Attach is a copy of any memorandum opinion and findings of fact or conclusions of law supporting the judgment or order appealed from. See SDCL 15-26A-4(2).

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|---|---|---|
| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
| | ) :SS | |
| COUNTY OF HUGHES | ) | SIXTH JUDICIAL CIRCUIT |

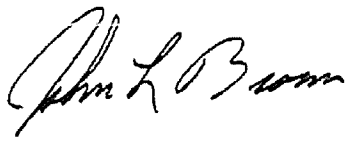
| | | |
|---|---|---|
| IN THE MATTER OF PUC DOCKET HP 14-0001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE | ) | CIV NO. 16-33<br><br>ORDER |

WHEREAS, the Court enters its Memorandum Decision on June 19, 2017, and that Memorandum Decision constitutes the Court's findings of fact and conclusions of law, and expressly incorporates by reference the same herein, it shall be and hereby is

ORDERED that the decision of the PUC is AFFIRMED.

Dated this 19th day of June, 2017.

BY THE COURT:



The Honorable John L. Brown
Circuit Court Judge

ATTEST:

Clerk of Courts
(SEAL)

# CIRCUIT COURT OF SOUTH DAKOTA
## SIXTH JUDICIAL CIRCUIT

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**Re: Hughes County Civ. No. 16-33; *In the Matter of Public Utilities Commission Docket No. HP14-001, Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline***

## MEMORANDUM DECISION

This is an appeal from the Final Decision of the South Dakota Public Utilities Commission ("PUC") regarding certification of TransCanada's Keystone XL Pipeline Permit. Appellants are tribes, organizations, and individual landowners who intervened in the PUC's proceeding and now appeal to this Circuit Court. In general, Appellants argue that TransCanada failed to prove that the Keystone XL Project "continues to meet the conditions upon which the permit was issued" in 2010. This Court AFFIRMS the decision of the PUC.

## BACKGROUND

TransCanada Keystone Pipeline LP ("TransCanada"), appellee, is a Delaware limited partnership, a wholly owned subsidiary of TransCanada Corporation. TransCanada Reply Brief to Common Arguments of Several Appellants at 2. Based in Calgary, Alberta, Canada, TransCanada owns and operates power plants, natural gas storage facilities, and nearly 45,000 miles of crude oil and natural gas pipelines in Canada, the U.S., and Mexico. Id.

In 2005, TransCanada began developing the Keystone Project, anchored by two large capacity pipelines running from Hardisty, Alberta, to Patoka, Illinois and the Texas Gulf Coast. Id. The Keystone Pipeline, first operational in 2010, runs southeast from Hardisty to a point south of Winnipeg, then straight south across

North and South Dakota to Steele City, Nebraska, just north of the Nebraska-Kansas border. Id. In 2007, TransCanada applied for, and the South Dakota Public Utilities Commission issued, a construction permit for the Keystone Pipeline. Id. at 3.

In 2008, TransCanada announced its plan to construct the Keystone XL Pipeline. Id. The proposed Keystone XL Pipeline would primarily be used to transport tar sands crude oil extracted from the Western Canadian Sedimentary Basin from a hub near Hardisty, Alberta, Canada, to delivery points in Oklahoma and Texas. Dakota Rural Action Brief at 2; AR at 9173, referencing *U.S. State Dept. Final Supplemental Environmental Impact Statement* ("FSEIS"), pp. ES-6-7. In South Dakota, the proposed Keystone XL Pipeline would cross portions of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp counties. Id.; AR at 31684-31685.

On March 12, 2009, TransCanada filed an application with the South Dakota PUC for a permit as required by SDCL § 49-41B to construct the South Dakota portion of the Keystone XL Pipeline ("Pipeline"). ICOUP Brief at 1. The original application described the Pipeline to be an approximately 1,702 mile pipeline for transporting crude oil from Alberta, Canada, to the greater Houston area in Texas, with approximately 1,375 miles to be located in the United States, 313 of which would be located in the western part of South Dakota. Id. TransCanada was required to provide information including a description of the nature and location and the purpose of the proposed Pipeline to the PUC in its permit application in order for the PUC to make an informed, sound decision on the project under South Dakota Law. SDCL § 49-41B-11; Yankton Sioux Tribe Brief at 1. The PUC issued its *Amended Final Decision and Order* on June 29, 2010, based on that information. Yankton Sioux Tribe Brief at 1. As a part of its Final Decision, the PUC issued a detailed list of its findings of fact and conclusions of law that led to the decision. Id. Through this Final Decision, the PUC issued a permit authorizing construction of the Pipeline as the project was described and defined in the findings of fact contained in the 2009 Final Decision. Id.

On September 15, 2014, after failing to commence any construction in South Dakota over a four year period under its permit granted in 2010 in HP09-001, TransCanada filed a Certification with the PUC signed by Corey Goulet, President of the Keystone Pipeline business unit, on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41-27. ICOUP Brief at 1-2. The certification and petition, filed as PUC Docket HP14-001 asserted that the conditions upon which the PUC granted the facility permit in Docket HP09-001 continue to be satisfied. Id. The petition requested that the PUC issue an order accepting its certification pursuant to SDCL § 49-41B-27. Id. As an appendix to the petition, TransCanada submitted a document captioned "Tracking Table of Changes" that identified thirty (30) findings contained in the Final

Decision and, for each finding, sets out a new different finding. Id.; *see* Petition for Order Accepting Certification, Appendix C.

The Cheyenne River Sioux Tribe ("CRST") filed for intervention in PUC docket HP14-001 on October 15, 2014. CRST Intervention at 305-07, Cheyenne Brief at 3. On October 30, 2015, TransCanada submitted a Motion to Define the Scope of Discovery. Id.; TransCanada's Motion to Define Discovery at 1000-05. TransCanada asserted in its motion that the scope of the proceedings in Docket HP14-001 were narrowly confined by SDCL § 49-41B-27 to the fifty requirements listed in the original permit. Id. CRST opposed TransCanada's Motion and filed its response on December 1, 2014. CRST Response to Motion to Define Discovery at 1249-61; Cheyenne Brief at 3. The PUC subsequently granted TransCanada's Motion to Define the Scope of Discovery on December 17, 2014. PUC Order to Grant Motion to Define Issues at 1528-29; Cheyenne Brief at 3.

Following discovery, the PUC held an evidentiary hearing beginning on July 27, 2015. Cheyenne Brief at 3. The hearing lasted nine days and TransCanada submitted pre-filed direct testimony for its witnesses. Id.; TransCanada Pre-Filed Test. at 27465-917. At the conclusion of the evidentiary hearing CRST, along with other Appellants, made a Joint Motion to Deny the Petition for Certification on the grounds that TransCanada failed to submit substantial evidence. Id.; HP14-001 Evidentiary Hr'g Tr. at 27338, 27345; 7-11. The PUC denied the Joint Motion to Dismiss. HP14-001 Evidentiary Hr'g Tr. at 27361:16-18; 27367;13-14, Cheyenne Brief at 3-4.

Pursuant to the PUC's instructions, CRST submitted its Post-Hearing Brief on October 1, 2015. CRST Post Hr'g Brief at 29538-559; Cheyenne Brief at 4. In its Post-Hearing Brief, CRST argued that the PUC must reject TransCanada's Petition for Order Accepting Certification on the grounds that TransCanada failed to submit substantive evidence upon which it could grant the petition. Cheyenne Brief at 4. On November 6, 2015, after all post-hearing briefs had been submitted to the PUC, President Obama rejected TransCanada's application for a Presidential Permit to cross the United States – Canada border. Id. Requirement number two (2) of the 2010 South Dakota permit explicitly requires TransCanada to obtain the Presidential Permit. Id. As such, on November 9, 2015, CRST and other Appellants filed a Joint Motion to Dismiss the Petition for Certification and Revoke the 2010 Permit. Joint Motion to Dismiss at 31347-355; Cheyenne Brief at 4.

CRST and others argued that, with the President's rejection, it was now impossible for TransCanada to meet requirement number two (2) in the underlying permit. Id. On December 22, 2015, the PUC held a hearing dismissing Appellants' Joint Motion, reasoning that it was still theoretically possible for TransCanada to eventually comply with the condition. PUC Motion Hr'g Tr. 31623:19-24 and 31625:1-14; Cheyenne Brief at 4.

On January 6, 2016, the PUC unanimously approved TransCanada's re-certification petition for continued construction through the western half of South Dakota. ICOUP Brief at 2. This region of the state, carved out of the heart of the Great Sioux Nation in 1889, remains home to five (5) of the nine (9) federally recognized, protected Indian reservations located within the geographic boundaries of South Dakota. Id. This region is presently untraversed by any major crude oil, refined products and highly volatile or hazardous liquid pipelines. Id. The only pipeline system of any real significance in this half of South Dakota is the Mni Wiconi Rural Water Supply Project which carries drinking water from the Missouri River near Pierre to "West River" communities and ensures safe and adequate municipal, rural, and industrial water supply for the residents of the Pine Ridge Indian, Rosebud Indian, and Lower Brule Indian Reservations and the citizens of Haakon, Jackson, Jones, Lyman, Mellette, Pennington, and Stanley counties. Id.

On January 21, 2016, the PUC granted TransCanada's Petition for Order Accepting Certification and published its Final Decision and Order Finding Certification Valid and Accepting Certification. PUC Final Decision and Order at 31668-695, Cheyenne Brief at 4. On February 19, 2016, CRST filed Notice of Appeal with the Sixth Circuit Court in Hughes County, TransCanada, and all interested parties in PUC Docket HP14-001. Cheyenne Brief at 4. CRST filed a Statement of Issues on February 29, 2016. Id. CRST and all other Appellants from PUC Docket HP14-001 subsequently filed a Motion and Stipulation for Consolidation and Extension of time on April 13, 2016. Id. at 4-5.

## JUDICIAL NOTICE

To be built as proposed and originally permitted, the Pipeline needs permits from each of the states through which it passes. ICOUP Brief at 2-3. A Presidential Permit is required under federal law, because the proposed Pipeline crosses an international boundary. Executive Order 13337, 69 Fed. Reg. 25229 (August 30, 2004); Appellant Brief at 3. This Court takes judicial notice that on November 6, 2015, the U.S. Department of State denied TransCanada's second application for a Presidential Permit for the Keystone XL Pipeline. The federal Presidential Permit was rejected by the United States Department of State, after failed environmental reviews, as not in our national interest and denied on November 7, 2015. President Obama cited concerns about climate change, energy prices, and jobs as his major reason. ICOUP Brief at 2-3.

This Court also takes judicial notice that following the inauguration of President Trump, a number of actions have been taken to help facilitate the construction of both the Keystone XL Pipeline and the Dakota Access Pipeline (which would run thru a significant portion of Eastern South Dakota, though is not at issue in this case). On January 24, 2017, President Trump issued a Memorandum for the Secretary of State, Secretary of the Army, and Secretary of the Interior, which invited TransCanada to "promptly re-submit its application to

the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States." Presidential Memorandum Regarding Construction of the Keystone Pipeline; https://www.whitehouse.gov/the-press-office/ 2017/01/24/ presidential-memorandum-regarding-construction-keystone-xl-pipeline. The Memorandum further directed that the Secretary of State shall take all actions necessary and appropriate to facilitate its expeditious review and reach a final determination within 60 days of TransCanada's submission of the permit application. Id. The permit was submitted on January 26, 2017. https:// keystonepipeline-xl.state.gov/documents/organization/267737.pdf. On March 24, 2017, the Under Secretary of State for Political Affairs issued a Presidential Permit to TransCanada authorizing TransCanada to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canadian border in Phillips County, Montana. https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm. This Court takes judicial notice of the current Presidential Permit.

## QUESTIONS PRESENTED

Appellants join in these three substantive issues:

I. Whether the PUC erred in denying Appellants' Motion to Dismiss when the Presidential Permit was denied by the State Department and President Obama?

II. Whether the PUC shifted the burden of proof to Appellants during the hearing, requiring Appellants to prove TransCanada cannot comply with the Conditions instead of requiring TransCanada to prove that they can comply?

III. Whether the PUC committed clear error when it determined that TransCanada met its burden of proof by substantial evidence that it continues to meet the Conditions?

Appellants also appeal several discovery rulings and present these discovery-related issues:

IV. Whether the PUC erroneously limited the scope of discovery by granting Motion to Define Issues?

V. Whether the PUC committed clear error by ordering that pre-filed testimony be submitted

before discovery responses from a potential motion to compel were due?

VI. Whether the PUC wrongfully excluded 20 intervenors' testimony as a discovery sanction for untimely disclosure?

DRA, ICOUP, and Yankton Sioux Tribe appeal several evidentiary rulings made by the PUC, and presents these issues:

VII. Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?

VIII. Whether the PUC erred when it admitted and considered the "Tracking Table of Changes" prepared by TransCanada and included in its Petition for Certification?

IX. ICOUP appeals whether the PUC erred when it failed to admit or consider climate change testimony during this Certification hearing?

X. DRA appeals whether there was bias on behalf of the PUC regarding a denial to produce documents under the attorney work product doctrine and attorney-client privilege?

Next, Yankton Sioux Tribe appeals certain tribal rights issues:

XI. Whether the PUC erred by relying on the Final Supplemental Environmental Impact Statement in FOF 57 that TransCanada consulted with the Standing Rock Sioux Tribe?

XII. Whether the PUC erred by precluding testimony of aboriginal title or usufructuary rights?

XIII. Whether the PUC erred when it concluded that Tribes are not "local governmental units" under Condition 6?

Finally, DRA individually appeals many of the PUC findings of facts. The Court will address those arguments that have merits. Otherwise, this Court summarily AFFIRMS all other PUC findings of fact. SDCL § 1-26-36.

## STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36.

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The 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:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment."

SDCL 1-26-36. "Agency decisions concerning questions of law . . . are fully reviewable." *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881.

All of the Appellants cite to pre-1998 case law for the outdated standard of review of an agency's findings of fact. Appellants cite to cases which applied a substantial evidence analysis to review an agency's findings.[1] However, the South

[1] *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, 6, ¶ 6, 547 N.W.2d 556, 558 ("Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not

Dakota Supreme Court revised and clarified the review standard in *Sopko I. Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 6, 575 N.W.2d 225, 228. Our Supreme Court concluded,

> To allay future confusion over the proper standard of review in administrative appeals, *we will no longer employ "substantial evidence" terminology.* In the past, we have regularly combined clearly erroneous and substantial evidence principles, but the latter is not the proper test. SDCL 1-26-36 was amended effective July 1, 1978, changing the standard of review for sufficiency of the evidence from "unsupported by substantial evidence on the whole record" to "clearly erroneous." (For reasons unknown the definition remains unrepealed. SDCL 1-26-1(9)). The difference between the two standards should not be obscured: It is simply inaccurate to conclude, findings supported by substantial evidence are not clearly erroneous. 1 S. Childress & M. Davis, *Federal *229 Standards of Review* § 2.07 at 2-44 (2d ed. 1992) (citing cases from every federal circuit). Even when substantial evidence supports a finding, reviewing courts must consider the evidence as a whole and set it aside if they are definitely and firmly convinced a mistake has been made. *See W.R.B. Corp. v. Geer,* 313 F.2d 750, 753, (5th Cir.1963), *cert. denied* 379 U.S. 841, 85 S.Ct. 78, 13 L.Ed.2d 47 (1964). Furthermore, "[u]se of substantial evidence language, even in a technically correct comparison, is troublesome not only as a vestige of the rejected jury test, but also as a potential infringement on separate standards of review in other areas, such as administrative appeals." Childress & Davis, *supra,* § 2.07, at 2-47.

*Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 7, n.2, 575 N.W.2d 225, 228-29 ("In our view, 'substantial evidence' and 'clearly erroneous' are not synonymous.") (emphasis added).

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whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them."); *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834, 836 ("Our standard of review of factual issues is the clearly erroneous standard. Under this standard, we must determine whether there was substantial evidence to support the Department's finding."); *Helms v. Lynn's, Inc.,* 1996 SD 8, ¶ 10, 542 N.W.2d 764, 766.

Dakota Rural Action ("DRA") asks this court to apply the Public Trust Doctrine and hold the PUC to a higher standard, a trustee with fiduciary duties to the public to protect natural resources. DRA Initial Brief, at 19-20. DRA suggests that the PUC should have set a higher bar for TransCanada, whose activities risk damaging the State's land and water resources. As DRA cites, South Dakota adopted the Public Trust Doctrine in *Parks v. Cooper* and held, "we align ourselves with the Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming decisions that have recognized the public trust doctrine's applicability to water, independent of bed ownership." *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838. But *Parks* was an appeal to the Supreme Court from a declaratory judgment by a circuit court, not an administrative appeal, and the Supreme Court did not apply the Doctrine as an additional standard of review to SDCL § 1-26-36, but as a legal principle that "all waters . . . are held in trust by the State for the public." There is no precedent for "review[ing] the PUC's Order through the lens of the Public Trust Doctrine[.]" DRA Initial Brief at 20.

The standard of review the circuit court will apply when examining the PUC's findings is "to decide whether they were clearly erroneous in light of the entire evidence in the record." *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 6. "If after careful review of the entire record [the court is] definitely and firmly convinced a mistake has been committed, only then will [the court] reverse." *Id.* Under the clearly erroneous standard, the question on appellate review is not whether the reviewing court would have made the same findings as the underlying court or agency, but whether on the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Halbersma v. Halbersma*, 775 N.W.2d 210, 2009 S.D. 98.

## ANALYSIS AND DECISION

### I.

### Whether the PUC erred in denying Appellants' Motion to Dismiss when the Presidential Permit was denied by the State Department and President Obama?

In a statement by Secretary of State John Kerry on November 6, 2015, he stated,

> "After a thorough review of the record, including extensive analysis conducted by the State Department, I have determined that the national interest of the United States would be best served by denying TransCanada a presidential permit for the Keystone XL pipeline. President Obama agrees with this determination and the

> eight federal agencies consulted under Executive Order 13337 have accepted it."

http://www.state.gov/secretary/remarks/2015/11/249249.htm.

"For proposed international petroleum pipelines (such as the Keystone XL Pipeline) the President of the United States, through Executive Order 13337, directs the Secretary of State to decide whether a project serves the national interest before granting a Presidential Permit." Dakota Rural Action Brief at 21. DRA contends that PUC fatally erred in denying the Joint Motion to Dismiss which asked the PUC to revoke the Original Permit as a result of the denial of a Presidential Permit for the Project. Id.

Condition No. 2 of the Original Permit specifically provides that TransCanada "shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State". Id. DRA argues that SDCL § 49-41B-27 clearly provides that TransCanada must show it could continue to meet the conditions of the Original Permit in order to obtain certification, not that they *will meet* conditions at some point in the future. Id. (emphasis added). DRA contends that when the Presidential Permit was applied for and denied, the PUC should have immediately dismissed TransCanada's petition for certification and issued an order granting the Joint Motion to Dismiss. Id. at 22. DRA argues that the failure of the PUC to do so was in excess of its statutory authority, constituted an error of law, and was arbitrary or capricious in nature. Id.

The PUC looks to the definition of "shall" as meaning "something that *will* take place in the future," and another definition of "shall" is a "requirement". PUC Reply Brief to CRST at 17 (emphasis added). "Under KXL Condition 2, it is clear that [TransCanada] did not have the permits set forth in the condition at the time the KXL Decision was issued, but that it would be required to obtain such permits, to the extent such permits were still required, before it could proceed with the Project." Id. PUC goes on to say that TransCanada has previously had its Presidential Permit denied and it has reapplied. Id. SDCL § 49-41B-33 allows the PUC to revoke TransCanada's permit for "failure to comply with the terms or conditions of the permit". Id. However, at this point the PUC states that they have not determined that such a time has arrived. Id.

DRA also touches on an argument raised by an individual Intervenor and rancher, Paul Seamans during the hearing on the Intervenors' Joint Motion to dismiss. Id. Mr. Seamans said, "if you let this thing go on forever and ever, you have that easement hanging over your heard. And it's going to affect the salability of your land if you ever decide to sell it." Hr'g Tr. at 31600:13-16. DRA argues then that by denying the Joint Motion to Dismiss, the PUC has effectively told South Dakota landowners that title to their property is clouded in perpetuity. Dakota Rural Action Brief at 22. "A perpetual cloud on landowners' title, with a corresponding impairment of marketability of property, creates a tremendous issue with respect to due process of law and a deprivation of property rights." Id. Whatever significance that argument may have is rendered moot by the subsequent grant of the Presidential Permit, of which this Court has taken judicial notice, and is not now ripe for consideration in this proceeding.

This Court is in agreement with the PUC regarding the definition of *shall* in the Original Permit, that TransCanada could obtain the permit in the future and it would be required to do so prior to beginning construction on the Pipeline project. The PUC was not clearly erroneous in their decision to deny the Motion to Dismiss based on the denial of the Presidential Permit at the time of certification. Thus, the decision of the PUC is AFFIRMED.

## II.

**Whether the PUC shifted the burden of proof to Appellants during the hearing, requiring Appellants to prove TransCanada cannot comply with the Conditions instead of requiring TransCanada to prove that they can comply?**

Pursuant to ARSD 20:10:01:15.01, in a contested case proceeding such as HP14-001, the "petitioner has the burden of proof going forward with presentation of evidence unless otherwise ordered by the commission". Yankton Sioux Tribe Brief at 10. Yankton argues that a plain reading of the rule required the PUC to place the burden of proof on TransCanada, and that the PUC issued no order to alter this standard. Id. However, Yankton asserts that the PUC "time and time again ruled in favor of [TransCanada] on the ground that the intervenors had failed to meet some nonexistent burden of proof". Id. Cheyenne River Sioux Tribe joins in this argument,

> "The rules are explicitly clear and dispositive in the instant matter. TransCanada was the petitioner in HP14-001. TransCanada submitted a Petition for Order

> Accepting Certification to the PUC pursuant to SDCL § 49-41B-27. TransCanada's Petition asked the PUC to make a factual determination that TransCanada can continue to meet the conditions upon which the original permit was granted. Intervening parties opposed TransCanada's Petition. As a result the PUC held a contested evidentiary hearing on the matter. During such a proceeding the rules state that TransCanada must carry the burden of proving that the proposed Keystone XL pipeline project continues to meet the conditions upon which the original permit was granted."

Cheyenne River Sioux Tribe Brief at 6.

Yankton cites to SDCL § 49-41B-22 in their brief to establish that the Applicant has the burden of proof when the PUC is acting as an adjudicator. Yankton Sioux Tribe Brief at 12. That statute reads,

> "The applicant 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 sitting 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. However, this statute does not seem to be in concert with the actual issues at hand in this case.

Yankton also cites to ARSD 20:10:01:15.01, which states,

> "In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses."

ARSD 20:10:01:15.01, Yankton Sioux Tribe Brief at 12. Yankton argues that this is the on-point rule, which the PUC is required to enforce. Id. at 13.

DRA also joins in this issue,

> "The PUC in its Order, erroneously shifted the burden of proof to the intervenors. For example, Finding No. 31, which relates to approximately 41 separate requirements within the 50 conditions of the Original Permit, recites that "[n]o evidence was presented that [TransCanada] cannot satisfy any of these conditions in the future". ([AR] 31686). Likewise, Findings Nos. 32, 33, 34, 27, 42, and 68 also recite, in somewhat similar language, that "no evidence was presented that [TransCanada] cannot continue to comply with this condition." ([AR] 31686-31687, 31691). The PUC went even further in Conclusion of Law No. 10, which recites that the intervenors failed to establish any reason why TransCanada cannot continue to meet conditions of the Original Permit ([AR] 31694)."

Dakota Rural Action Brief at 26. DRA argues that TransCanada had the burden of demonstrating, through substantial evidence, that it could continue to comply with the conditions of the Original Permit, and in the absence of any evidence, certification could not have been granted. Id. TransCanada failed to meet their burden, and in an attempt to rescue the company, the PUC erroneously shifted the burden to the intervenors. Id.

TransCanada, on the other hand, contends that the Commission issued no explicit orders relating to the burden of proof other than the statements by various Commissioners throughout the proceeding that Keystone had the burden of proof. TransCanada Reply Brief to Common Arguments of Several Appellants at 10. Moreover, TransCanada argues,

> "The Commission's final decision does not indicate that it shifted any burden to the Appellants other than the

> conclusion of law that [TransCanada] having met its burden, the Intervenors failed to establish any reason why [TransCanada] cannot continue to meet the conditions. That conclusion is not contrary to the administrative rule."

Id. at 10-11.

During opening remarks at the beginning of the Evidentiary Hearing on July 27, 2015, Commissioner Nelson stated, "It is the Petitioner, TransCanada, that has the burden of proof. And under SDCL 49-41B-27 that burden of proof is to establish that the proposed facility continues to meet the 50 conditions set forth in the Commission's Amended Final Decision." HP14-001 Evidentiary Hr'g Tr. at AR 23968:6-10. Mr. Taylor, one of the lawyers appearing at that hearing on behalf of TransCanada Corporation gave an opening statement in which he acknowledge this burden by stating, "We are here today to meet Keystone's burden of proof." Id. at 24025:17-18.

TransCanada does not dispute that it had the burden of proof to show that its certification is valid. TransCanada Reply Brief to Common Arguments of Several Appellants at 8-9. However, TransCanada does not believe this means that the Appellants had no burden in the proceeding. Id. at 9.

> "Rather, as the South Dakota Supreme Court has held, the term 'burden of proof' encompasses two distinct elements: 'the burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding."

Id. (citing *In re Estate of Duebendorfer,* 2006 S.D. 79, ¶ 42, 721 N.W.2d 438, 448). The burden of persuasion rests with the party having the affirmative side of an issue and does not change, but the burden of going forward with the evidence may shift. Id. TransCanada asserts that after they submitted their certification, accompanying documents, and testimony per SDCL § 49-41B-27, the Appellants, as challengers to TransCanada's certification bore the burden of offering sufficient evidence to show that TransCanada's certification was invalid because TransCanada could not in fact meet some of the permit conditions. Id.

This Court does not find clear error in the PUC's application of the burden of proof in this case. While Appellants point to Findings by the PUC that no evidence was presented that TransCanada cannot satisfy conditions in the future, or continue to comply with the condition, this does not negate the burden of proof. TransCanada's responsibility in meeting their burden of proof was to show that

they *can* continue to comply with the permit. If Appellant's want to show that it is impossible for TransCanada to do so or that TransCanada is not currently doing so, they must prove that affirmatively. The Court does not find that the PUC inappropriately shifted the burden of proof in this case, and that any shift that may have occurred was within their purview and not clearly erroneous.

III.

**Whether the PUC committed clear error when it determined that TransCanada met its burden of proof by substantial evidence that it continues to meet the Conditions?**

Yankton contends that TransCanada submitted a filing captioned "certification" with the PUC when it initiated this action. Yankton Sioux Tribe Brief at 18. "This document consists of a sworn statement by Corey Goulet, President of the Keystone Pipeline business unit, attesting that Keystone certifies that the conditions upon which the 2010 permit was granted continue to be satisfied." Id. Yankton believes this "certification" does not constitute evidence and is insufficient to prove continued compliance with the 50 conditions of the permit. Id. In fact, if filing a document labeled "certification" is sufficient to meet the burden of proof intended by SDCL 49-41B-27, then Yankton contends the burden should have shifted back to TransCanada upon Yankton's filing of a "certification" to the contrary. Id. at 20. Yankton did file a "certification" on October 30, 2015, which consisted of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that TransCanada did *not* meet all 50 permit conditions. Id. (emphasis added).

Looking at the term "substantive evidence", SDCL § 1-26-1(9) provides some guidance, ". . . such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion". Cheyenne River Sioux Tribe Brief at 9, SDCL § 1-26-1(9). Cheyenne asserts that there was no physical evidence presented during the hearing but that TransCanada relied solely on the testimony of the witnesses that it submitted. Id. at 9. "With regard to testimonial evidence, such testimony must be specific and substantive in order to be regarded as substantive evidence sufficient to base an administrative decision." Id. at 11 (See *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122). "Vague and/or conclusory testimony cannot be used to base a decision because such testimony is not substantive evidence." Id. (See *M.G. Oil Co.*, 793 N.W.2d at 823).

Cheyenne argues that the witness' testimony was not substantive because they merely referenced which changes he or she was responsible for in the Tracking

Table of Changes and then made a statement that he or she is unaware of any reason why TransCanada cannot continue to meet the permit conditions. Id. at 12 (See Direct Testimony of Corey Goulet at 27456-59; Direct Testimony of Meera Kothari at 27467-71; Direct Testimony of Heidi Tillquist at 27484-86; Direct Testimony of Jon Schnidt at 27508-12). "Such testimony merely recites the language of SDCL § 49-41B-27. Reciting the language of SDCL § 49-41B-27 followed by a vague statement of being unaware of any reason why [TransCanada] cannot comply in the future is materially no different from the testimony proffered in *M.G. Oil Co.*" Id. at 13. Cheyenne contends that TransCanada's failure to submit specific and substantive testimonial evidence required the PUC to deny TransCanada's Petition. Id.

PUC, however, contends that the reliance on *M.G. Oil Co.*, is misplaced. PUC Reply Brief to CRST at 15.

> "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 bear no resemblance to the proceedings at issue in *M.G. Oil*."

Id.

Yankton also asserts that the Commission committed reversible error by basing its decision on whether TransCanada is "able" to meet the requirement imposed by the 2010 permit, which is the incorrect standard to make the determination. Yankton Sioux Tribe Brief at 21. SDCL § 49-41B-27 reads,

> "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."

SDCL § 49-41B-27. Yankton argues that this statute does not permit a utility to merely show that it is *able* to meet such conditions. Yankton Sioux Tribe Brief at 21 (emphasis in original).

Cheyenne River Sioux Tribe joins in this argument that the South Dakota Supreme Court has, on numerous occasions, declared that all agency actions must meet the "substantive evidence" standard of review. Cheyenne River Sioux Tribe Brief at 5. Cheyenne states that, "because TransCanada failed to submit any substantive evidence in the instant matter it has failed to meet the minimum burden of proof. As such, the PUC could not grant TransCanada's Petition for Order Accepting Certification." Id. at 5-6.

Upon the conclusion of evidence at the evidentiary hearing, a visual aid was provided to the PUC which tracked each and every permit condition which had been the subject of testimony by TransCanada or PUC staff witnesses during the course of the proceedings. Dakota Rural Action Brief at 25, referenced at AR 27339:23-24. DRA contends that of the Original Permit, which contained 107 separate and distinct requirements, during the entire course of proceedings, TransCanada presented limited and insufficient evidence only as to its purported ability to continue to comply with six (6) of the conditions. Dakota Rural Action Brief at 25. Furthermore, DRA argues that PUC's staff's witnesses only presented evidence as to four (4) conditions. Id.

TransCanada argues that its certification, testimony, and evidence were sufficient to meet its burden to prove the validity of its certification under SDCL § 49-41B-27. TransCanada Reply Brief to Common Arguments of Several Appellants at 14. The measure of TransCanada's burden before the Commission was a preponderance of the evidence. Id. (citing *In re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605 ("The general burden of proof for administrative hearings is preponderance of the evidence.")).

In its Reply Brief to Cheyenne River Sioux Tribe, PUC contends that a central issue to the proceeding boils down to what is meant by the term "certify" in SDCL § 49-41B-27, and what effect the use of that term has on issues such as the certifying party's *prima facie* case and burden of proof. PUC Reply Brief to CRST at 6-7. PUC relies on the statutory language that the permit holder must simply

"certify" that "the facility continues to meet the conditions upon which the permit was issued." PUC Reply Brief to CRST at 8.

> "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 statue must be given their plan 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.

PUC argues that the word "certify" is a precise and narrow verb. PUC Reply Brief to CRST at 8. According to Black's Law Dictionary (10th ed. 2014), "certify" means, "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Id. Thus, PUC goes on, under the plain meaning of the language of the statute, TransCanada'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 Conditions to which the facility is subject. Id.

> "Although the Certification standing alone would seem to have met the 'must certify' requirements set forth in SDCL 49-41B-27, [TransCanada] 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."

Id. at 9. PUC believes that sufficient evidence was produced at the hearing and judicially noticed by the Commission to support upholding TransCanada's Certification and the Commission's Decision. Id. at 10.

This Court agrees with the above definition of certify, and would also note, that had the legislature wanted to or meant to require a more significant burden or process to extend an already granted permit, they would have chosen more substantial language in the statute.

This Court must first look at where the "substantial evidence" test the Appellants rely on comes from, and then what "substantial evidence" means. Reviewing the record, Appellant's seem to rely upon pre-1998 cases such as: *In re Establishing Elec. Boundaries, supra*; *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834 (S.D. 1996) ("[T]he inquiry is whether the record contains substantial evidence to support the agency's determination."); *Helms v. Lynn's, Inc.*, 1996 S.D. 8, ¶ 10, 542 N.W.2d 764 (S.D. 1996) ("The issue we must determine is whether the record contains substantial evidence to support the agency's determination."); *Abilb v. Gateway 2000, Inc.*, 1996 S.D. 50, 547 N.W.2d 556 (S.D. 1996) ("The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them."). As noted in the Standard of Review, *supra*, in 1998 the South Dakota Supreme Court did away with the substantial evidence test on administrative appeals. However, *arguendo*, the term "substantial evidence" means such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion. *In re Establishing Elec. Boundaries* at 121; SDCL § 1-26-1(8). This Court finds that 31,000 plus pages of record, nine days of hearing, and 2,507 page of evidentiary transcript and dozens of exhibits were "sufficiently adequate to support a conclusion" in this case. The PUC did not commit clear error when it determined that TransCanada met its burden of proof by substantial evidence and by a preponderance of the evidence, therefore, the PUC is AFFIRMED on this issue.

## IV.

## Whether the PUC erroneously limited the scope of discovery by granting Motion to Define Issues?

On December 7, 2014, the Commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule. Yankton Sioux Tribe Brief at 8. On October 30, 2014, before a prehearing scheduling conference had been ordered, TransCanada filed a Motion to Define the Scope of Discovery Under SDCL § 49-41B-27, *supra*. Id.

At the time the Order was granted, no party to the matter had sought discovery. Yankton Sioux Tribe Brief at 8. Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. Id. The scope of discovery is defined in SDCL § 15-6-26(b), which states in part,

> ". . . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

SDCL § 15-6-26(b)(1).

However, in TransCanada's Motion to Define the Scope of Discovery under SDCL § 49-41B-27, they asked the Commission to issue an order that the scope of discovery be limited to certain matters under SDCL § 15-6-26(c)(4), which deals with protective orders. Yankton Sioux Tribe Brief at 9, SDCL § 15-6-26(c)(4). SDCL § 15-6-26(c)(4) specifically reads,

> "Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification 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 for good cause shown, the court in which the action is pending, on matters relating to deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."

SDCL § 15-6-26(c)(4).

Yankton argues that TransCanada did not fulfill the requirements a party seeking a protective order must fulfill before a protective order can be issued. Id. at 9. Specifically, Yankton argues that TransCanada failed to certify that it conferred in good faith or attempted to confer with other affected parties in an effort to resolve

the dispute, and that TransCanada failed to show good cause for the issuance of a protective order. Yankton Sioux Tribe Brief at 9. Further, Yankton argues that it was improper for TransCanada to seek a protective order before any party had sought discovery because no dispute existed to necessitate such an order. Id.

> "The Supreme Court has explained that 'broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.' . . . The Commission's order effectively narrowed the issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court. As a matter of law, this decision must be reversed."

Id. at 10 (internal citations omitted).

The PUC makes an argument that "[w]ith respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute and corresponding limitation on discovery was in accord with South Dakota statutes and case law precedent." PUC Reply Brief to Yankton Sioux Tribe at 13. Moreover, PUC believes that SDCL § 49-41B-24 must be read *in pari materia* with SDCL § 49-41B-27. Id. SDCL § 49-41B-24 reads,

> "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 modification of the construction, operation, or maintenance as the commission deems appropriate."

SDCL § 49-41B-24. "Statutes 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, 626 N.W.2d 675, 683.

> "In this case, the statue 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.' Therefore, limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issue

> on June 29, 2010, in Docket HP09-001, or 2) the identified minor factual changes from the Findings of Fact in the Decision identified in [TransCanada's] Tracking Table of Changes attached to the Petition as Appendix C was appropriate."

PUC Reply Brief to Yankton Sioux Tribe at 14.

Giving broad deference to the administrative agency, this Court does not find that it was clearly erroneous, or an abuse of discretion to limit the scope of discovery in this case. The decision of the PUC is AFFIRMED.

V.

**Whether the PUC committed clear error by ordering that pre-filed testimony be submitted before discovery responses from a potential motion to compel were due?**

Yankton Sioux Tribe argues that the PUC committed a blatant and prejudicial error by requiring the submission of pre-filed testimony prior to the conclusion of discovery. Yankton Sioux Tribe Brief at 7. On April 3, 2015, the PUC issued an Order Granting in Part Motion to Amend Procedural Schedule, which established a schedule in which pre-filed direct testimony was to be filed and served no later than April 2, 2015. Id. Final discovery responses were to be served by April 17, 2015, *after* the service of final discovery responses. Id. The PUC then amended the procedural schedule on May 5, 2015, but it did not alter the dates on which pre-filed direct testimony and final discovery responses were due. Id. Yankton argues that this severely limited the parties' abilities to present their case through direct testimony and violated their due process rights. Id. As such, Yankton requests this action be reversed as prejudicial error. Id.

> "When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order. The front page of all prefiled testimony shall show the docket number, docket name, and name of the witness."

ARSD 20:10:01:22.06. On April 23, 2015, the PUC issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony. PUC Reply Brief to Yankton Sioux Tribe at 11.

PUC argues that the record in this matter does not demonstrate error by the Commission in its conduct of a very protracted and inclusive set of proceedings. Id. at 12. PUC further contends that given the active evidentiary hearing participation, the multitude of motions and responses to motions filed by Intervenors, and the Intervenors' active participation in the numerous Commission motion hearings conducted during this proceeding that lasted more than fifteen months, neither Yankton nor any other Intervenor's due process rights or procedural rights under SDCL Chap. 1-26 were violated by the original order requiring prefiled testimony. Id. It is PUC's position that Yankton has failed to demonstrate prejudicial error resulting from the Commission's orders requiring the filing of prefiled testimony. Id. at 13.

Again, reviewing this appeal under a clearly erroneous standard of review, this Court is not left with a definite and firm conviction that a mistake was made by the PUC when it issued its Order Granting in Part Motion to Amend Procedural Schedule or its Order Amending Procedural Schedule. The Court also notes that Yankton Sioux Tribe presented no evidence in their briefs as to *how* this affected their case or caused prejudicial error to the evidence they did present at the hearing. As such, the PUC is AFFIRMED on this issue.

## VI.

## Whether the PUC wrongfully excluded 20 intervenors' testimony as a discovery sanction for untimely disclosure?

The PUC has broad discretion in imposing sanctions for failure to comply with discovery orders. PUC Reply Brief to Individual Intervenors at 18; SDCL § 15-6-37(c); *Schwartz v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979). The South Dakota Supreme Court has held,

> "The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts."

*Haberer v. Radio Shack, a Div. of Tandy Corp.*, 555 N.W.2d 606, 611 (S.D. 1996) (citing *Magbahat v. Kovarik*, 382 N.W.2d 43 (S.D. 1986)).

The PUC contends that where the Commission excluded specific types of evidence, the grounds for such exclusion were based on sound evidentiary legal principles, such as relevancy or lack of jurisdiction. PUC Reply Brief to Individual Intervenors at 19.

> "With respect to the other discovery sanctions, the Commission does not believe the rights of any Intervenor were substantially prejudiced. Of the seventeen Intervenors who did not respond at all to discovery, twelve did not participate further in the case. . . With respect to the three Intervenors, John Harter, BOLD Nebraska, and Carolyn Smith, who were precluded from offering witnesses or evidence at the evidentiary hearing for inadequately responding to discovery, all of them participated in further proceedings in the case and participated in the evidentiary hearing."

Id. at 20. PUC further argues that despite the Appellant's contention that lesser sanctions could have been imposed, "a very significant process of discovery and pre-hearing motions and a nine day hearing with a large number of both individual and organizational Intervenor participants make it highly unlikely that meaningful evidence was omitted from the record in this case." Id. The authority of the PUC concerning sanctions is flexible and allows the PUC "broad discretion with regard to sanctions imposed thereunder for failure to comply with discovery orders." Id. at 20-21; *Chittenden & Eastman Co. v. Smith, supra.*

This Court recognizes that the PUC does have broad discretion to impose sanctions under SDCL §§ 15-6-37(b)(2)(A), 15-6-37(b)(2)(B), and 15-6-37(c). The Court will not reverse the PUC's decision to sanction under a clearly erroneous review of the record. The Court AFFIRMS the exclusion of this testimony.

## VII.

## Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?

Dakota Rural Action contends that the PUC excluded numerous DRA exhibits following a Motion in Limine filed by TransCanada. Dakota Rural Action Brief at 30. A small number of excluded exhibits were permitted on reconsideration. AR at 21070-71. However, DRA argues that the PUC's order was erroneous in that it was largely based on TransCanada's complaint that the

proposed exhibits were not timely disclosed in discovery. Dakota Rural Action Brief at 30. "The PUC abused its discretion and acted arbitrarily and capriciously because the bulk of the excluded exhibits constituted documents disclosed by [TransCanada] to DRA during discovery. [TransCanada] was on notice that its own documents could be used as exhibits and PUC's exclusion of those documents was in error." Id.

TransCanada filed a Motion in Limine on July 10, 2015, prohibiting DRA from offering in evidence any exhibit disclosed on DRA's exhibit list dated July 7, 2015, that had not been timely disclosed in discovery. TransCanada Reply Brief to Dakota Rural Action at 14; AR at 9474-9450. TransCanada's basis for this motion was that DRA's exhibit list included 1,073 documents, all but 36 of which had not been produced in discovery despite TransCanada's outstanding request served on December 18, 2014, that DRA produce all documents that it intended to offer as exhibits. Id. Though DRA asserted that the rest of the documents on its exhibit list came from TransCanada's document production, TransCanada argues that disclosing these documents for the first time on July 7, 2015 was sandbagging. Id.

Under SDCL § 15-6-26(e), a party must supplement its discovery responses at appropriate intervals. Id. at 15. Under SDCL § 15-6-37(c), a party who without substantial justification failed to timely supplement its discovery responses, "is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Id.; SDCL § 15-6-37(c).

TransCanada contends that under SDCL § 15-6-37(c), DRA was required to provide substantial justification for its failure to timely supplement its document production. Id. Because DRA made no effort to do so before the PUC, and does not cite to the applicable statutory framework in their appeal, DRA's argument is entirely insufficient for this Court to conclude that the PUC abused its discretion in granting TransCanada's motion. Id.

This Court finds that late disclosure of 1000+ exhibits would not be harmless under SDCL § 15-6-37(c), and as stated above, PUC does have broad discretion to impose sanctions. DRA provided no substantial justification as required, and therefore the PUC is AFFIRMED on this issue.

## VIII.

## Whether the PUC erred when it admitted and considered the Tracking Table of Changes prepared by TransCanada and included in its Petition for Certification?

Yankton Sioux Tribe filed a Motion to Dismiss early in the pendency of the case before the PUC arguing TransCanada's Petitions must be dismissed pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. Yankton Sioux Tribe Brief at 3. Yankton argued that TransCanada has never received a permit from the PUC for the project described in TransCanada's Petition and therefore the relief requested in the Petition cannot be granted. Id. at 3-4. In support of its motion, Yankton stated that TransCanada,

> "asked the Commission to accept its certification that the project described in the Petition, the 2014 Project, continues to meet the conditions upon which a permit was issued in Docket No. 09-001. And although the Petition might mislead the reader to believe that the project referenced therein is the same project that was permitted in Docket 09-001, the appendix C to the Petitions clearly identifies thirty (30) differences between the two projects."

Id. at 4. Appendix C is a "Tracking Table of Changes" which lists the thirty (30) findings of fact made by the PUC regarding the 2009 Project that do not apply to the 2014 Project. Id.

Yankton argued that because the PUC went through the trouble of making the above findings of fact in regards to the 2009 Project, any deviation from those findings then constitutes a new, separate project. Id. However the Motion to Dismiss was denied by the PUC, "concluding that the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and a thorough opportunity to investigate the facts and proceed to evidentiary hearing if necessary." Id. (citing *Order Granting Motions to Join and Denying Motions to Dismiss* dated January 8, 2015, at 1).

Later, Yankton and other movants jointly filed a Motion in Limine challenging the pre-filed testimony of TransCanada's witnesses that solely reference the Tracking Table of Changes. Id. at 5. The PUC denied this motion and agreed with TransCanada, finding, that the testimony at issue, which only referenced the Tracking Table of Changes, was relevant to the proceeding. Id.

Yankton contends that when the PUC was then faced with a Motion to Strike filed by Dakota Rural Action during the evidentiary hearing, PUC Chairman Nelson questioned why no party had brought an appropriate motion timely to challenge the pre-filed testimony on the ground that it only concerned the Tracking Table of Changes, and not a single condition of the permit. Id. at 6. Yankton submits that this contrary and inconsistent ruling, along with the commentary provided by the PUC on the subject amounts to arbitrary and capricious decision making, constitutes an abuse of discretion, and are clearly unwarranted exercises of discretion. Id.

The Court finds that it is not clearly erroneous, in light of the entire record, for the PUC to find that this is in fact the same project as described in Docket No. 09-001. The Tracking Table of Changes was an acceptable and relevant illustration to rely upon during the hearing. And the Court finds no arbitrary or capricious decision making, no abuse of discretion, and no clearly unwarranted exercise of discretion. The admittance of the Tracking Table of Changes is AFFIRMED.

## IX.

## ICOUP appeals whether the PUC erred when it failed to admit or consider climate change testimony during this Certification hearing?

The Intertribal Council on Utility Policy argues that they were denied the opportunity to offer expert testimony on climate change, and that climate was deemed not relevant to the Keystone XL Pipeline proceedings. Intertribal Council on Utility Policy Brief at 11. Though not well stated, the argument seems to be based on the overall change, with regard to the governmental recognition worldwide of climate change and weather extremes, and that being one of the primary reasons that President Obama's State Department rejected and the President denied TransCanada's repeated application. Id.

> "On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses precluding [ICOUP] from offering the testimony of COUP's proposed witnesses Dr. James Hansen, Dr. George Seielstand, and Dr. Robert Oglesby. The basis for the Commission's decision to grant the motion was that the testimony of these witnesses dealt with climate and climate change and that this evidence was beyond the scope of this certification proceeding."

PUC Reply Brief to ICOUP at 26. PUC asserts that none of the 50 Conditions deal with climate change, nor do any of the Findings of Fact in the KXL Decision. Id. at 27.

The PUC notes that the Presidential Permit currently required by Condition 2 was denied by the U.S. Department of State due to concerns about climate change, and that the issue of CO2 emissions and their effect on climate may affect other agency policies and permit proceedings required by Condition 2. Id. However, PUC believes these policy decisions are not with the province of this proceeding which deals with TransCanada's Certification that it continues to meet the 50 KXL Conditions. Id.

During oral arguments, Counsel for ICOUP stated that climate change is relevant because climate affects the pipeline and the pipeline affects climate. However, the Court finds that climate change is not within the necessary qualifications that PUC must certify in this case. Further, the argument that the Presidential Permit denial addressed climate change, is not relevant to this proceeding, as this Court has already ruled, *supra*, that the denial had no effect on the certification of TransCanada's permit in South Dakota. There was no error in failing to admit evidence of climate change. Moreover, the Court agrees with TransCanada's view of the issue, presented during oral arguments, that the issue of climate change was not perfected or preserved for appeal in this case. The PUC is AFFIRMED on this issue.

## X.

## DRA appeals whether there was bias on behalf of the PUC regarding a denial to produce documents under the attorney work product doctrine and attorney-client privilege?

On April 22, 2015, the PUC entered an order denying DRA's motion to compel discovery from PUC staff. Dakota Rural Action brief at 29; AR 4798-99. DRA was seeking copies of all communications between TransCanada and its affiliates and the PUC and its staff because of assertions on the part of DRA and other intervenors that the interests of the PUC and TransCanada were improperly aligned. Id. "Throughout the course of the proceedings, DRA and other intervenors were left with the impression that PUC staff, instead of engaging on an independent basis, appeared largely supportive of [TransCanada's] attempt to seek certification." Id.

The DRA believes the documents sought from the PUC staff were important because: (1) the government should be open and transparent, and (2) as a public interest organization, DRA is concerned about the prospect of regulatory capture with respect to the PUC's relationship with hydrocarbon pipeline operators. Id. DRA lays out their argument as follows,

> "In denying DRA's motion to compel discovery and obtain the communications between [TransCanada] and PUC staff, the PUC erroneously determined that the communications sought constituted attorney work product. The attorney work product doctrine exists for the purpose of protecting the attorney/client privilege. By adopting the position that communications between [TransCanada] and PUC staff constitute attorney work product, the PUC has inadvertently admitted that the interests of PUC staff and [TransCanada] are aligned in an almost *de facto* attorney/client relationship, constituting the essence of regulatory capture and providing clear and convincing evidence of underlying bias."

Id. at 30 (internal citations omitted).

In response, the PUC notes that the Staff does not advise the Commissioners in a contested case. PUC Brief at 24. "In order to avoid violating the ex parte communications prohibition of SDCL 1-26-26, the Commission maintains a fairly rigorous separation between the Commission, consisting of Commissioners and the Commission advisors, and the Staff." Id. Moreover,

> "The Commission determined that what DRA was seeking in the interrogatory objected to by Staff were documents and tangible things prepared in anticipation of litigation or for trial by or for another party's representative (including such other party's attorney). The Commission determined that Staff was a party to this docket, and the materials sought by DRA from Staff were documents prepared by Staff counsel in anticipation of the

> evidentiary hearing in this matter and documents obtained by Staff for hearing preparation."

Id. at 24-25. During oral arguments, counsel for PUC again addressed the "Chinese firewall" constructed to prevent any inappropriate communication between Commissioners and Staff within the PUC office.

This Court finds no evidence in the record that the denial of this discovery was clearly erroneous. As such, the PUC is AFFIRMED on this issue.

## XI.

## Whether the PUC erred by relying on the Final Supplemental Environmental Impact Statement in FOF 57 that TransCanada consulted with the Standing Rock Sioux Tribe?

Yankton believes, "[t]he Commission erred in its *Final Decision* by finding that page 11 of the State Department's Record of Consultation, found at Appendix E to the Final Supplemental Environmental Impact Statement ("FSEIS"), constitutes proof that the Standing Rock Sioux Tribe was consulted by the Department of State." Yankton Sioux Tribe Brief at 22. Executive Order 13175, as well as a number of federal laws, require federal agencies to conduct meaningful consultation with Indian tribes that may be affected by a proposed federal undertaking. Id. In order for the proposed project to be constructed in compliance with federal law, the State Department is required to meaningfully consult with affected tribes, including the Standing Rock Sioux Tribe. Id.

As part of the FSEIS, the State Department compiles a table which listed the dates of communication pertaining to each Tribe it interacted with during the process. Id. However, Yankton contends that this document is void of any evidence indicating that actual consultation, or meaningful consultation, occurred. Id. at 23.

In response, PUC asserts the following,

> "Appendix E to the FSEIS, which is a matter of public record of which the Commission took judicial notice on July 21, 2015, without objection from any party, contains the Record of Consultation: Indian Tribe and Nations setting forth the consultations between the Department of State and various Tribes under Section 106 of the

> National Historic Preservation Act. AR 020144. On page 11 of the Record of Consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.
>
> Furthermore, multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that [TransCanada's] representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-02635[4], 026481, 026888, 026900-02690[]1, 026908-026909)."

PUC Reply Brief to Yankton Sioux Tribe at 29.

The Court notes that communication was cut-off by the Tribes when they refused to communicate with TransCanada and voiced strong opposition to this project. Cheyenne River Sioux Tribe's Attorney, during oral argument, acknowledged this, but insisted that it didn't mean that TransCanada should stop trying to communicate with the Tribes. This logic is flawed. If one party is attempting to communicate and address issues, and the other party closes themselves off, it is not the responsibility of the first party to continue trying and pushing or forcing the second party to communicate with them. Further, this issue is raised by the Yankton Sioux Tribe but it is in regards to communication specifically with the Standing Rock Sioux Tribe. Standing Rock Sioux Tribe is not a party to this appeal. As independent, sovereign nations, this Court does not know of authority that would give Yankton Sioux Tribe standing in this matter, and Yankton Sioux Tribe has provided the Court with none.

## XII.

## Whether the PUC erred by precluding testimony of aboriginal title or usufructuary rights?

Yankton contends that the Commission erred when it precluded testimony regarding consideration of aboriginal treaty rights. Yankton Sioux Tribe Brief at 23.

> "On May 26, 2015, [TransCanada] filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination. [TransCanada] based its motion on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project's route. All three of these allegations were made in error and should have been rejected."

Id.

Yankton argues that the legislature enacted SDCL § 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. Id. at 24. SDCL § 49-41B-1 reads,

> "The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operate in this state without first obtaining a permit from the commission."

SDCL § 49-41B-1.

Yankton continues, that their usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. Yankton Sioux Tribe

Brief at 25. Yankton believes that the PUC is authorized to consider Yankton's concerns with respect to its usufructuary rights regardless of whether those rights have been identified as such in court. Id. Moreover, Yankton believes that "[b]ecause the Commission's decision to preclude relevant testimony and evidence violated the Tribe's due process rights and severely impaired its ability to fulfill its duties under SDCL Chapter 49-41B, the Commission's decision must be reversed." Id.

PUC argues that the Commission's exclusion of specific types of evidence such as usufructuary and aboriginal rights were based on sound evidentiary legal principle, such as relevancy or lack of jurisdiction. PUC Reply Brief to Yankton Sioux Tribe at 29-30. The example PUC cites to is that the Commission determined that it has no jurisdiction to adjudicate tribal rights. Id. at 30. Such determinations are properly litigated in the courts of this state or in federal court. Id.; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 733 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). PUC continues that no court has held that Native American Tribes have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route in South Dakota. Id. at 30.

The Court would point out that the statute relied upon by Yankton Sioux Tribe, SDCL § 49-41B-1, makes no direct mention of aboriginal or usufructuary rights. The Court finds no clear error was committed when the PUC found no authority that Native American Tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL Pipeline. The decision of the PUC is AFFIRMED.

## XIII.

## Whether the PUC erred when it concluded that Tribes are not "local governmental units" under Condition 6?

SDCL § 49-41B-4.2 reads, in part,

> "The South Dakota Legislature before approving a proposed trans-state transmission line shall find that each of the following criteria has been met:
>
> . . .
>
> (4) That the proposed trans-state transmission line and route will not unduly

> interfere with the orderly development of the region with due consideration having been given to views of the governing bodies of effective local units of government. . ."

SDCL § 49-41B-4.2. Yankton argues that the Commission failed to treat any Tribe as local units of government and failed to include any permit condition requiring that Keystone consult with tribes about the Project. Yankton Sioux Tribe Brief at 25. Yankton contends that "[a]s a governmental unit for a region and group of people likely to be affected by the proposed pipeline, the Yankton Sioux Tribe is clearly a local unit of government for purposes of the Project." Id.

Further, Yankton argues that the PUC erred in its *Final Decision* by failing to treat Tribes as local units of government and by finding that no permit condition requires that TransCanada consult with tribes about the Project. Id. at 26.

PUC, in response, contends that TransCanada has tried to reach out to Tribes in the vicinity of the Project and employs a manager of Tribal relations, but that such consultations have not been achievable in cases such as Cheyenne River Sioux Tribe because the Tribe was not willing to speak with TransCanada's representatives and has passed legislation that forbids TransCanada or any of its contractors from entering the reservation boundaries. PUC Reply Brief to Yankton Sioux Tribe at 30-31. Further, PUC argues that no permit condition requires that TransCanada consult with the Tribes about the Project. Id. at 31. "Condition 6, Apx 27, #6, refers to 'local governmental units,' but does not specify Tribes." Id.

During oral arguments, Yankton Sioux Tribe made an argument that, although the Reservation is not near the path of the pipeline, they feel they will be affected by "man camps" that come with the building of the pipeline. Further Yankton made the statement that the "Tribe has unique knowledge" and should have therefore been consulted. The Court finds these arguments unpersuasive. It is clear that the Tribe is concerned with the possibility of negative impacts, likely crime and/or drug related issues, with which "man camps" have been stigmatized. However, this Court cannot consider any and all *remotely possible* impact this project *might* have somewhere down the line. If so, the Court would also have to look at, balance, and weigh against, the *possible positive* impacts including economic and job growth that will come once the project begins. The project itself is not within Tribal boundaries. Further, the fact that the Tribe feels it has unique knowledge of the land is not enough to warrant required discussions between

TransCanada and the Yankton Sioux Tribe when the land for which they claim knowledge is not Tribal land.

The Yankton Sioux Tribe is a sovereign nation within the bounds of the United States; it is not a local unit of government within the State of South Dakota's government structure. Further, the proposed route of the Keystone XL Pipeline does not cross any Tribal lands. The PUC is AFFIRMED.

## CONCLUSION

Ultimately many of the issues raised by Appellant's would have been more properly raised following the issuance of the original permit in Docket No. 09-001. Four years lapsed between the issuance of the permit and the certification process, during which no suit was filed to challenge the petition itself. This appeal is from an already granted permit, to which the only requirement was to "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." While the Court recognizes there may be legitimate concerns regarding many of the issues raised, *inter alia*, potential distribution of arsenic into the river, sloughing on nearby roads, and issues of climate change, they have been adequately addressed by the Commission or are not appropriate to be addressed in this appeal.

For the foregoing reasons, the Public Utilities Commission's decision is AFFIRMED.

Honorable John L. Brown
Presiding Sixth Circuit Court Judge