IN THE SUPREME COURT OF SOUTH DAKOTA

In the Matter of PUC Docket HP 14-0001, Order Accepting Certificate of Permit issued in Docket HP 09-001 to Construct the Keystone XL Pipeline (Dakota Rural Action Appeal)

Case No. 28333

APPELLANT'S REPLY BRIEF

FOR DAKOTA RURAL ACTION

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Preliminary Statement

This reply brief from Dakota Rural Action (DRA) is in response to the appellee's briefs filed by both TransCanada Keystone Pipeline, LP (TransCanada) and the South Dakota Public Utilities Commission (PUC). The arguments of both the PUC and TransCanada overlap in any number of material respects, so DRA was of the view that the Court would appreciate one less brief to read given the voluminous record on appeal and the number of parties.

SDCL § 15-26A-62 simply provides that "[t]he appellant may file a brief in reply to the brief of the appellee. The reply brief must be confined to new matter raised in the brief of the appellee and shall not exceed the page limitation set in § 15-26A-66."

Introduction

Because this reply is the final brief to be submitted to the Court in what has been a long and contentious process, DRA believes it is crucial to take a step back and remind ourselves and the Court of the context of these proceedings and how events in South Dakota fit into the larger policy questions concerning this case that are being debated in both the United States and Canada. In short, why are we before this Court?

Whether or not to build the Keystone XL Pipeline (KXL) is a question of international significance. Any decision about KXL made in South Dakota will have effects extending well beyond the Upper Great Plains. Those consequences will be felt not just by South Dakota's farming and ranching families and the indigenous tribes in KXL's path, but by people around the world. The record before the PUC and publicly-available information (of which this Court can take judicial notice) shows that KXL has

created significant flashpoints extending from its origins in the tar sands region of Alberta, Canada, to refineries on the Gulf of Mexico, where TransCanada proposes to ship tar sands crude.

This case is important because it lies at the intersection of a host of public policy and legal questions. At its core, though, this case reverts to the question of whether TransCanada should be allowed to build a high-capacity tar sands crude pipeline – through South Dakota, or for that matter, anywhere else.

The PUC proceedings produced a lot of information about KXL and TransCanada's ability (or lack thereof) to build a safe pipeline. A significant concern lies in the information intervenors were prevented from exploring with the PUC. From the outset, in its December 17, 2014 Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp. 1528-1529), the PUC determined that it did not want to hear any evidence outside of a narrow range of subjects. That decision was fateful, because it deprived South Dakota citizens and the PUC itself of the ability to examine the larger context of KXL, and its risks and harms.

It is undisputed that KXL was being developed for the express purpose of allowing oil companies operating in Western Canada to exploit and expand production of tar sands crude. That is a significant issue, not just for the members of First Nations and other communities living in Alberta's tar sands region who are being poisoned by tar sands extraction, but because the tar sands have been described as one of the single

biggest sources of carbon pollution on the planet.[1] Yet, despite the efforts of intervenors such as the Intertribal Council on Utilities Policy (ICOUP), the PUC declined to consider the impact of tar sands extraction and consumption when making its decision, going so far as to decree that issues impacting South Dakota, such as the role of tar sands exploitation as a factor in accelerating unstable and negative climate effects, were off the table for discussion.

Throughout the PUC proceedings, DRA and other intervenors pointed to TransCanada's base Keystone 1 pipeline as an example of the company's handiwork – premised on the common-sense approach that a company's past performance is the best indicator of its future efforts. Following the PUC's evidentiary hearing in this case, Keystone 1 sprung a major leak near Freeman, South Dakota, that was publicly reported on April 2, 2016 (*see, Joint Memorandum of Law in Support of Joint Motion for Leave to Present Additional Evidence*, p. 1, filed by DRA and other intervenors with the Circuit Court on July 18, 2016). The Freeman spill was followed by another, larger spill near Amherst, South Dakota, on November 16, 2017, consisting of approximately 200,000 gallons of oil that gushed from the Keystone 1 pipeline over a 15-minute period.[2]

Pipelines such as KXL are in a different category, largely due to their high-capacity and the volume of hazardous liquids being shipped through them at high pressure. TransCanada wants to move 830,000 barrels of liquid hydrocarbons per day

[1] L. Poulton, S. Goldenberg, et al., *The Guardian*, "Carbon Bomb: Canada, The tar sands sell-out", May 28, 2015; https://www.theguardian.com/environment/ng-interactive/2015/may/28/carbon-bomb-canada-tar-sands-fort-mckay-town-sold-itself (last accessed, January 20, 2018).
[2] S. Gibbens and C. Welch, *National Geographic*, "Keystone Pipeline Spills 200,000 Gallons of Oil", November 16, 2017; https://news.nationalgeographic.com/2017/11/keystone-oil-spill-south-dakota-spd/ (last visited, January 20, 2018).

through KXL. *U.S. State Dept. Final Supplemental Environmental Impact Statement* (FSEIS), p. ES-6. Landowners, farmers, and ranchers in the pathway of such a pipeline are increasingly at risk considering KXL's capacity. South Dakota's history with Keystone 1 presents a cautionary tale – particularly because Keystone 1's capacity is only 590,000 barrels per day.[3] It is not too much of a stretch to recognize that a bigger pipeline means a bigger mess when it inevitably leaks. The Freeman and Amherst spills illustrate that reality, and the risk posed to land and water resources in the pipeline's path.

TransCanada maintains that it builds safe pipelines and that the risk of spills is minimal. Those claims are disputed by DRA and other intervenors, as highlighted in the PUC's record and in the briefs submitted on appeal. TransCanada also argues that tar sands oil is needed to fulfill our energy requirements. That is also in dispute.

What is not in dispute is that this Court is faced with a disconnect and divergent interests between a large transnational corporation (and the industry of which it is a part) and South Dakota property owners who do not want to put their land and water at risk. These local, geographic-centered disputes are not going away. With every pipeline leak, spill, or failure, landowners are increasingly aware of risks.

The dispute over KXL has in many respects reignited a debate over eminent domain and the extremely liberal approach to takings permitted by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court held that notwithstanding the Fifth Amendment's prohibition on the use of eminent domain power

[3] Web Archive of TransCanada website: https://web.archive.org/web/20130116010600/http://transcanada.com/100.html (last visited, January 21, 2018).

to take property of one private party for sole purpose of transferring it to another private party, "economic development" as a public purpose could justify its use. *Id*, at 484-485. Whether a private oil pipeline serves a public purpose – as opposed to serving the private profit interests of a particular industry – is a question that courts and state legislatures will continue to grapple with. As briefly mentioned by DRA in prior filings, this is a key question being litigated in the State of Nebraska, one which may ultimately preclude construction of KXL.

These local concerns – whether the interests of a large multinational energy companies outweigh the property rights of local landowners – do connect back to the larger policy questions that KXL raises and the direction of our national energy policy, which asks the fundamental question of how our society is going to meet its energy needs. Do we continue to construct large fossil fuel infrastructure projects such as KXL that will enable production of Canadian tar sands crude and associated petrochemicals? Should we instead be focusing our efforts on building infrastructure for cleaner, renewable energy such as wind and solar, and enabling the transition of our economy to one that embraces renewable and sustainable practices? The development of a significant number of wind energy generation facilities in South Dakota provides evidence of this energy transition.[4] While the PUC and TransCanada seek to duck these crucial questions in this case, they nonetheless lie at the core of the dispute. It's the elephant in the room neither wants to acknowledge exists.

[4] South Dakota Public Utilities Commission: South Dakota Wind Energy Projects; https://puc.sd.gov/energy/Wind/project.aspx (last visited, January 20, 2018).

That said, this Court is not hinging its decision on these larger policy issues. Nonetheless, they form the context informing any decision concerning KXL and oil pipelines in general and should be considered. This Court's focus, as argued in the prior briefs, is on a narrower question – whether reversing the PUC's decision is warranted under SDCL § 1-26-36, which provides the framework for review of administrative agency decisions in South Dakota. SDCL § 1-26-36 empowers this Court with authority to reverse the PUC's decision if, among other things, substantial rights of the appellants have been prejudiced because the administrative findings, inferences, conclusions, or decisions are "made upon unlawful procedure," "affected by other error of law," "clearly erroneous in light of the entire evidence in the record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL § 1-26-36.

As simple as these questions may appear, they open a virtual Pandora's box of issues and further questions, all of which are in play before this Court. Those questions revolve around a number of key themes, including the authority and role of the PUC, the meaning of SDCL § 49-41B-27, which required TransCanada to certify to the PUC that it continued to meet the conditions of the Original Permit,[5] the necessary burden of proof required for certification, along with the need for substantial evidence to meet that burden, not to mention the fact-driven question of whether TransCanada even presented substantial evidence warranting the PUC decision. We also have questions as to whether the process before the PUC itself was fair and afforded intervenors such as DRA

[5] "Original Permit" references the PUC's Amended Final Decision and Order of June 29, 2010 in Docket HP09-001.

procedural due process considering the severe limitations on proceedings and testimony imposed by the PUC. Finally, the tribal intervenors in this case have posed substantial questions concerning the rights of tribes and the indigenous peoples of the Upper Great Plains in challenging the decisions of state and local governments that infringe upon their interests.[6]

All these questions are significant – not just in the context of whether the PUC's decision in this case should be reversed, but for the citizens of South Dakota in how they interact with state administrative agencies that are charged with regulating the conduct of industry and protecting South Dakota's land and water resources.

Argument

1. Standard of Review

If there is one point DRA and TransCanada can agree upon, it is that this Court's examination of the PUC's interpretation of SDCL § 49-41B-27 is subject to *de novo* review. *Knapp v. Hamm & Phillips Service Co., Inc.*, 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788.

That level of review also extends to examination of the facts upon which the PUC based its decision. This Court previously explained that in reviewing a circuit court's decision under SDCL § 1–26–37, the Court was reviewing the underlying agency's findings.

> "Even if we apply SDCL 1–26–37 as amended [requiring review of the circuit court's decision for clear error], ... we [would then] decide whether the circuit court was clearly erroneous in determining that the agency was clearly erroneous.

[6] DRA joins and supports the tribal intervenors – the Cheyenne River Sioux Tribe and the Yankton Sioux Tribe – in their arguments in this case.

> This reverts us to the agency record.... It follows that, in the final analysis, we still review [the agency record] essentially as did the circuit court."

State, Div. of Human Rights ex rel. Miller v. Miller, 349 N.W.2d 42, 46 (S.D. 1984).

This Court further noted that "[t]herefore, in 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." *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶13, *citing*, *Miller*, supra, at 46. Further, this Court performs that review of the agency's findings "unaided by any presumption that the circuit court's decision was correct." *Id*.

The upshot of this point is that the Court is undertaking a fresh look at the evidence submitted to the PUC, as well as how the PUC interpreted SDCL § 49-41B-27 in light of what TransCanada was required to demonstrate in order to "certify" compliance with the Original Permit conditions. As DRA argued in its brief and throughout the proceedings below, the PUC got it wrong on multiple counts, and its decision should be reversed.

2. Scope and Conduct of PUC Proceedings; Agency Role; Due Process Rights under South Dakota Administrative Procedures Act Violated by PUC

a. Case of First Impression; Applicability of South Dakota Administrative Procedures Act.

What makes this case unique and fascinating is that it presents any number of issues of first impression that will have significance beyond the decision of whether TransCanada should be permitted to build KXL. Although we will briefly touch on issues raised concerning the appropriate burden of proof and whether TransCanada presented

sufficient evidence to meet it below, those questions are by necessity tied to a review of the PUC's role and the rights of parties appearing in contested cases before that agency.

What makes this case one of first impression is that, among other things, this Court has never examined whether contested proceedings before the PUC under §49-41B-27 require the PUC to afford parties due process rights afforded under SDCL §1-26-18. The statute provides that:

> "Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. … A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf."

SDCL §1-26-18. This point is critical because the Court has previously noted that due process rights apply to contested cases before administrative agencies. *Application of Union Carbide Corp*., 308 N.W.2d 753, 758 (S.D. 1981). This is clearly a "contested case". The import of *Union Carbide* is that once an agency matter becomes a "contested case", SDCL §1-26-18 applies. *Id*.

A key question before this Court is to what extent DRA and other intervenors were afforded due process rights by the PUC in a contested hearing that involved interpretation of §49-41B-27 as to certification of continued compliance with permit conditions for a hydrocarbon pipeline. The application of SDCL §1-26-18 of the South Dakota Administrative Procedures Act (SDAPA) to SDCL §49-41B-27 gives rise to a host of issues.

For example, when on December 17, 2014, the PUC issued its Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp.

1528-1529), which limited the extent of discovery and issues that the PUC was willing to hear, it created a *de facto* limitation on DRA's and other intervenors' due process rights under the SDAPA. Likewise, from a procedural standpoint, the PUC's limitation on participation and presentation of evidence at its hearing on the part of lay intervenors also constituted an unlawful and unwarranted limitation on their due process rights as afforded under the SDAPA.

b. Applicability of the Public Trust Doctrine

DRA, as well as the PUC and TransCanada, have briefed issues raised concerning the applicability of the public trust doctrine in South Dakota. DRA has urged the Court to apply the public trust doctrine in a way that holds the PUC accountable as a fiduciary for South Dakota's land and water resources. DRA has previously cited this Court's ruling that "as matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine …" *Parks v. Cooper*, 2004 S.D. 27 ¶ 46. In effect, the PUC's and TransCanada's response to this argument is that existing case law provides no precedent for application of the public trust doctrine.

These responses miss the point. This Court has the power and authority to interpret law, including matters of first impression. DRA suggests that, to fulfill the Court's holding in *Parks,* and for that ruling to have meaning, state regulatory agencies such as the PUC that are in a position to make decisions affecting South Dakota's water resources are, in effect, trustees for the public and should be held to a higher standard of review with respect to such decisions.

What TransCanada and the PUC fail to recognize is that while, yes, there are no decisions on point, this is a matter of first impression and DRA is asking the Court to

make a logical extension of its ruling in *Parks* by holding the PUC to a higher standard of decision making. This ties directly to the points made by DRA throughout these proceedings concerning both the burden of proof placed on TransCanada and the need for substantial evidence. While this Court has not considered the applicability of the public trust doctrine to state administrative agencies, the door is clearly open to do so as when this Court commented on the *Parks* decision by noting that it "exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution." *State v. Schwartz*, 2004 S.D. 123 ¶ 52.

DRA understands that it is asking the Court to break new ground and apply the existing public trust doctrine so that it has meaning with respect to the administrative agencies whose decisions impact the state's water and land resources. TransCanada and the PUC have not provided any rationale for why the Court is not able to do so – other than state that it has not done so before. That is insufficient. The Court can make a significant impact by providing a check on state regulatory agencies by holding them to a higher, fiduciary standard. It should do so.

c. Transparency of State Regulatory Agencies; Denial of Key Discovery into Communications between the PUC and TransCanada Thwarts Effective Citizen Oversight

Another issue argued by the parties with respect to the conduct of the PUC resulted from the agency's ruling on a discovery issue where DRA sought to obtain communications between PUC staff and TransCanada. As described in DRA's brief, the PUC denied DRA's discovery request on the basis that communications between TransCanada and PUC staff constituted privileged attorney communications. The PUC

and TransCanada have taken the position that DRA (or for that matter, the general public) is not entitled to examine communications between them because the PUC staff is a separate party to these proceedings from the PUC itself. Apparently, the PUC believes that communications between the staff of a state regulatory agency and the companies it is charged with regulating should not see the light of day because of the existence of a "Chinese wall" between PUC staff and commissioners.

This response completely misses the mark and misconstrues the status of a key state regulatory agency. The fact that the PUC staff participates as a party to the proceedings does not matter. They are still the staff of a state regulatory agency. Their activities and salaries are paid for with public funds. They are charged with regulatory oversight of various industrial sectors, including hydrocarbon pipelines. No attorney-client privilege exists between a regulatory agency and the companies it regulates. The ability of the public to obtain communications between regulators and the regulated is critical to the functioning of an open and democratic system. The PUC's ruling was off the mark. In its brief, DRA explained its concerns about regulatory capture of the PUC as a state agency by the industry it is charged with regulating.

The PUC's misguided ruling frankly heightens those concerns as we are now left wondering what type of interactions between the PUC and TransCanada require a shroud of secrecy. The Court should not let this stand, should reverse the PUC's decision, and remand the case with instructions to the PUC to reveal the contents of its staff's communications with TransCanada. Otherwise, South Dakota's citizens will be left with the question – what do they have to hide?

3. Burden of Proof is on TransCanada

The parties have extensively briefed how the PUC impermissibly attempted to shift the burden of proof to the intervenors in this case. Despite the law being clear that the applicant before an administrative agency bears the burden of proving its assertions, the PUC nonetheless took the position that when TransCanada made a blank statement asserting compliance with the conditions of the Original Permit, it was then up to the intervenors, including DRA, to disprove the company's assertion.

In contested administrative cases, the burden of proof consists of a preponderance of the evidence. *In re Black Hills Power, Inc.*, 2016 S.D. 92, ¶ 17, *citing, Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 10. In its brief, DRA noted that the Original Permit contained 50 basic conditions which, combined with various sub-conditions, included 107 separate conditions. In the hearing before the PUC, TransCanada only presented evidence concerning compliance with six of those conditions, and PUC staff presented evidence relating to only four conditions. That is not a preponderance of evidence, and neither the PUC nor TransCanada have shown a statutory or regulatory basis that would permit TransCanada to sidestep its obligations.

Again, this situation presents another issue of first impression for this Court. Given the basic rule concerning the burden of proof being on an applicant, can the PUC simply shift that burden onto intervenors to disprove an applicant's bald assertion that it "certifies" compliance with permit conditions? DRA suggests not, and that the position taken by the PUC and TransCanada, in effect, constitutes an abdication of the PUC's role as an effective oversight agency.

4. TransCanada Failed to Present Evidence Sufficient to Demonstrate Compliance with Permit Conditions

Again, the question of whether TransCanada presented sufficient evidence to warrant the PUC's determination that it effectively certified continued compliance with the Original Permit conditions has been argued extensively. The parties' briefs included a significant discussion of the fact that between both TransCanada and the PUC staff, they only presented evidence concerning 10 of the total of 107 separate conditions/sub-conditions in the Original Permit. This reality sets up a core question this Court will need to determine – mainly, what constitutes substantial, substantive evidence that TransCanada is in compliance with the conditions of the Original Permit in order to justify certification under §49-41B-27?

TransCanada and the PUC continue to argue in their briefs that, in effect, TransCanada's simple signature on piece of paper stating it continues to comply with the Original Permit conditions suffices. This position flies in the face of the requirement that an applicant must meet its burden of proof with a preponderance of evidence. *In re Black Hills Power, Inc., supra,* at ¶ 17. In that regard, TransCanada and the PUC are further asking this Court to hold that somehow, a promise to comply with conditions at some point in the future constitutes a preponderance of or substantial evidence of compliance.

DRA suggests, contrary to the position taken by TransCanada and the PUC, that logic and a reasonable interpretation of SDCL § 49-41B-22 and § 49-41B-27, which creates an opportunity (presuming intervention) for a hearing and, hence, a "contested case" under the SDAPA, would reasonably require actual evidence that in the more than four years since the Original Permit was issued to TransCanada, as applicant, it must present substantive evidence showing actual compliance with all conditions of the Original Permit.

Furthermore, because the Original Permit required compliance with all federal and state laws and regulations, TransCanada had the burden of presenting such evidence of compliance. TransCanada could have presented working drafts of changes in design, construction plans, and improvements in leak detection to sufficiently protect the safety of the environment from leaks and spills of toxic tar sands crude, as well as compliance with the PHMSA special conditions noted in DRA's brief. TransCanada chose not to do this, and should not be rewarded by this Court for that failure.

The Original Permit, as TransCanada and the PUC argue, contained a number of prospective conditions. Yet the language of SDCL § 49-41B-27 requires certification of compliance when "construction" "commences" more than four years after permit issuance. TransCanada was not and is not ready to commence construction. It admittedly has not even completed its design and construction drawings, leak detection, and spill response plans. While a limited number of prospective conditions may have been warranted on issuance of the Original Permit, certification four years later under SDCL § 49-41B-27 should require a showing that those conditions were met. Instead, the PUC granted certification on a hope and promise.

DRA notes that SDCL §49-41B-22 requires that, to receive a permit, a hazardous transportation facility applicant must convince the PUC that the proposed facility will: "(1) … comply with all applicable laws and rules; (2) ... 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) ... not substantially impair the health, safety or welfare of the inhabitants; and (4) ... not unduly interfere with the orderly development of the region ...". Yet, SDCL § 49-41B-27 authorizes the PUC to certify a permit when the

applicant certifies its proposed facility "continues" to meet the conditions upon which the permit was issued. In short, how is it reasonable to interpret § 49-41B-27 as simply requiring another promise it "will" comply, without demonstrating actual compliance? DRA urges the Court to reject TransCanada's and the PUC's interpretation of § 49-41B-27 as merely permitting certification of compliance based upon a future promise.

5. PUC Procedural Rulings

There is no need to revisit the PUC's defective procedural rulings concerning excluded witnesses, evidence, and exhibits in this reply – they have been fully briefed. However, DRA does wish to highlight what is perhaps the key procedural ruling requiring reversal of the PUC decision – the December 17, 2014 Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp. 1528-1529). The limitations placed on the scope of the proceedings constitute a fatal denial of the intervenors' due process rights afforded by the SDAPA as discussed above.

Conclusion

DRA trusts this Court will carefully weigh all the issues raised on appeal of the PUC's decision and, upon evaluating factors such as the role to be played by the PUC in protecting South Dakota's land and water, and the paucity of evidence presented by TransCanada to support certification under SDCL § 49-41B-27, conclude that TransCanada has not met its burden of certifying continued compliance with the conditions of the Original Permit. The PUC's decision in this case, as well as the Circuit Court's affirmation of that decision, should be reversed. There are ample grounds for doing so, and DRA urges the Court to reverse the PUC's decision.

Respectfully submitted this 22nd day of January, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing reply 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, table of authorities, and this signature page, contains 4,568 words as determined by reliance on Microsoft Word.

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