IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR AN ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

#28331

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable John L. Brown

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S BRIEF

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PRELIMINARY STATEMENT

Appellant Cheyenne River Sioux Tribe will be referred to as "CRST," or "Appellant." Appellee, the South Dakota Public Utilities Commission, will be referred to as the "Commission." Appellee, TransCanada Keystone Pipeline, LP, will be referred to as "Keystone." The 39 persons who were granted intervention in the case and did not withdraw as parties will be referred to collectively as "Intervenors." The Petition for Order Accepting Certification under SDCL §49-41B-27 filed by Keystone on September 15, 2014, will be referred to as the "Petition." The Keystone XL Pipeline project will be referred to as the "Project" or "Keystone XL." The Appendix to this brief will be referred to as "Apx" with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as "AR" followed by the appropriate page number(s). The transcript of the administrative evidentiary hearing held before the Commission on July 27-31, 2015, and continuing August 1 and 3-4, 2015, will be referred to as "TR" followed by the page number(s). Exhibits offered into evidence at the evidentiary hearing will be referred to as "Ex" followed by the exhibit number and page number(s) where appropriate. The Final Decision and Order; Notice of Entry issued by the Commission in Docket HP14-001 on January 21, 2016, will be referred to as the "Decision." The Amended Final Decision and Order; Notice of Entry issued by the Commission in Docket HP09-001on June 29, 2010, will be referred to as the "KXL Decision." The 50 conditions set forth by the Commission in Exhibit A to the KXL Decision will be referred to as the "KXL Conditions" followed by the Condition number(s) when a specific condition or conditions are referenced. References to the United States Department of State's Final Supplemental Environmental Impact Statement

will be referred to as "FSEIS" followed by the appropriate Volume and Chapter number or Appendix letter followed by the section and/or page number where appropriate. The Circuit Court's Order and Memorandum Decision is designated as "Order." The Appendix to this brief includes the following documents: (1) HP09-001 Amended Final Decision and Order; Notice of Entry, Apx A2-A40, (2) HP14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry, Apx A41-A68, (3) SDCL 1-26-36, SDCL 49-41B-24 and SDCL 49-41B-27.

JURISDICTIONAL STATEMENT

The Commission accepts CRST's jurisdictional statement.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Issue A. Whether the Commission improperly applied the burden of proof given the statute at issue in this case and whether sufficient evidence was presented to justify the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Circuit Court affirmed the Commission and found the Commission properly applied the burden of proof given the statute at issue in this case and that sufficient evidence was presented to justify the Commission's Decision.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Cheyenne River Sioux Tribe on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled "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." The Commission granted

intervention to all forty-two persons and organizations that applied for intervention. The Commission approved withdrawal from Docket HP14-001 to three intervenors who requested to withdraw. The Commission heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

"The separation-of-powers doctrine proscribes de novo review of administrative action that is not quasi-judicial." *S.D. Dep't of GF&P v. Troy Twp.*, 2017 S.D. 50, ¶ 51, 900 N.W.2d 840, 858. The administrative act of accepting a company's certification is not quasi-judicial. Therefore, the correctness of the Commission's decision to accept the certification at issue may not be reviewed; this Court may consider only whether the Commission acted arbitrarily. "The [appellants] have the burden of proof." *Id.*

If the Court determines that the administrative act of accepting a company's certification is quasi-judicial, the standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company,* 2015 S.D. 55, ¶ 11, 866

N.W.2d 545, 548. "[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the 'same review of the administrative tribunal's action as did the circuit court.'" [citations omitted] "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. "A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency's decision only if it is 'clearly erroneous in light of the entire evidence in the record.'" *In Re Pooled Advocate Trust,* 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep't of Soc. Serv.,* 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, "[a]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." *Krsnak v. S. Dakota Dep't of Env't & Natural Res.,* 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra,* 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916.

"A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II,* 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.,* 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labo*r, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or decision is inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion,* 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

ISSUE A.

WHETHER THE COMMISSION IMPROPERLY APPLIED THE BURDEN OF PROOF GIVEN THE STATUTE AT ISSUE IN THIS CASE AND WHETHER SUFFICIENT EVIDENCE WAS PRESENTED TO JUSTIFY THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION?

The record in this case simply does not support CRST's contention that the Commission's Decision in this case was arbitrary and capricious. The South Dakota Supreme Court has set forth the standard for concluding that an agency's action was arbitrary and capricious as follows:

> "'An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.'" *Huth v. Beresford Sch. Dist. # 61–2*, 2013 S.D. 39, ¶ 14, 832 N.W.2d 62, 65 (quoting *Hicks v. Gayville–Volin Sch. Dist.*, 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73).

In re Jarman, 2015 S.D. 8, 860 N.W. 2d 1. In its brief, CRST did not point to any record evidence of "personal, selfish, or fraudulent motives," or "false information" on which to base its claim of arbitrary and capricious decision-making. The reason is simple. It doesn't exist.

The record in this case clearly demonstrates the opposite, i.e., that the Commission entertained a very large number of Intervenor procedural and discovery motions over a many month period, which required the Commission to hold a very large

number of motion hearings and required Keystone to produce an enormous quantity of documents. The Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages. The Commission's Decision contains specific cites to the transcript and the administrative record for its Findings of Fact. With respect to evidence which was conflicting at hearing, of which there was virtually none, it is the Commission's responsibility, as the trier of fact, to analyze such evidence and give it the credibility and weight it deserves. The fact that a party disagrees with an administrative decision does not render the decision arbitrary and capricious.

1. Burden of Proof

The Chairman of the Commission, Chris Nelson, who presided over the hearing, stated at the outset of the hearing that the initial burden of proof falls on Keystone. TR 10 (AR 023968). So what is that burden of proof in a case under SDCL 49-41B-27? A central issue in this proceeding boils down to what is meant by the term "certify" in the statute and what effect does the use of that term have on issues such as the certifying party's *prima facie* case and burden of proof. In terms of statutory construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to establish that:

(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

SDCL 49-41B-22. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word "establish," the word "prove," or the word "demonstrate." The language of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute. This proceeding is not, however, a retrial of the permit proceeding conducted in 2009 and 2010 in Docket HP09-001. The Commission's Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

> An unappealed administrative decision becomes final and should be accorded res judicata effect. See *Joelson v. City of Casper, Wyo.*, 676 P.2d 570, 572 (Wy 1984) (if judicial review is granted by statute and no appeal is taken, the decision of an administrative board is final and conclusive); *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (final adjudicatory decision of administrative agency is regarded as res judicata).

Jundt v. Fuller, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. Apx A2-A39.

Instead, the statute at issue, SDCL 49-41B-27 states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "Further, the Legislature has commanded that '[w]ords used [in the South Dakota Codified Laws] are to be understood in their ordinary sense [.]'" SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621.

The word "certify" is a precise and narrow verb. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Black's Law Dictionary (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." *Id.; Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 ("Words and phrases in a statute must be given their plain meaning and effect."). Thus, under the plain meaning of the language of the statute, Keystone's obligation under SDCL 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50 KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. Apx A26-A39. Keystone's obligation to "certify" means that Keystone met its burden under the statute by filing with the Commission a certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Although the Certification standing alone would seem to have met the "must certify" requirement set forth in SDCL 49-41B-27, Keystone also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with

a Quarterly Report of the status of Keystone's activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8 and a tracking table of minor factual changes that had occurred since the Commission's issuance of the KXL Decision attached as Appendices B and C respectively. Apx 27-28, #8. SDCL 49-41B-27 does not even explicitly require the Commission to open a docket proceeding to consider whether to "accept" the certification as compliant with the statute. Due to Keystone's simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission's prior history of handling the receipt of certifications, however, the Commission opened a docket to consider Keystone's Petition and Certification, despite the fact that the ministerial, non-quasi-judicial administrative act of accepting a certification pursuant to statute failed to deprive anyone of "life, liberty, or property". *S.D. Dep't of GF&P* at ¶21.

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must "certify"; Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

> Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17 Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL

49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

2. Even if Keystone's Burden of Proof Required More than its Certification, Sufficient Evidence was Entered into the Record at Hearing and through Judicial Notice to Support the Commission's Decision.

Even if the Court determines that the Certification standing on its own is insufficient to shift the burden of production to Intervenors, however, the Commission believes that sufficient evidence was produced at the hearing and judicially noticed by the Commission to support upholding Keystone's Certification and the Commission's Decision. Keystone did not rest on its Certification standing alone. Along with its Certification, Keystone submitted the Petition and the accompanying three informational appendices at the time of initial filing, fourteen sets of pre-filed direct, rebuttal, and surrebuttal testimony for eight witnesses, nine of which were admitted into evidence as exhibits, and the evidentiary hearing testimony of seven witnesses lasting nearly six days.

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." Substantial evidence "'does not mean a large or considerable amount of evidence ...,' *Pierce*, 487 U.S. at 564-65, 108 S.Ct.at 2549, 101 L.Ed.2d at 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. at 217, 83 L.Ed. at

140 (1938)." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

Corey Goulet, the certifying officer for Keystone, spent approximately eight hours on the witness stand and testified that Keystone continues to meet, or with respect to prospective conditions will be able to meet, and has made a commitment to meet, the 50 KXL Conditions. Apx A26-A39. Since the vast majority of the KXL Conditions are prospective and cannot be performed until the construction and operational phases of the Project, Mr. Goulet testified that Keystone intended to fully comply and "meet" such prospective conditions at the appropriate time. TR 151 (AR 024109); TR 512-514 (AR 024643 – 024645); Ex 2001, #15 (AR 020505). With respect to conditions that don't come into action until the future, there is really no more that the permit holder can produce to demonstrate that its intention is to fully comply with all such permit conditions at the time they come into being as active conditions. As to Intervenors' argument that the Decision should be overturned because Keystone did not produce substantial evidence specific to each prospective condition that it will be able to meet such prospective conditions in the future at the appropriate time for each such condition, such an argument is tantamount to an interpretation that a certification is essentially a retrial of the original permit proceeding. If the Legislature had intended such a construction, it would not have employed in SDCL 49-41B-27 the phrase "certify that it continues to meet the conditions upon which the permit was issued," but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4 is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Apx A26, #4. Conditions 7 through 9 require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Apx 27-28, #7, 8, and 9. Keystone XL appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone's appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed six annual reports and twenty-nine quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

With respect to the remaining conditions that are not prospective, or at least not fully prospective, the record demonstrates that Keystone has taken steps to comply with such conditions to the extent feasible at this stage of the process. Condition 10, Apx A28, #10, requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that, despite the fact that it is likely significantly more than six months before construction will commence, it has already started making some of those contacts and will continue. TR 662 (AR 024793), 827 (AR 025248), 1292 (AR 025771), 2395 (AR 027282), 2405 (AR 027292), 2409 (AR 027296), 2447 (AR 027334), Petition, Appendix B, Condition 10. Apx A28, #10. Intervenors presented no evidence indicating this wasn't the case.

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, #15.

Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees will be done as part of the process of acquiring easements. TR 151 (AR 024109); Petition, Appendix B, Condition 19; Apx A31, #19. There is no evidence that Keystone has failed to comply with this condition or is unable or unwilling to comply with this condition.

Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662 (AR 024793), 670 (AR 024801), 699 (AR 024830), 718 (AR 024849); Apx A35, #34. Intervenors produced no evidence that this process is not ongoing or will not continue to be so, but rather focused on whether Keystone had sought out local knowledge from tribes, particularly the Cheyenne River Sioux Tribe.

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is

ongoing. TR 630 (AR 024761), 637 (AR 024768); Petition, Appendix B, Condition 41; Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41; Apx A36-37, #41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965; Ex 1003. Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978. She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307. Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306-307, 1975-1976 (AR 024304-024305, 026779-

026780). There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. Under these circumstances, the Commission's decision to accept the certification as valid and accurate was not "a choice outside the range of permissible choices." *State v. Stenstrom*, 2017 S.D. 61, ¶17 (quoting *MacKaben v. MacKaben*, 2015 S.D. 86, ¶ 9, 871 N.W.2d 617, 622).

As set forth above, it is the Commission, as the adjudicatory fact finder under SDCL 1-26-36, who is to determine what credibility and weight to give the evidence in this case. It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its Decision, that the Commission took this matter seriously. The

Commission should not be faulted for deciding to handle this non-quasi-judicial administrative act in a quasi-judicial fashion. The Intervenors simply did not provide any evidence indicating that Keystone does not currently comply with Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

As far as CRST's argument relying on *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, 793 N.W. 2d 816, the nature of the matter before the Rapid City Council, the proceedings conducted by the City Council, and the "evidence" or lack thereof heard by the Council and referred to by Council members as the basis for their votes bears no resemblance whatsoever to the proceedings conducted and the evidence heard and considered by the Commission in making its decision in this matter. The statements made by opponents of the conditional use permit in *M.G. Oil* were pure conclusory opinion statements made by persons opposed to the permit with no evidence of expertise or underlying factual justification whatsoever. The 31,000 plus pages of record, nine days of hearing, and 2,507 pages of evidentiary transcript and dozens of exhibits in this case bears no resemblance to the proceedings at issue in *M.G. Oil*. As far as CRST's statement about the Court finding that "no substantive evidence existed to support the decision," the standard set forth in *M.G. Oil* is the usual substantial evidence standard for review, not substantive evidence. As stated above, the enormous quantity of evidence heard by the Commission in this case, much of which was from highly professional expert witnesses and a directly involved high level executive of Keystone, bears no resemblance to what was presented before the Rapid City Commission.

As far as CRST's argument that SDCL 49-41B-27 required the Commission to make a factual determination as to whether Keystone "is able to construct the proposed project in 2016 given present conditions" and that Keystone asked the Commission to make a determination "that it can construct and operate the proposed project safely in 2016" (CRST Circuit Court Brief at 16), this would appear to be an argument that SDCL 49-41B-27 is essentially a statute requiring a permit holder to reapply for and re-prove its original permit proceedings under the elements set forth under SDCL 49-41B-22. SDCL 49-41B-27 contains no language whatsoever that this is what the statute intended. Rather, the statute requires Keystone to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." The only rational construction of this statute under the *in pari materia* principle of statutory construction is that the term "conditions" means the "conditions" to which the Commission made the permit subject under SDCL 49-41B-24 which states as follows:

> Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

> Utilities 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. (emphasis supplied)

As the Court has stated, "[s]tatutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. If the Legislature had intended to place a four year limit on a facility construction permit, they would certainly have known how to place such a simple provision in the law.

This administrative certification proceeding is not an enforcement proceeding. If the Commission believed that Keystone was violating one or more of the KXL Conditions, it could and should open an enforcement proceeding under SDCL 49-41B-33(2). This was a certification filed by Keystone under SDCL 49-41B-27. No enforcement action under SDCL 49-41B-33(2) has been undertaken by the Commission. As far as CRST's argument about changed general conditions surrounding the Project, Keystone's Tracking Table of Changes notes a number of minor changes in factual circumstances and certain minor route refinements to accommodate landowner preferences, to make minor adjustments based on additional information gained during continuing evaluation of the route terrain, river crossings, etc., to add an additional input location in Montana to receive slugs of oil from the Bakken formation in Montana and North Dakota, and to add an additional two horizontal directional drilling river crossings to minimize the effects of such crossings and the need for extensive restoration work. None of these indicate that Keystone is out of compliance with any KXL Conditions or will be unable to comply at such time as the particular condition is ripe for action.

SDCL 49-41B-27 should be read *in pari materia* with SDCL 49-41B-24. *Goetz v. State*, *supra*. As far as the CRST's argument that the Commission is handcuffing itself by its interpretation of SDCL 49-41B-27 as a ministerial, non-quasi-judicial act, the Commission would point out that it has the power to revoke the permit for the Project under SDCL 49-41B-33(2) should circumstances change to the point where the Keystone cannot comply with the KXL Conditions.

CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Decision.

Dated this 28th day of November, 2017

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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