
**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF
TRANSCANADA KEYSTONE PIPELINE,
LP FOR ORDER ACCEPTING
CERTIFICATION OF PERMIT ISSUED IN
DOCKET HP09-001 TO CONSTRUCT THE
KEYSTONE XL PIPELINE

DOCKET HP 14-001

**CHEYENNE RIVER SIOUX TRIBE'S
POST-HEARING BRIEF**

I. FACTUAL BACKGROUND

The South Dakota Public Utilities Commission (“Commission”) issued a pipeline permit to TransCanada Keystone XL Pipeline (“Keystone”) on June 29, 2010. Because construction on the project has not commenced within four years since issuance of the original permit, Keystone must prove to the Commission that it can and will continue to meet the fifty Conditions upon which the original permit was issued. Pursuant to S.D. Codified Laws § 49-41B-28, Keystone submitted a Petition for Certification on September 15, 2014. The Commission set an October 15, 2014 deadline for opposing parties to intervene in the Certification matter.

Direct prefiled testimony was filed by Keystone, South Dakota Public Utilities Commission Staff (“Staff”), and various Intervenors on April 2, 2015 and rebuttal prefiled testimony was submitted on April 27, 2015. On July 7, 2015, Keystone, Staff, and Intervenors submitted witness and evidence lists to the Commission. A nine day contested hearing was held beginning July 27, 2015 and concluding August 5, 2015. During the contested hearing each of Keystone’s witnesses adopted his or her prefiled testimony and were subsequently surrendered for cross-examination. After all testimony and evidence had been offered, Intervenors moved for immediate dismissal of Keystones Petition. Hearing Tr. 2451:19-24 August 5, 2015. Intervenors argued that Keystone failed to submit substantial evidence sufficient to prove that it can continue to meet the Conditions upon which the original permit was issued. *Id.* at 2451:25-2452:1-3. The

Commission denied Intervenor's motion at the time of the hearing and asked that the issue be examined in Parties' closing briefs. *Id.* at 2474:20-25-2475:1-9.

II. ARGUMENT

The Commission must consider three questions in the instant matter: (1) which party carries the burden of proof, (2) what is the burden of proof, and (3) has the burden of proof been met? With regard to the first question the law unequivocally places the burden of proof on the petitioner. The law as it relates to the second question is also clearly defined. The South Dakota Supreme Court has, on numerous occasions, declared that all agency actions must meet its "substantive evidence" standard of review. Meaning this Commission must base its decision on at least *some* substantive evidence. Finally, because Keystone failed to submit any substantive evidence in the instant matter it has failed to meet the minimum burden of proof. As such, the Commission must deny Keystone's Petition for Certification.

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

Keystone carries the initial burden of proof in the instant matter. The Commission'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." S.D. Admin. R. 20:10:01:01.02 (2006) (emphasis added). Accordingly, matters of proof are governed by Commission'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 Commission's rules *expressly* and *specifically* address the issue of which party carries the initial burden of proof during a contested case proceeding. Specifically, the Commission's 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..." S.D. Admin. R. 20:10:01:15.01 (2006) (emphasis added).

Frankly, the PUC's rules are explicitly clear and dispositive in the instant matter. Keystone is the petitioner. Keystone has submitted a Petition for Certification to the Commission pursuant to S.D. Codified Laws § 49-41B-27. The Petition asks the Commission to make a factual determination that Keystone can continue to meet the Conditions upon which the original permit was granted. Intervening parties oppose such a determination. The Commission held a contested hearing on the matter. During such a proceeding the rules state that Keystone must carry the burden of proving that the proposed project continues to meet the Conditions upon which the original permit was granted.

Indeed, after a thorough review of the record it is readily apparent that Keystone, the Commission, and the Intervenors agree that the initial burden of proof lies with Keystone and that Keystone must prove that it can continue to meet each of the fifty Conditions set forth in the original 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.”” Hearing Tr.10:6-7, July 27, 2015 (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.” Hearing Tr. 67:17-68:3, July 27, 2015.

Simply put, it appears from the record that the question regarding which party carries the initial burden of proof in this matter is uncontested. The Commission’s rules, Commissioner Nelson, and Keystone itself all assert that Keystone carries the burden of proof.

It is important to note here that the initial burden of proof cannot be construed as being satisfied by Keystone merely signing a statement that it can continue to meet the Conditions

upon which the permit was met. That is no burden of proof at all. Instead, such action amounts to nothing more than the Commission accepting a vague and conclusory statement as “proof” that Keystone can in fact continue to meet each of the fifty Conditions contained in the original permit. In other words, it would amount to an impermissible shifting of the initial burden of proof from the Petitioner to Intervenors. Such burden shifting would violate the plain language of S.D. Admin. R. 20:10:01:15.01 (2006).

2. *The Decision to Recertify Must Be Based on the Submission of ‘Substantial Evidence.’*

To survive judicial review any decision by the Commission to grant Keystone’s Petition for Certification must be based on “substantial evidence.” In general, the South Dakota courts, including the South Dakota Supreme Court, are obligated to give broad deference to the decisions of administrative agencies. More specifically, the courts must “...give great weight to the findings made and inferences drawn by an agency on questions of fact.” S.D. Codified Laws § 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).

When deciding whether an agency decision is “clearly erroneous” a court will look to see whether “substantive evidence” exists in the record upon which an agency based its decision. *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (S.D. 1996)(citing *In re Establishing Certain Territorial Elec. Boundaries.*, 318 N.W.2d 118 (S.D. 1982)); *Helms v. Lynn’s, Inc.*, 542 N.W.2d 764 (S.D. 1996)(stating ‘[t]he issue we must determine is whether the record contains substantial evidence to support the agency’s determination.’); *Abilb v. Gateway 2000, Inc.*, 547 N.W.2d 556

(S.D. 1996)(stating ‘[t]he question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.’); *see also Westergren v. Baptist Hosp. of Winner*, 549 N.W.2d 390 (S.D. 1996); *Zoss v. United Bldg. Centers, Inc.*, 566 N.W.2d 840 (S.D. 1997); *Jackson v. Lee’s Travelers Lodge, Inc.*, 563 N.W.2d 858 (S.D. 1997); *Rohleck v. J & L Rainbow, Inc.*, 553 N.W.2d 531 (S.D. 1996)(each case cites and applies the substantive evidence test described in *Therkildsen, Helms, and Abilb*).

Also, before moving too far afield, it should also be noted that the “arbitrary and capricious” provision of S.D. Codified Laws § 1-26-36(6) employs an identical substantive evidence standard. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011) (citing *Therkildsen* and *Abilb* 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.’). In other words, the South Dakota Supreme Court’s well established substantive evidence analysis must be applied in both a clearly erroneous argument and an arbitrary and capricious argument. Moreover, the Supreme Court has explicitly applied the substantive evidence standard to all state agency actions, including the Public Utilities Commission. *In re Establishing Elec. Boundaries*, 318 N.W.2d at 121. The practical implication in the instant matter is that if the Commission were to grant Keystone’s Petition for Certification, it must do so based on substantial evidence which proves that each of the fifty Conditions contained in the original permit can continue to be met.

South Dakota law provides some guidance regarding what the term substantive evidence means. Indeed, S.D. Codified Laws § 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.” S.D. Codified Laws § 1-26-1(9). However, this statutory definition is quite vague and must be read in light of the South Dakota Supreme Court’s previous substantive evidence

case law. Generally, there are two types of substantive evidence which the South Dakota Supreme Court has accepted as substantive evidence: physical and testimonial. For instance, the South Dakota Supreme Court has held that a blood toxicity test is sufficient evidence for an administrative agency to deny workers compensation benefits. *Therkildsen*, 545 N.W.2d at 837-38. Therefore, physical evidence is likely sufficient evidence to support an agency decision. However, in the instant matter no physical evidence was submitted by Keystone, Staff, or the Intervenors. Instead, Keystone solely relies on the testimony of its witnesses during the July 27 through August 5, 2015 Certification Hearing. As such, the Commission need only consider the South Dakota Supreme Court's testimonial substantive evidence case law.

The Commission may rely solely on testimonial evidence to base its decision if the testimony is specific and substantive. *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 S.D. Codified Laws § 49-34A-44 when determining his boundaries recommendation to the Commission. *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 S.D. Codified Laws § 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 substantive evidence minimum. The Supreme Court disagreed, stating that substantive evidence existed due to the record being "...replete..." with specific and substantive testimony in which the witness explained how he applied the underlying statute to his analysis and recommendation. *Id.* at 122.

It is worth noting here that at the time this case was heard by the Court the language in S.D. Codified Laws § 1-26-36(5) was slightly different than it is today. Currently § 1-26-36(5) provides that "[t]he court may reverse or modify the decision if substantial rights of the appellant

have been prejudiced because the administrative findings, inferences, conclusions, or decisions are...**(5) [c]learly erroneous in light of the entire evidence in the record.**” S.D. Codified Laws § 1-26-36(5). (emphasis added). At the time the South Dakota Supreme Court considered *In re Electric Boundaries*, S.D. Codified Laws § 1-26-36(5) stated that “[t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are...**(5) [u]nsupported by substantial evidence on the whole record.**” *In re Establishing Elec. Boundaries*, 318 N.W.2d at 121 (emphasis added). Nonetheless, the Court’s subsequent case law regarding the “clearly erroneous” language contained in the current version of S.D. Codified Laws § 1-26-36(5) explicitly adopts the substantive evidence standard used in *In Re Establishing Elec. Boundaries*, making the court’s substantive evidence analysis in that case applicable in the instant matter.

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 substantive evidence. *M.G. Oil Co.*, 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 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 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 821-

22. 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 820.

As mentioned earlier, in *M.G. Oil Co.* the South Dakota Supreme Court applied an identical substantive evidence analysis to the underlying arbitrary and capricious claim as it does in clearly erroneous claims. *Id.* at 821-22. Specifically, 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.* 822-23. The Court concluded that such testimonial statements were not substantive 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 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.* 823-24. As such, the Court found that no substantive 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*, 649 N.W.2d 617, 621 n. 2). In other words, testimony which merely regurgitates the language of a governing statute cannot be considered substantive evidence.

The facts present in *M.G. Oil Co.* are startlingly 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 Keystone's witnesses did precisely the same. Keystone's witnesses merely reference the 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 Keystone cannot continue to meet the permit Conditions. *See*

Prefiled Testimony of Corey Goulet, 4:15; Prefiled Testimony of Heidi Tillquist, 3:6; Prefiled Testimony of Jon Schmidt, 5:12; Prefiled Testimony of Meera Kothari, 4:13. Such testimony merely recites the language of S.D. Codified Laws § 49-41B-27. Reciting the language of S.D. Codified Laws § 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.*

Keystone could have directed its witnesses submit specific and substantive prefiled testimony. It chose not to do so. Keystone's witnesses could have submitted testimony which did not simply repeat the language of S.D. Codified Laws § 49-41B-27 followed by a vague statement of being unaware of any reason Keystone cannot comply with Conditions in the future. They did not. In light of *M.G. Oil Co.*, such testimony cannot reasonably be construed as substantive evidence upon which to base a decision to grant Keystone's Petition. It is not the responsibility of the Commission to rescue petitioners who fail to meet their evidentiary burdens. The Commission must deny Keystone's Petition for Certification because Keystone failed to offer the Commission any substantive testimonial evidence to base a decision to grant such a petition.

In yet another case the court issued a similar reproach with regard to vague conclusory statements being passed off as substantive evidence. In that case, an employer asserted that two of its former employees were not entitled to unemployment benefits due to "misconduct." *Abilb*, 547 N.W.2d at 557. Specifically, the employer accused the employees of intentionally inflating their sales statistics. *Id.* at 558. In *Abilb* 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 *Abilb* are slightly different than the circumstances in the instant matter. Namely, in *Abilb* 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. Rather, the Court’s language with regard to the employer’s conclusory statement is dicta since the issue wasn’t the sufficiency of employer’s evidence, but rather the sufficiency of the employees’ evidence. In other words, the Court held that the employees had submitted substantial evidence to base the Department of Labor’s 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 *Abilb* relied solely on a vague conclusory statement, so too does Keystone. The vague and conclusory statements made by Keystone’s witnesses cannot be rehabilitated by the Commission in such a way that allows them to be considered substantive evidence. Keystone failed to meet its evidentiary burden when it chose to rely solely on the vague testimony proffered by its witnesses. Keystone’s failure has essentially handcuffed the Commission into denying the Petition at issue in the instant matter.

3. *Keystone Failed to Submit Any Substantial Evidence, as Defined by S.D. Codified Laws § 1-26-1(9) and the South Dakota Supreme Court’s Case Law.*

Keystone failed to submit any substantial evidence whatsoever during the July 27 through August 5, 2015 hearing. Failure to submit substantive evidence during a hearing held pursuant to S.D. Codified Laws § 49-41B-27 must result in an immediate dismissal of the underlying

Petition for Certification. *See Therkildsen*, 545 N.W.2d 834; *In re Establishing Certain Territorial Elec. Boundaries.*, 318 N.W.2d 118; *Helms*, 542 N.W.2d 764.

None of Keystone's witnesses provided specific and substantive testimony. Rather, all of the testimony offered by Keystone's witnesses merely recites the language contained in S.D. Codified Laws § 49-41B-27 followed by conclusory remarks stating that the respective witness is unaware of any reasons why the fifty Conditions cannot be met. Prefiled Testimony of Corey Goulet, 4:15; Prefiled Testimony of Heidi Tillquist, 3:6; Prefiled Testimony of Jon Schmidt, 5:12; Prefiled Testimony of Meera Kothari, 4:13. Such vague and conclusory testimony is precisely the same sort of testimony which was at issue in *M.G. Oil Co.* Because Keystone offered no other evidence Keystone has failed to meet the evidentiary minimum of its burden of proof. As such, the Commission has no other choice but to deny Keystone's Petition for Certification.

It is critically important to note here that the July 27 through August 5, 2015 hearing pertained to a separate and distinct issue from the original permit hearing. The original permit hearing required the Commission to make a factual determination as to whether Keystone could safely construct the proposed project pursuant to the fifty Conditions in 2010. The Certification hearing requires a second and slightly different factual determination; namely, can Keystone construct the proposed project safely and in compliance with the fifty Conditions in 2015. As such, Keystone cannot merely rely on the evidence which it submitted in the earlier permit hearing. Keystone is asking the Commission to make a separate and distinct factual determination. Namely, that Keystone can construct the pipeline in 2015 in compliance with the fifty Conditions. As such, Keystone was required to submit substantial evidence proving that it can comply with each of the fifty permit Conditions in 2015 and beyond.

The burden of proof is low. Any substantial evidence whatsoever submitted by Keystone during the July 27 through August 5, 2015 Hearing would have sufficed; however, Keystone

chose not to submit any such evidence. Instead, it merely relied on a series of witnesses making vague conclusory statements which largely parrot the language of S.D. Codified Laws § 49-41B-27. As such, the Commission has no choice but to deny Keystone's Petition on the grounds that no substantial evidence exists in the HP14-001 record upon which the Commission can base a decision to grant Keystone's Petition. In other words, Keystone failed to submit substantial evidence to base a factual determination that Keystone is capable of complying with the fifty Conditions in 2015 and beyond. Keystone had the opportunity to make its case and it failed to do so. The Commission cannot rescue Keystone from its fatal error with interpretative gymnastics, as Staff asks the Commission to do. Although creative, Staff's argument inexplicably ignores S.D. Codified Laws § 1-26-36 and the entirety of the South Dakota Supreme Court's very well established substantial evidence standard of review. Simply put, adopting the PUC Staff's argument, along with its total oversight of the judiciary's standard of review of state agency decisions, would almost certainly result in an overturned Commission ruling in the instant matter.

III. CONCLUSION

The Commission's administrative rules clearly and unequivocally place the initial burden of proof on Keystone. To survive judicial review the Commission must base a decision to grant Keystone's Petition for Certification on substantive evidence. Testimonial evidence may be sufficient to satisfy the Court's substantive evidence analysis, but in order to do so it must be specific and substantive. Instead of offering specific and substantive witness testimony Keystone's witnesses chose to proffer a recitation of the S.D. Codified Laws § 49-41B-27 followed by vague conclusory statements regarding Keystone's ability to comply with permit Conditions. In light of S.D. Codified Laws § 1-26-1(9) and the South Dakota Supreme Court's substantive evidence standard of review, such testimony cannot reasonably be construed as substantive evidence upon which the Commission can base a decision to grant Keystone's

Petition. Accordingly, Keystone's failure to meet its evidentiary burden leaves the Commission with no other option but to deny the Petition for Certification.

Respectfully Submitted,

/S/

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