IN THE SUPREME COURT OF SOUTH DAKOTA

In the Matter of PUC Docket HP 14-001, Order Accepting Certificate of Permit issued in Docket HP 09-001 to Construct the Keystone XL Pipeline (Cheyenne River Sioux Tribe Appeal)

Case No. 28331

APPELLANT'S BRIEF FOR

CHEYENNE RIVER SIOUX

TRIBE

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JURISDICTIONAL STATEMENT

CRST appeals an Order entered by the Circuit Court for the South Dakota Sixth Judicial Circuit, Hughes County, on June 19, 2017 in case number CIV-16-33. The circuit court's order affirmed the SD Public Utilities Commission's January 21, 2016, Order in Matter No. 14-001, Finding Certification Valid and Accepting Certification [of Permit Issued in Docket 09-001 to Construct Keystone XL Pipeline]. CRST filed its Notice of Appeal of the circuit court's order on July 19, 2017.

The circuit court's June 19, 2017 Order is a final order and is therefore reviewable by this Court pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUE ON APPEAL

On appeal, CRST submits the following legal issue:

Whether the PUC correctly interpreted and applied (2006) ARSD 20:10:01:15.01 and SDCL §49-41B-27 in finding and concluding that TransCanada had met its burden of proof in the PUC docket #14-001 Keystone XL certification proceedings, and whether the circuit court erred in affirming the PUC's findings and conclusions in this regard?

The Sixth Judicial Circuit Court did not find clear error in the PUC's application of the burden of proof in this case, and therefore the PUC's decision was affirmed.

Relevant Statutes and Regulations:

SDCL §49-41B-27

(2006) ARSD 20:10:01:15.01

Relevant Cases:

M.G. Oil Co. v City of Rapid City, 2011 S.D. 3, 793 N.W.2d 816

In re Establishing Certain Territorial Elec. Boundaries, 318 N.W.2d 118 (S.D. 1982)

STATEMENT OF THE CASE AND FACTS

On June 29, 2010 the South Dakota Public Utilities Commission ("PUC") issued a permit to TransCanada Keystone Pipeline, LP ("TransCanada") to build the Keystone XL Pipeline through Western South Dakota ("2010 Permit"). The permit was accompanied by fifty separate requirements that TransCanada was obligated to abide by during construction and operation of the pipeline. TransCanada failed to begin construction within four years of the permit being issued. SDCL §49-41B-27 requires permittees, such as TransCanada, to obtain a determination by the PUC that the project for which an original permit was issued continues to "…meet the conditions on which the permit was issued." SDCL §49-41B-27. On September 15, 2014, TransCanada submitted to the PUC a Petition for Order Accepting Certification ("Certification Petition") under SDCL §49-41B-27, which stated that "…the conditions upon which the [PUC] granted the facility permit in Docket HP09-001…continue to be satisfied" and that TransCanada "…certifies that it will meet and comply with all of the applicable permit conditions…" TransCanada's Pet. For Order Accepting Certification at 46-47.

The Cheyenne River Sioux Tribe ("CRST") filed for intervention in PUC docket HP14-001 on October 15, 2014. CRST Intervention at 305-07. On October 30, 2015 TransCanada submitted a Motion to Define the Scope of Discovery. TransCanada's Mot. to Define Disc. at 1000-05. TransCanada asserted in its motion that the scope of the proceedings in Docket HP14-001 were narrowly confined by SDCL §49-41B-27 to the fifty requirements listed in the original permit. Id. CRST opposed TransCanada's Motion to Define the Scope of Discovery and filed its response on December 1, 2014. CRST

Resp. to Mot. to Define Disc. at 1249-61. The PUC subsequently granted TransCanada's Motion to Define the Scope of Discovery on December 17, 2014. PUC Order to Grant Mot. to Define Issues. at 1528-29.

Following discovery the PUC held an evidentiary hearing beginning on July 27, 2015. The hearing lasted nine days and TransCanada submitted prefiled direct testimony for its witnesses. TransCanada Pre-Filed Test. at 27465-917. At the conclusion of the evidentiary hearing CRST, along with other Appellants, made a joint Motion to Deny the Petition for Certification on the grounds that TransCanada failed to submit substantial evidence. HP14-001 Evidentiary Hr'g Tr. at 027338, 027345:7-11. The PUC denied the joint motion to dismiss TransCanada's Petition for Order Accepting Certification. HP14-001 Evidentiary Hr'g Tr. at 027361:16-18; 027367:13-14.

Pursuant to the PUC's instructions CRST submitted its Post-Hearing Brief on October 1, 2015. CRST Post Hr'g Br. at 29538-559. In its Post-Hearing Brief CRST argued that the PUC must reject TransCanada's Certification Petition on the grounds that TransCanada failed to submit substantive evidence upon which it could grant the petition. On January 21, 2016 the PUC granted TransCanada's Certification Petition and published its Final Decision and Order Finding Certification Valid and Accepting Certification ("Order Finding Certification"). PUC Final Decision and Order at 31668-695.

On February 19, 2016 CRST filed a Notice of Appeal to the Sixth Circuit Court of the PUC's Order Finding Certification in PUC Matter Number #14-004. The case was assigned to the Honorable John L. Brown, Presiding Judge of the Sixth Circuit Court. A number of issues were raised by all Appellants, including Appellant CRST, on appeal.

After issues were briefed by the parties, a hearing was held before the Court on March 8, 2017.

Among other issues, CRST argued to the Sixth Circuit that the PUC committed reversible error when it published its Order Finding Certification because TransCanada had failed to meet the requisite burden of proof in its Certification Petition by not putting forth evidence showing that it continued to meet all 50 conditions of the 2010 Permit. Because TransCanada failed to submit any evidence pertaining to 44 of the 50 conditions in the 2010 Permit during the HP14-001 certification proceedings, CRST argued that TransCanada failed to meet the minimum burden of proof required by SDCL §49-41B-27 and (2006) ARSD 20:10:01:15.01. Moreover, the PUC's findings and conclusions in its Order Finding Certification shift the burden of proof from the Petitioner TransCanada to anyone who contested TransCanada's Petition, including Intervenor CRST. In Finding #31, the PUC stated, that "No evidence was presented that Keystone cannot satisfy any of these conditions in the future." Nearly identical findings were made in Paragraphs #32, 33, 34, 37, 42 of the PUC's Final Decision and Order. TransCanada's failure to come forward with proof that it could still meet all 50 conditions of the 2010 Permit, combined with the PUC's shifting of the burden of proof from TransCanada to anyone who contested the Keystone Petition for Certification, was a clearly erroneous interpretation and application of SDCL §49-41B-27 and (2006) ARSD 20:10:01:15.01.

On June 19, 2017, the Sixth Circuit issued an Order and Memorandum Decision affirming the PUC's decision in full.

CRST believes that the PUC and the Sixth Circuit's decisions should be reversed.

ARGUMENT

The PUC's Decision to Grant TransCanada's Petition for Certification, and the Sixth Circuit's Affirmation of such Decision, was Clearly Erroneous and Arbitrary and Capricious because TransCanada Failed to Submit Substantial Evidence During the Evidentiary Hearing and because the PUC Improperly Shifted the Burden of Proof from the Petitioner to the Intervenors During the Proceeding.

A. Under both the "clearly erroneous" and the "arbitrary and capricious" standards of review, the Sixth Circuit erred in finding that TransCanada had met its burden of proof to show that it continued to meet all 50 conditions of the 2010 Permit.

In general, South Dakota courts are obligated to give broad deference to the decisions of administrative agencies. More specifically, courts must "…give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36. Nonetheless, judicial deference to agency findings is not absolute. Courts may reverse or modify agency decisions if "…substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are...*(5) [c]learly erroneous in light of the entire evidence in the record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."* *Id*. (emphasis added).

The standard of review this Court applies when reviewing the PUC's findings is "to decide whether they were clearly erroneous in light of the entire evidence in the record." *Sopko v. C & R Transfer Co.*, 1998 S.D. 8 ¶ 6, 575 N.W.2d 225, 227. After careful review of the entire record, if the court is "definitely and firmly convinced a mistake has been committed," only then will the court reverse. *Id*. Under this standard the question is, based on the entire evidence in the record, is the reviewing court left with

a definite and firm conviction that a mistake has been made? *Halbersma v. Halbersma*, 2009 S.D. 98, 775 N.W.2d 210.[1]

The "arbitrary and capricious" provision of SDCL § 1-26-36(6) employs the substantial evidence standard. *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, ¶ 15, 793 N.W.2d 816 (citing *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, 545 N.W.2d 834 and *Abild v. Gateway 2000, Inc*., 1996 S.D. 50, 547 N.W.2d 556 as authority, the South Dakota Supreme Court upheld and endorsed a circuit court's substantial evidence analysis stating '[t]he use of the "substantial evidence" review was correct to determine whether there was substantial evidence to support the City Council's findings.'). Moreover, the Supreme Court has explicitly applied the substantial evidence standard to all state agency actions, including the Public Utilities Commission. *In re Establishing Certain Territorial Elec. Boundaries*., 318 N.W.2d 118, 121 (S.D. 1982). The practical implication in the instant matter is that, in order to have granted TransCanada's Petition, the PUC must have based such a decision on substantial evidence which proved that each of the fifty requirements contained in the original 2010 Permit continued to be met. If there was not substantial evidence put forth, then it was arbitrary and capricious for the PUC to have granted such permit.

B. TransCanada Failed to Meet its Burden of Proof During the Evidentiary Hearing.

1. Petitioners in Contested Hearings Carry the Initial Burden of Proof.

[1] CRST agrees with the Sixth Circuit's note in its decision clarifying that the "clearly erroneous" standard of review no longer employs the "substantial evidence" terminology that CRST used during its arguments before the Sixth Circuit.

TransCanada carried the initial burden of proof during the HP14-001 proceedings. The PUC's Administrative Rules state that "[e]xcept to the extent a provision is not appropriately applied to an agency proceeding *or is in conflict with…the commission's rules*, the rules of civil procedure as used in the circuit courts of this state shall apply." (2006) ARSD 20:10:01:01.02 (emphasis added). Accordingly, matters of proof during PUC evidentiary hearings, such as the one held in the HP14-001 docket, are governed by PUC's administrative rules unless no such rules exist, in which case the rules of civil procedure for South Dakota circuit courts are to be applied.

With regard to the burden of proof, the PUC's rules expressly and specifically address the issue of which party carries the initial burden of proof during a contested case proceeding. The PUC rules state that "[i]n any contested case proceeding…*petitioner has the burden of proof* as to factual allegations which form the basis of the…application, or petition…" (2006) ARSD 20:10:01:15.01 (emphasis added). The rules are explicitly clear and dispositive in the instant matter. TransCanada was the petitioner in HP14-001. TransCanada submitted a Certification Petition to the PUC pursuant to SDCL §49-41B-27. TransCanada's Certification Petition asked the PUC to make a factual determination that TransCanada can continue to meet the conditions upon which the original 2010 Permit was granted. Intervening parties opposed TransCanada's Certification Petition. As a result the PUC held a contested evidentiary hearing on the matter. During such a proceeding the rules state that TransCanada must carry the burden of proving that the proposed Keystone XL pipeline project continues to meet the conditions upon which the original 2010 Permit was granted.

A careful review of the record reveals that, at least at the start of the evidentiary hearing, the PUC, TransCanada, and the Appellants all agreed that the initial burden of proof was on TransCanada and that TransCanada was required to prove at the evidentiary hearing that it can continue to meet each of the fifty requirements set forth in the original 2010 Permit. For example, Commissioner Nelson stated at the beginning of the hearing that "*[i]t is the Petitioner, TransCanada, that has the burden of proof*. And under SDCL §49-41B-27 that burden of proof is to establish that the proposed facility continues to meet the 50 Conditions set forth in the Commission's Amended Final Decision." HP14-001 Evidentiary Hr'g Tr. at 023968:6-10 (emphasis added). In addition, Mr. Bill Taylor, counsel for Keystone, stated that

> "[w]e 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. 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." HP14-001 Evidentiary Hr'g Tr. at 024025:17-25 and 024026:1-3.

Simply put, South Dakota law, the PUC's rules, PUC Chairman Nelson, and TransCanada itself all assert that TransCanada carried the burden of proof during the HP14-001 proceedings.

2. South Dakota Law Requires the PUC to Base its Decisions on the Submission of Substantial Evidence.

South Dakota law provides some guidance regarding what the term substantial evidence means. SDCL §1-26-1(9) defines the term as "…such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL §1-26-1(9). However, this statutory definition is somewhat vague and

must be read in light of the South Dakota Supreme Court's substantial evidence case law. Generally, there are two types of evidence which the South Dakota Supreme Court has accepted as substantial evidence: physical and testimonial. During the HP14-001 evidentiary hearing no physical evidence was submitted. Instead, TransCanada solely relied on the testimony of the witnesses that it submitted.

With regard to testimonial evidence, such testimony must be specific and substantive in order to be regarded as substantial evidence sufficient to base an administrative decision. See *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122. In the case *In re Establishing Electric Boundaries*, an expert witness testified that he used the criteria described in SDCL § 49-34A-44 when determining his boundaries recommendation to the PUC. *In re Establishing Elec. Boundaries*, 318 N.W.2d at 121. Essentially, the witness' testimony consisted of a summary of each of the criteria listed in SDCL § 49-34A-44 and specific testimony as to how he applied the criteria in his analysis. See *Id*. In making its decision the PUC essentially adopted the witness' recommendation. The appellant challenged the sufficiency of the testimonial evidence, arguing that it did not meet substantial evidence minimum. The Supreme Court disagreed, stating that substantial evidence existed due to the record being "replete" with testimony in which the witness explained how he applied the underlying statute to his analysis and recommendation. *Id*. at 122. That testimony was both specific and substantive. It was not a rote recitation of the standards laid out in the statute.

As illustrated above, testimonial evidence may be sufficient to base an administrative decision in certain circumstances. *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122. However, as stated before the testimony must be *specific* and

substantive. See *Id*. Vague and/or conclusory testimony cannot be used to base a decision because such testimony is not substantial evidence. *M.G. Oil Co*., 2011 S.D. 3, ¶18, 793 N.W.2d at 823. The Court's requirement for testimonial evidence to be substantive and specific is most apparent in the *M.G. Oil Co*. case. In *M.G. Oil. Co*. an applicant applied for a conditional use permit to operate a video lottery casino. *Id*. at ¶ 1, 817. Under the governing statute, the Rapid City Common Council ("City Council") could deny issuing such a permit if it concluded that issuing the permit would cause an undue concentration of similar uses, so as to cause blight, deterioration or substantially diminish or impair property value. *Id.* at ¶ 16, 822. During a series of public meetings several individuals made vague conclusory statements regarding the potential impact of granting the conditional permit. It was alleged by several individuals that an increase in crime would occur and a City Alderman stated that it was his belief that real estate values might depreciate as a consequence of issuing the permit. *Id*. at ¶ 20, 823-24. The City Council voted to deny the permit. The applicant appealed arguing that the City's decision was arbitrary and capricious and an abuse of discretion. *Id*. at ¶ 1, 817.

In *M.G. Oil Co*. the South Dakota Supreme Court applied the substantial evidence analysis to the underlying arbitrary and capricious claim. *Id*. at ¶ 12-15, 821-22. In its analysis the Court looked to see whether the testimony and comments submitted during the City Council meetings were substantial evidence upon which the Council could base its decision to deny the applicant's permit. *Id*. at ¶ 17-20, 822-23. The Court concluded that such testimonial statements were not substantial evidence. *Id*. In reaching its decision the Court reasoned that "[v]ague reservations expressed by [Council] members and nearby landowners are not sufficient to provide factual support for a Board decision."

Id. at ¶ 18, 823 (citing *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992)). The Court went on to assert that the City's failure to link specific and substantive testimonial evidence to the governing statute resulted in nothing more than simply repeating the language of the ordinance as a basis to deny the permit. *Id.* ¶ 20, 823-24. As such, the Court found that no substantial evidence existed to support the City's actions and stated that "[the City Council] renders a decision so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Id*. at 824 (citing *Johnson v. Lennox Sch. Dist. #41-4*, 2002 S.D. 89, 649 N.W.2d 617, 621 n. 2). In other words, testimony which merely recites the language of a governing statute cannot be considered substantial evidence.

The facts present in *M.G. Oil Co*. are startling similar to the facts present in the instant matter. In *M.G. Oil Co*. a series of witnesses made vague conclusory statements which largely parroted the language of the governing statute. In the instant matter TransCanada's witnesses did precisely the same. TransCanada's witnesses merely reference which changes that he or she was responsible for in the Tracking Table of Changes and then makes a statement that he or she is unaware of any reason why TransCanada cannot continue to meet the permit Conditions. See Direct Testimony of Corey Goulet at 027456-027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512.

Such testimony merely recites the language of SDCL §49-41B-27. Reciting the language of SDCL §49-41B-27 followed by a vague statement of being unaware of any reason why Keystone cannot comply in the future is materially no different from the

testimony proffered in *M.G. Oil Co.* TransCanada could have directed its witnesses submit specific and substantive prefiled testimony. It chose not to do so. TransCanada's witnesses could have submitted testimony which did not simply repeat the language of SDCL §49-41B-27 followed by a vague statement of being unaware of any reason TransCanada cannot comply with permit conditions in the future. They did not. In light of *M.G. Oil Co.*, such testimony cannot reasonably be construed as substantial evidence upon which the PUC could base its decision to grant TransCanada's Petition for Order Accepting Certification. It is not the responsibility of the PUC or a court to rescue petitioners who fail to meet their evidentiary burdens. TransCanada's failure to submit specific and substantive testimonial evidence required the PUC to deny TransCanada's Petition. Instead the PUC arbitrarily and capriciously granted the Petition for Order Accepting Certification despite the fact that all of TransCanada's witnesses failed to submit specific and substantive testimony during the HP14-001 evidentiary hearing.

In yet another case the Court issued a similar reproach with regard to vague conclusory statements being passed off as substantial evidence. In that case, an employer asserted that two of its former employees were not entitled to unemployment benefits due to "misconduct." *Abild v Gateway 2000, Inc.,* 1996 S.D. 50, ¶¶2-5, 547 N.W.2d at 557-8. Specifically, the employer accused the employees of intentionally inflating their sales statistics. *Id.* at 558. In *Abild* South Dakota law placed the burden of proving "misconduct" on the employer. *Id.* at 559-60. At the agency level the Department of Labor concluded that the employer had not met its burden of proof and awarded benefits to the two terminated employees. *Id.* at 557. On appeal, the South Dakota Supreme Court upheld the agency's decision. In reaching its decision the Supreme Court pointed out that

the employer had merely alleged that the employees had been "dishonest" and therefore had committed misconduct. *Id*. at 559. The Court characterized this evidence as nothing more than a legal conclusion insufficient to base a conclusion that the Department's decision was clearly erroneous. *Id*.

Obviously the circumstances in *Abild* are slightly different than the circumstances in the instant matter. Namely, in *Abild* the burden was on the employer to show that the employees had not submitted substantial evidence. As such, the Court's statements regarding the employer's conclusory testimony was not analyzed in the same manner as an appellant challenging the sufficiency of evidence on which an agency has based a decision. Nonetheless, the Court's language regarding vague conclusory statements is helpful in the instant matter. More to the point, just as the employer in *Abild* relied solely on a vague conclusory statement, so too did TransCanada during the HP14-001 proceedings. TransCanada failed to meet its evidentiary burden when it chose to rely solely on the vague testimony proffered by its witnesses. This evidentiary failure on the part of TransCanada required the PUC to deny the Petition for Order Accepting Certification, thereby making the PUC's subsequent decision to grant TransCanada's Petition arbitrary and capricious.

3. During the HP14-001 Proceedings TransCanada Failed to Submit Any Substantial Evidence, as Defined by SDCL § 1-26-1(9) and the South Dakota Supreme Court Case Law.

TransCanada failed to submit any substantial evidence whatsoever during the HP14-001 evidentiary hearing. TransCanada's failure to submit substantial evidence required the PUC to dismiss the Certification Petition. *See Therkildsen*, 1996 S.D. 39,

545 N.W.2d 834; *In re Establishing Certain Territorial Elec. Boundaries*, 318 N.W.2d 118.

The original permit hearing in Docket HP09-001 required the PUC to make a factual determination as to whether TransCanada could safely construct and operate the proposed project pursuant to the fifty conditions as they existed in 2010. By comparison, the HP14-001 proceedings required the PUC to make a separate and distinct factual determination; namely, whether TransCanada is able construct and operate the proposed project in 2016 given present-day conditions. TransCanada and the PUC repeatedly stated throughout the HP14-001 proceedings that those proceedings were not the HP09-001 proceedings and that Intervenors could not keep revisiting the HP09-001 proceedings. Using their own reasoning, then, Keystone cannot merely rely on the evidence which it submitted in the HP09-001 proceeding to meet the burden in a separate PUC proceeding. In HP14-001 TransCanada asked the PUC to make a second factual determination: that it can construct and operate the proposed project safely in 2016. It should have been required to put forward and present as much specific and substantive evidence as was necessary to carry its burden of proof.

Admittedly, the burden of proof is low. Any substantial evidence whatsoever submitted by TransCanada during the HP14-001 evidentiary hearing would have sufficed; however, TransCanada chose not to submit any such evidence. None of TransCanada's witnesses provided specific and substantive testimony. Rather, all of the testimony offered by TransCanada's witnesses merely recited the language of SDCL §49-41B-27 followed by brief conclusory remarks stating that the respective witness is unaware of any reasons why the fifty requirements cannot be met. *See* Direct Testimony

of Corey Goulet at 027456-027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512. Indeed, upon examination of the 2,507 pages of transcripts the Court will find that nearly all of it is the Intervenors' cross examinations of TransCanada's witnesses and not substantial evidence testimony.

Such vague and conclusory testimony is precisely the same sort of testimony which was at issue in *M.G. Oil Co*. Because TransCanada offered no other evidence its burden of proof was not met, thereby making the PUC's Final Order granting certification arbitrary and capricious.

C. The PUC Improperly Shifted the Burden of Proof to the Intervenors

Instead of requiring TransCanada to submit substantial evidence, the PUC asserted that no substantial evidence is required and that TransCanada carried its burden of proof when Mr. Corey Goulet signed a certification on September 15, 2014, assuring the PUC that TransCanada can and will continue to meet the conditions upon which the underlying permit was granted. January 5, 2016 PUC Hr'g Tr. at 031660:15-18. The PUC's erroneous belief that the burden of proof should be shifted to the Appellants was repeated in Finding #31 of the Certification Order where the PUC stated, that "No evidence was presented that Keystone cannot satisfy any of these conditions in the future." Nearly identical findings were made in Paragraphs #32, 33, 34, 37, 42 of the Certification Order. These findings turned the burden of proof in (2006) ARSD 20:10:01:15.01 on its head, from requiring the Petitioner to prove that it can satisfy the

conditions, to requiring the Intervenors to prove that the Petitioner *cannot* satisfy the conditions.

The PUC's assertion that Mr. Goulet's certification constituted sufficient proof, coupled with the PUC's upside-down findings regarding the burden of proof, erroneously and capriciously shifted the burden of proof to anyone who chose to contest the proceeding. Such unlawful burden shifting amounts to reversible error on the part of the PUC.

CONCLUSION

Though deference is generally afforded to administrative agencies, such deference is not absolute. In the instant matter no deference was due by the Sixth Circuit with regard to the PUC's decision in HP14-001. Indeed this Court must reverse the PUC's Final Decision and Order Finding Certification Valid and Accepting Certification and remand with instructions to dismiss TransCanada's Petition for Order Accepting Certification.

Respectfully submitted this 20th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the type volume limitation set forth in SDCL § 15-26A-66(b). The text of the brief, excluding the cover page, table of contents, and index to appendix, contains 4,429 words as determined by reliance on Microsoft Word.

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