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	)	Docket 14-001 **DAKOTA RURAL ACTION'S POST-HEARING REPY BRIEF**

Dakota Rural Action ("**DRA**") is submitting this reply brief in response to the post-hearing briefs filed by TransCanada Keystone Pipeline, LP ("**TransCanada**") and the Public Utilities Commission Staff ("**Staff**").

INTRODUCTION

The Staff's post-hearing brief can be dealt with summarily. While providing a procedural history of this case, in effect, Staff's argument is that if TransCanada simply submits a statement that it "certifies" ongoing compliance, that suffices to meet the burden imposed by SDCL § 49-41B-27. This argument is remarkably deficient in that it ignores basic principles of administrative law and the requirement that any decision by an administrative agency be supported by substantial evidence. A simple signed statement saying "we certify" does not constitute substantial evidence. The position taken by Staff would effectively eviscerate the Commission's jurisdiction and authority. DRA suggests that Staff's position does not reflect the intent of the statute and does not serve the citizens of the State of South Dakota whom the Commission and its Staff are engaged to protect.

TransCanada's argument largely reflects Staff's parsimonious attitude towards the Commission's authority and jurisdiction, albeit focusing more on a misguided attempt to shift the burden of proof in these proceedings onto the intervenors instead of fulfilling its statutory burden to demonstrate, by submitting substantial evidence, that it "continues to meet the conditions upon which the permit was issued." SDCL § 49-41B-27.

Neither the Staff nor TransCanada's positions set forth in their respective post-hearing briefs articulate good reasons why the Commission should grant TransCanada's petition for certification under SDCL § 49-41B-27.

STAFF POST-HEARING BRIEF FAILS TO ADDRESS EVIDENTIARY STANDARDS

Staff's post-hearing brief can be effectively summarized in two points – first, Staff suggests (relying on definitions in Black's Law Dictionary) that the term "certify", as set forth in SDCL § 49-41B-27, simply means that TransCanada crosses the goal line by submitting a signed statement "certifying" that continues to meet the conditions upon which its original permit was granted in 2010. Remarkably, Staff suggests that the Black's Law Dictionary of "certify" simply means to either "authenticate" or "verify" in writing, and that it does not mean "prove". Second, Staff suggests that South Dakota's legislature intended such an interpretation.

Without lending credence to Staff's reliance on Black's Law Dictionary definitions, DRA notes that the definition of the term "authenticate" means "[t]o prove the genuineness of (a thing); to show (something) to be true or real." *Black's Law Dictionary* (10th ed. 2014). Likewise, the term "verify" means "[t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate." *Id*. Carrying this analysis one step further, to "prove" means "[t]o establish or make certain; to establish the truth of (a fact or hypothesis) by ***satisfactory evidence***." *Id*. (emphasis added).

DRA's initial post-hearing brief contains an in-depth discussion of South Dakota law, which requires any decision by an administrative agency such as the Commission to be supported by substantive evidence in order to avoid reversal on appeal. *Helms v. Lynn's, Inc.*, 542 N.W.2d 764 (S.D. 1996); *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (S.D. 1996) (citing *In re Establishing Certain Territorial Elec. Boundaries*., 318 N.W.2d 118 (S.D. 1982)). Perhaps Staff is taking the position that TransCanada's conclusory statements and unsupported promises that it will continue to comply with the conditions imposed upon it constitutes substantive evidence. If so, that would be a fatal error, as South Dakota's

Supreme Court has made it abundantly clear that basing an administrative decision on conclusory statements constitutes an abuse of discretion and provides grounds for reversal. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816, 823 (S.D. 2011).

In effect, Staff's position entirely misses the mark by failing to recognize that even using the Black's Law Dictionary definitions it provides, TransCanada must prove it can continue to meet the conditions upon which the permit was issued. Proof requires evidence. In South Dakota, that means substantive evidence, not conclusory statements. Staff's position, in apparent haste to support TransCanada's desire to carve its pipeline route across South Dakota, ignores this basic principle, if not the plain meaning of the statute.

Finally, Staff references legislative intent. There is no need to explore legislative intent because the law and the statute are already clear. Under SDCL § 49-41B-27 TransCanada must certify and prove, with substantive evidence, that it "continues to meet the conditions upon which the permit was issued." Staff cannot logically advance the position that South Dakota's legislature somehow intended to bypass the requirement of an Evidentiary Hearing and change the standard of proof that administrative agency actions in contested hearings must be supported by substantive evidence. That is a radical position that is contrary to established principles of administrative law.

TRANSCANADA FAILS TO MEET ITS BURDEN

Predictably, TransCanada advances an argument similar to the position taken by Staff. In short, TransCanada argues that it met its burden by merely filing a statement with the Commission "certifying" that it "continues to meet the conditions upon which the permit was issued" as required by SDCL § 49-41B-27, and that somehow their unsubstantiated promise that they will continue to comply with conditions of the 2010 permit magically shifts the burden of proof to the intervenors. It understandably cites no authority for this novel proposition. This is a disingenuous position in light of the well-established principle

of law that substantive evidence is required to be presented by the Applicant to support any decision by an administrative agency such as the Commission. *Helms v. Lynn's, Inc.*, *supra.*

In its post-hearing brief, TransCanada insists that the current proceedings are not a rehearing of the 2010 permit proceedings in order to advance the unprecedented position that it need not present substantive evidence demonstrating that it continues to meet (much less whether it even can meet) the conditions of the 2010 permit. DRA suggests that TransCanada's argument fails the smell test of basic statutory construction. The language of SDCL § 49-41B-27 is clear in that it requires TransCanada, as the applicant, to certify that it "continues to meet the conditions upon which the permit was issued." The statute provides a clear directive to applicants who fail to commence construction within the four-year period set forth in SDCL § 49-41B-27. They have to go back to the Commission.

While TransCanada may suggest that the current proceedings are not, in effect, a retrial of the 2010 permit proceedings, this characterization is an attempt to conveniently sidestep the burden they must meet. In order to demonstrate that it continues to meet the conditions upon which the 2010 permit was issued, TransCanada is required to present substantive evidence as to each and every condition. SDCL § 49-41B-27 does not say that applicants must certify that they can only continue to meet "some" of the permit conditions. SDCL § 49-41B-27 does not say that intervenors have to prove that an applicant cannot continue to meet the conditions under which the permit originally issued. The burden of proof, requiring substantive evidence, falls squarely upon TransCanada as the applicant.

The Commission's own regulations recognize the burden TransCanada must meet. The regulations provide that:

> "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." ARSD § 20:10:01:15.01 (Emphasis added).

TransCanada is the applicant. It filed a petition seeking certification of the 2010 permit pursuant to SDCL § 49-41B-27. TransCanada's allegation that it continues to meet the conditions upon which the 2010 permit was issued is a factual allegation forming the basis of its petition. ARSD § 20:10:01:15.01 is clear that TransCanada bears the burden of proof. Because TransCanada is making an affirmative assertion in its petition, under law, it bears the burden of proving its assertion. *Tripp State Bank of Tripp v. Jerke*, 189 N.W. 514 (S.D. 1922). That burden is TransCanada's not DRA's, nor that of other intervenors.

As noted above, in order for TransCanada to prevail, it must demonstrate through substantive evidence that it can continue to meet each and every one of the conditions upon which the 2010 permit was issued. Conclusory statements are insufficient. *M.G. Oil Co. v. City of Rapid City*, *supra*. TransCanada's burden to provide substantive evidence is inescapable. Any decision by an administrative agency that is not supported by substantive evidence will be deemed clearly erroneous and will be overturned by South Dakota's courts. *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (S.D. 1996). Courts will scrutinize the agency's record and assess whether the record contains substantial evidence to support the agency's decision. *Helms v. Lynn's, Inc.*, *supra*.

In the present case, even after nine days of evidentiary hearings, TransCanada's record is sorely lacking. While TransCanada's post-hearing brief recounts testimony from DRA's and other intervenors' witnesses, focusing its efforts on the misguided proposition that the intervenors bore the burden of proof, the fact remains that TransCanada's witnesses, in their direct testimony, simply presented conclusory statements that failed to address the specific conditions it was required to demonstrate that it could continue to meet. In the rare instance where TransCanada's witnesses actually referenced specific conditions, they then failed to present substantive evidence demonstrating that they could continue to meet – or for that matter, even meet at all – the conditions upon which the 2010 permit was issued. DRA's post-hearing brief cited example after example of TransCanada's remarkable evidentiary failure. We will not recite each of those instances in this reply brief.

DRA's issues at the hearing, as addressed by TransCanada in its post-hearing brief, encompass protection of water, land, and the correlated issue of pipeline safety. This reply brief will not address the arguments raised by other intervenors concerning tribal consultation, socio-economic impacts, and concerns over tribal safety and cultural resources. However, DRA hereby joins the arguments raised by its fellow intervenors in opposition to TransCanada on those points.

Without lending credence to arguments made by TransCanada in its post-hearing brief, DRA submits that selected points relating to water, land, and pipeline safety can be briefly touched upon. DRA notes that TransCanada's post-hearing brief discusses the testimony of witnesses presented by the intervenors under the patently mistaken assumption that it can "certify" compliance by merely saying so, and without advancing substantive evidence to make its case.

Water

TransCanada focuses much of its effort in attacking the testimony of Prof. Arden Davis of the South Dakota School of Mines and Technology. TransCanada's approach to Dr. Davis's testimony is allege that the testimony it presented from its corporate expert witness Heidi Tillquist rebuts the concerns he raised concerning the risks posed by the proposed Keystone XL pipeline to South Dakota's scarce water resources. TransCanada's argument that Tillquist's testimony countered the evidence presented by Dr. Davis is grounded largely on her role as a risk analyst for the project – a role for which her testimony demonstrated she was spectacularly unqualified. As DRA noted in its post-hearing brief, Tillquist lacked elementary knowledge of basic principles of risk analysis such as the role of black swan events in calculating risk [Hearing Transcript, p. 850].[1]

As noted in DRA's post-hearing brief, while Tillquist may be qualified as an environmental toxicologist, her testimony as a risk analyst lacked credibility. As cited by DRA, her risk analysis was based

[1] Referenced in DRA's post-hearing brief, the black swan theory or theory of black swan events is one of the more widely-known principles of risk analysis. It is a metaphor that describes an event that comes as a surprise, has a major effect, and is often inappropriately rationalized after the fact with the benefit of hindsight.

largely on analysis of the PHMSA database [Hearing Transcript, pp. 825-828] which contained limited data. [Hearing Transcript, pp. 830-831]. Her risk analysis excluded risk of spills at tanks and terminals [Hearing Transcript, p. 832], she failed to take geographical variance into account [Hearing Transcript, pp. 861-863], she was unable to factor in different construction and operation standards between pipeline companies reporting in PHMSA database [Hearing Transcript, pp. 834-835], and she failed to factor in increased likelihood of adverse weather events [Hearing Transcript, p. 867]. Topping it all off, Tillquist's admission that her statistical methodology was driven, in part, for public relations purposes was stunning [Hearing Transcript, pp. 844-847], and underscores her lack of credibility as a risk analyst. The ultimate effect for the purposes of these proceedings is that Commission cannot rely on any of Tillquist's testimony as providing substantive evidence as to the probability of a pipeline leak or spill, or to the severity of any such spill. She simply lacks credibility. Furthermore, her testimony failed to address continued (much less any) compliance with the conditions of the 2010 permit – particularly those conditions related to TransCanada's ability to comply with all environmental laws and regulations, which includes the Oil Pollution Act of 1990, 33 U.S.C. §§2701, *et seq*., the Clean Water Act, 33 U.S.C. §1251, *et seq*., and corollary federal regulations and state statutes and regulations.

TransCanada's post-hearing brief next focuses on testimony from DRA's rebuttal witness John Harter, who testified extensively about the risks to his land and water resources posed by the proposed KXL pipeline project that would cross his property. With respect to water resources and the integrity of the City of Colome's water supply, TransCanada attempts to dismiss concerns by citing that it consulted with Colome officials and that a portion of the proposed pipeline was re-routed (see TransCanada post-hearing brief, p. 9). TransCanada conveniently ignored the substance of Mr. Harter's testimony regarding the potential flow of contaminants given that the intake for Colome's public drinking water supply was both downgradient and in close proximity to the proposed pipeline route [Hearing Transcript, pp. 2220, 2223-2224]. Thus, TransCanada failed to present substantial evidence that it could comply with environmental laws and regulations, including the Oil Pollution Act of 1990, 33 U.S.C. §§2701, *et seq*., the Clean Water

Act, 33 U.S.C. §1251, *et seq*., and corollary federal regulations and state statutes and regulations designed to protect the drinking water supplies of communities such as Colome. Combined with Tillquist's faulty risk analysis as to the likelihood and severity of a pipeline breach or spill, it is clear that TransCanada's proposed pipeline puts South Dakota's water resources at risk.

Land

Land reclamation is a key issue for the family farmers and ranchers who largely make up DRA's membership. Land reclamation constitutes a crucial component of the conditions of the 2010 permit issued by the Commission, specifically as to conditions 15, 16, and 26. Through testimony offered by Sue Sibson, DRA presented substantive and credible evidence that TransCanada is either unwilling to or incapable of fulfilling its promise to reclaim productive grazing and farming land damaged by its pipeline projects. TransCanada's reply brief, in a remarkable moment of candor, acknowledges that it has failed to remediate the damage done to the Sibsons' property. Ms. Sibsons' testimony included reference to other similarly situated landowners on whose land Applicant had failed in reclamation efforts. As noted by TransCanada, there were a number of attempts by the company to take action – all of which failed (see TransCanada's post-hearing brief, pp. 14-15). Unfortunately for TransCanada, it must actually reclaim farmland and grazing land, not merely attempt to do so. Given TransCanada's failure to reclaim the Sibsons' property in the six years that have passed since construction of the base Keystone pipeline, the reasonable conclusion is that TransCanada cannot comply with land reclamation conditions. Promises are inadequate. TransCanada is required to present substantive evidence that it can comply. It has failed to do so.

Pipeline Safety

With respect to the issues raised by DRA during the evidentiary hearing in these proceedings, the final arguments made by TransCanada in its post-hearing brief relate to pipeline safety issues. TransCanada elected to focus its energies on attacking DRA's witness, Evan Vokes, the former TransCanada engineer-turned-whistleblower. In lengthy and detailed testimony, Mr. Vokes cited numerous instances where

TransCanada's engineering and safety practices were deficient. These have been largely described in DRA's post-hearing brief. Interestingly, in its brief, TransCanada attempts to refute Mr. Voke's testimony largely through the testimony of Dan King, a TransCanada employee who managed approximately 600 engineers, including Mr. Vokes. Given Mr. Vokes testimony that he was asked "many times" by TransCanada management to ignore regulatory violations [Hearing Transcript, p. 1627], King's testimony should be discounted as being self-serving. King furthermore mirrored the performance of other TransCanada witnesses such as Meera Kothari[2] by attempting to apportion fault for the company's failures on other people [Hearing Transcript, p. 2297]. In short, when combined with Kothari's unwillingness to accept responsibility for compliance with pipeline safety regulations as recounted in DRA's post-hearing brief, King's testimony provides little comfort that TransCanada is capable of complying with applicable safety rules. In light of the questions raised about TransCanada's safety and regulatory compliance record, TransCanada had the burden to demonstrate through substantive evidence that it could continue to meet the conditions of the 2010 permit with respect to safety. It failed to do so.

CONCLUSION

The bottom line for DRA is that TransCanada has the burden of proof. TransCanada must prove, through substantive evidence that it "continues to meet the conditions upon which the permit was issued" as is required by SDCL § 49-41B-27. Instead of meeting its burden, TransCanada engaged in a reckless gambit[3]. Instead of presenting substantive evidence to support its petition for certification, it gambled on the idea that it could simply provide conclusory statements as to continued compliance and then attempt to argue that the burden was on the intervenors to provide substantive evidence to counter its mere assertions. Unfortunately for TransCanada, that is not the law in South Dakota. As the applicant/petitioner, the burden

[2] Kothari, the lead engineer for the Keystone XL pipeline project, was particularly deft at proclaiming that a significant number of issues concerning the design and construction of the proposed pipeline were either not within the "scope" of her duties, or not her responsibility. Her testimony was discussed at length in DRA's post-hearing brief and, while noted, will not be repeated in this reply brief.

[3] A gamble akin to ordering and paying for a significant amount of pipe prior to actually obtaining permits to construct the Keystone XL pipeline.

is squarely on TransCanada to demonstrate that it can continue to comply with each and every condition of the 2010 permit. It has failed to do so. On that basis, the Commission should deny TransCanada's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October 2015, Dakota Rural Action filed the foregoing on the Public Utilities Commission of the State of South Dakota e-filing website. Also on this day, a true and accurate copy of the foregoing was transmitted via email to the following:

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