
**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

**YANKTON SIOUX TRIBE'S
POST-HEARING BRIEF**

HP14-001

COMES NOW Yankton Sioux Tribe, by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits the following as its post-hearing brief pursuant to the Public Utilities Commission's order of August 12, 2015.

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Keystone" or "Applicant") filed an application with the Public Utilities Commission ("Commission") in Docket HP-09-001 requesting a permit for a project to construct a pipeline through South Dakota to transport tar sands. Pursuant to South Dakota law, Keystone was required to provide key information including a description of the nature and location and the purpose of the proposed pipeline to the Commission in its permit application in order for the Commission to make an informed, sound decision on the project. SDCL § 49-41 B-11. The Commission issued its Amended Final Decision and Order ("Final Decision") on June 29, 2010, based on that information. As a part of its Final Decision, the Commission issued a detailed list of its findings of fact and conclusions of law that led to the decision. Through the Final Decision, the Commission issued a permit authorizing construction of the project as that project was described and defined in the findings of fact contained in the Final Decision.

On September 15, 2014, after more than four years had passed since the issuance of the permit for the 2009 Project described in the Final Decision, Keystone filed a new Petition with the Commission in Docket HP 14-001. The subject of the Petition is a project for a tar sands pipeline. In conjunction with this new Petition, Keystone submitted a “Certification” asserting that the conditions upon which the Commission granted the facility permit in Docket HP 09-001 continue to be satisfied. The Petition requests that the Commission issue an order accepting its Certification pursuant to SDCL § 49-41-B-27.

Because Keystone has failed to prove that the proposed project continues to meet and will meet the conditions on which the original permit was granted, and because this proceeding has been conducted without lawfully required due process and fundamental fairness, the Commission must deny Keystone’s request for certification.

I. Burden and Standard of Proof

As the petitioner in this matter, Keystone bears the burden of proof of meeting the statutory requirements for certification. Keystone has failed to meet its burden of proof, thus its petition must be denied. Administrative rule ARSD 20:10:01:15.01 states that “[i]n any contested proceeding...*petitioner has the burden of proof as to factual allegations which form the basis of the...application, or petition*” (emphasis added). *See, e.g., Pesall v. Montana Dakota Utilities*, SDPUC Docket No. EL13-028 (August 22, 2014). The law is unambiguous as to which party carries the burden of proof, and the Commission cannot grant the petition if the burden has not been met.

The relevant statute with respect to what must be proven in the case at bar is SDCL § 49-41B-27, which 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 added). Thus, the Applicant must prove to the Commission that it continues to meet the conditions stated in Exhibit A of the 2010 permit. This burden rests solely on the Applicant, and no other parties to the matter bear any burden of proof. It is not required that objecting parties demonstrate that the Applicant cannot meet the conditions. There is no case law, order of the Commission, or governing statute that supports shifting the burden of proof from the Applicant to intervenors or other parties. *See generally Pesall*, SDPUC Docket No. EL13-028 (placing the burden solely on the applicant despite the existence of contesting parties). Similarly, there is no case law, order of the Commission, or governing statute that mandates that the Commission accept the Applicant’s certification, absent the requisite showing of proof through the evidentiary hearing. The simple fact is that Keystone must affirmatively prove, by the evidentiary standard required, that it continues to meet the each of the 50 conditions on which the permit was granted.

Although the statutes governing the PUC make clear which party bears the burden of proof in contested proceedings, they do not specify what standard of proof must be met. The standard of proof required can be determined by looking to the State’s common law regarding agency decisions. A court has the authority to reverse or modify an agency decision if “substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are... (5) *Clearly erroneous in light of the entire evidence of the record*; or (6) *Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*” SDCL § 1-26-36.

To determine whether an agency decision is “clearly erroneous,” a court looks at whether “substantial evidence” exists in the record to support the agency decision. *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”); *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); *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*” (emphasis added))).

In addition, to determine whether an agency decision is “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion,” a court also bases its decision on whether or not substantial evidence exists in the record to support that decision. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011).

Therefore, the standard of proof which must be met to support an agency decision is substantial evidence. Keystone must therefore prove by substantial evidence that it can continue to meet the conditions upon which the permit was granted. The South Dakota Supreme Court, in *M.G. Oil Co. v. City of Rapid City*, held that the circuit court applied the proper standard of review to the agency decision when it “examined the record to determine ‘whether there was substantial evidence supporting [the City Council’s] decision and whether the decision was reasonable and not arbitrary.’” 793 N.W.2d 816 (S.D. 2011). The circuit court had cited *Olson v. City of Deadwood*, 480 N.W.2d 770, 774-75 (S.D.1992), for its use of the substantial evidence standard. *Id.* In *Olson*, the Supreme Court employed the substantial evidence test to determine whether or not the decision of the agency Deadwood Board of Adjustment should be upheld. As the Court clarified in that case, this issue in assessing an agency decision is “whether an order of

the board is supported by substantial evidence *and* is reasonable and not arbitrary.” *Id.* (emphasis added). Because the Public Utilities Commission is a South Dakota agency, its decisions must be based upon substantial evidence and must be reasonable and not arbitrary. This means that Keystone, as the petitioner and the burden bearer, must prove its case by substantial evidence. For *each* of the 50 conditions, Keystone *must present substantial evidence* that it continues to comply with the conditions on which the permit was granted.

II. Applicability of Federal Law

The Commission must read Keystone’s burden in conjunction with federal law, and it must deny the petition on the grounds that Keystone has not proven that federal requirements will be met. Despite the fact that requirements of federal law are clearly an issue in whether or not Keystone can and will comply with all legal and permit requirements, the Commission did not hear and Keystone did not present evidence that it will meet all such requirements.

South Dakota Rules of Evidence apply in contested cases generally. SDCL § 1-26-19. The South Dakota Rules of Evidence thus govern the admissibility of evidence in Public Utilities Commission cases. *Id.* Under the South Dakota Rules of Evidence, “all relevant evidence is admissible, except as otherwise provided by constitution or statute or by this chapter or other rules promulgated by the Supreme Court of this state.” SDCL § 19-19-402. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” SDCL § 19-19-401. “Even if [the evidence] only slightly affects the trier’s assessment of the probability of the matter to be proved,” the evidence is admissible. *Supreme Pork v. Master Blaster*, 764 N.W.2d 474, 488 (S.D. 2009).

In the present case, if the evidence concerning whether Keystone met federal requirements is relevant to the proceedings, then it should be admissible. The crucial question in determining admissibility of evidence is its relevancy. Therefore, the Commission cannot refuse to take evidence concerning whether a party failed to meet a federal requirement based solely on the grounds that the evidence pertains to a federal requirement. Because federal requirements are directly related to whether or not Keystone has met its burden of proof, evidence of compliance with such requirements is relevant and necessary to this proceeding.

Condition No. 2 of the PUC permit requires that Keystone comply with all applicable federal, state, and local permits, including the Presidential Permit. Condition No. 2 further states that, “[t]o the extent that any condition, requirement or standard of the Presidential Permit, *including the Final EIS Recommendations*, or any other law, regulation, or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply” (emphasis added). The FEIS with which the PUC permit requires Keystone to comply mandates that Keystone comply with the Programmatic Agreement contained therein. However, federal law requires Keystone to comply with the Amended Programmatic Agreement contained in the Final Supplemental Environmental Impact Statement (“FSEIS”), which differs from the FEIS. If Keystone follows the requirements of the FEIS as required by the PUC permit, it will be in violation of federal law because it will not be following the requirements of the FSEIS. This is one of many reasons it would have been proper for Keystone to file a new permit application, rather than seek certification.

III. Due Process and Actual Proof

The Commission must deny Keystone’s petition because basic elements of due process have not been met during the course of this proceeding. Article VI, Section 2 of the South

Dakota Constitution states: “No person shall be deprived of life, liberty or property without due process of law.” This fundamental right to due process attaches to administrative proceedings such as this because they are functions of the state government. The parties’ due process rights were initially curtailed during the discovery process.

The parties’ rights were infringed on by the improper issuance of an overly broad protective order. To obtain a protective order, a party must file a motion that 1) certifies that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and 2) shows good cause, including specific injury, for issuance of a protective order. SDCL § 15-6-26(C), *Bertelson v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. Sup. Ct. 2011). In addition, the protective order must be necessary to protect the party from annoyance, embarrassment, oppression, or undue burden or expense. SDCL § 15-6-26(c).

In the instant case, Keystone failed to file any motion with the Commission seeking a protective order. The Commission simply granted the order without Keystone having met any burden of proof whatsoever, despite the statutory requirements to the contrary. On April 17, 2014, without having received the requisite motion from Keystone, the Commission issued a protective order. In that order, the Commission deviated from the Commission’s own rules governing confidential information and overly restricted the material to be treated as confidential by granting Keystone the authority to decide on its own what it “elect[s] to designate...as confidential.” Protective Order dated April 17, 2015 at ¶ 4. Because this proceeding was not conducted in accordance with the proper procedures, the Applicant’s request for certification must be denied.

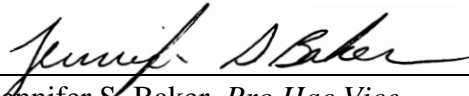
The parties' rights were again infringed upon through the granting of motions in limine. In a contested hearing, the Commission has a duty to permit all relevant evidence to be offered. Pursuant to SDCL § 19-19-401, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Several motions in limine were filed seeking to impose limitations on witness testimony. The Commission heard these motions and subsequently entered various orders granting several of said motions. With respect to the Tribe, the Commission ordered that portions of Faith Spotted Eagle's testimony pertaining to treaty rights be stricken and that Ms. Spotted Eagle's rebuttal testimony and Jason Cooke's rebuttal testimony be stricken, limiting and eliminating their rights to testify at the hearing. The rebuttal testimonies were stricken in part on the grounds that they "do not comport with the requirements for hearing testimony, and in particular rebuttal testimony." *See Order Granting Motion In Limine to Restrict Testimony of Yankton Sioux Witnesses Spotted Eagle and Unnamed Member of the B&C Committee.* However, all legal requirements as to form were in fact met. The sparseness of specifics in the testimony was due to the fact that it rebutted testimony that was equally sparse. These witnesses should not be penalized for the Applicant's failure to provide anything more than vague and general statements. The prefiled testimony of Yankton Sioux Tribe witness Chris Saunsoci was likewise stricken on these grounds, yet his testimony also met all form requirements and provided as much detailed information as was possible given the testimony he was rebutting. Moreover, the testimonies of Ms. Spotted Eagle and Mr. Cooke were also stricken on the grounds that they "addresse[d] matters beyond the scope of the issue in this proceeding." The testimonies of these individuals spoke directly to Keystone's compliance with federal law and federal permit requirements, giving them not just

“any” tendency but a *strong* “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” This material was relevant and therefore should have been given consideration by the Commission. The Commission opened door to testimony about treaty rights when it included compliance with federal law as a condition of the permit. It must be noted that treaty rights are not the same as aboriginal title and usufructuary rights. These are legally distinct concepts, and the Tribe’s witnesses sought to testify about treaty rights – which are a matter of federal law and thus relevant – not about aboriginal title (which the Tribe at no time raised). Furthermore, the Commission had no basis for excluding usufructuary rights which, again, are a matter of federal law and thus relevant to the proceeding. It is quite possible that Keystone would infringe upon the Tribe’s usufructuary rights by constructing the proposed pipeline, and such infringement constitutes a violation of federal law. Without adequate testimony and evidence, the Commission has no way of knowing whether this is likely to happen or not. Because Keystone offered no evidence to as to this issue, no evidence has been presented and clearly Keystone has not met its burden of proof in this respect.

Keystone, in fact, has not met its burden of proof with respect to most, if not all, of the conditions at issue. Keystone presented vague and hollow prefiled testimony that contained generalized statements that certainly do not constitute proof of compliance, and statements identifying areas to which they were capable of providing testimony. For their actual direct testimony, the evidence put on by Keystone, these witnesses merely acknowledged and verified their prefiled testimonies. Almost no additional information was solicited by Keystone during its witnesses’ direct testimonies; they simply rested on their non-substantive prefiled testimonies. Any pertinent information elicited through cross examination did not constitute substantive

evidence that Keystone will continue to meet each and every condition on which the permit was granted, as not all of the conditions were even addressed during the evidentiary hearing. It is therefore impossible for Keystone to have met its burden of proof. As a matter of South Dakota law, Keystone's petition for certification must be denied.

Dated this 1st day of October, 2015.



Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEBBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jbaker@ndnlaw.com
Email: trealbird@ndnlaw.com

Attorneys for Yankton Sioux Tribe