entirety of these proceedings, no one ever actually defined what "beyond the commission's jurisdiction" meant and how that applied.

For example, compliance with the requirements of the Pipeline Safety Act and 49 C.F.R. 194 and 195 are requirements that the PHMSA has jurisdiction to monitor, regulate and enforce. Yet, despite this limit on the Commission's jurisdiction, compliance with these specific rules is part of the permit conditions and the Commission heard days of testimony on Keystone's ability to comply at the evidentiary hearing. It is a misapplication of the rules of civil procedure to apply the rules of relevancy to reach two such conflicting results. A third reason that the

exclusion of Galindo's testimony is erroneous is that at the evidentiary hearing, the commission accepted testimony of Cheyenne River Sioux Tribe's Tribal Historic Preservation Officer related to the same subject as Galindo's testimony.

The Commission also erroneously limited Paula Antoine's testimony by order dated July 22, 2015 by excluding testimony related to the Tribe's spiritual camp located on tribal trust land in very close proximity to the proposed project route. This testimony related to the Tribe's activities at the camp in opposition to the pipeline and are appropriate and relevant socioeconomic factors that the commission should have considered in examining the evidence presented to determine if the conditions upon which the permit issued continue to be satisfied. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1. Both Galindo and Antoine testimonies provided information to the Commission that is considered relevant evidence by law. Accordingly, the exclusion of parts of Antoine's testimony and the exclusion of the entirety of Galindo's testimony was in error.

Conclusion

Pursuant to the laws of South Dakota and the Rules of the Public Utilities Commission regarding the construction of pipeline facilities the burden of proof rests with the Applicant. That burden is no difference in a case where Applicants are seeking certification pursuant to SDCL 49-41B-27. The PUC committed an abuse of discretion in its understanding and application of the burden of proof in this case. The record establishes that Keystone has failed to present substantial evidence as required and has failed to meet its burden of proof under the holdings from *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (1996) and *Helms v. Lynns*, 542 N.W.2d 764 (1991) and *In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota* (Aberdeen City Vicinity) (F-3111) 318 N.W.2d 118. Based on the above and foregoing the Rosebud Sioux Tribe respectfully requests that the Public Utilities Commission deny Keystones petition for certification.

Dated this 1st day of October, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Post Trial Brief on behalf of the Rosebud Sioux Tribe was electronically served to the parties on the South Dakota Public Utilities Commission website.

Dated this 1st day of October, 2015.

/s/Matthew L. Rappold

Matthew L. Rappold