BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE	**ROSEBUD SIOUX TRIBE'S REPLY BRIEF** **HP14-002**

For its response to Staff and Applicants post trial briefs the Rosebud Sioux Tribe states the following:

Misplaced Burden of Proof

Initially, the applicant's statutory burden of proof under SDCL 49-41B-22 is misplaced by Staff through reliance on *In re Setliff*, 2002 SD 58. Staff Brief at 3 (hereafter SB at). *Setliff* involved the appropriate burden of proof in an administrative proceeding that revoked a professional license. *Setliff* provides that the general standard of proof in an administrative proceeding that involved the revocation of a professional license is preponderance of the evidence. The applicant assigns the same standard as the burden of proof without any supporting authority. Applicant Brief at 7 (hereafter AB at).

For the reasons stated in Rosebud Sioux Tribes initial post trial brief the standard of proof required to satisfy SDCL 49-41B-22 is substantial evidence from Supreme Court guidance of *Therkildsen v. Fisher Beverage,* 545 N.W.2d 834 (SD 1996), *Helms v. Lynn's, Inc.*, 542 N.W.2d 764 (SD 1996) and *In the Matter of Establishing Certain Electrical Boundaries within the State of South Dakota*, 281 N.W.2d 65 (1979). Generally speaking, South Dakota courts give great deference to administrative agency decisions. Courts must "give great weight to the findings

made and inferences drawn by an agency on question of fact." In order to survive judicial review, any contested case decision from the PUC must be supported and based on substantial evidence. Courts may reverse agency decisions where substantial rights of the parties have been prejudiced "because the administrative findings, inferences, conclusions or decisions are clearly erroneous in light of the entire evidence in the record or are arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36 (5) and (6). In determining if an agency decision is clearly erroneous reviewing courts will examine whether substantial evidence exists to form the basis of the agency decision. *Therkildsen v. Fisher Beverage,* 545 N.W.2d 834 (SD 1996) citing *In re Establishing Certain Territorial Electrical Boundaries,* 318 N.W. 2d 118 (SD 1982).

On review of agency decision making to determine if agency action was either "clearly erroneous" or "arbitrary or capricious" the reviewing court will use the same analysis for each to determine if the decision is supported by substantial evidence. *M.G. Oil Co. v. City of Rapid City,* 793 N.W.2d 858 (SD 2011)(citing *Therkildsen* and *Abilb v. Gateway 2000, Inc.,* 547 N.W.2d 556 (SD 1996)). The substantial evidence test is well established in South Dakota and it must be employed in either an arbitrary and capricious or clearly erroneous challenge on review.

It should be noted that the language from SDCL 1-26-36(5) was different than it is today. At the time the Court issued the opinion from *In re Establishing Electrical Boundaries in South Dakota* SDCL 1-26-36(5) provided that "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 (5) unsupported by substantial evidence on the whole record. *In re Establishing Electrical Boundaries in South Dakota.* Presently, SDCL 1-26-36(5)

provides that "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 (5) clearly erroneous in light of the entire evidence in the record." SDCL 1-26-36(5). Despite the change in the statutory language, through subsequent case law, the Court maintained its understanding of the law to require that agency decisions satisfy the substantial evidence standard burden of proof. The question then becomes – what is substantial evidence and will we know it when we see it?

The Meaning of Substantial Evidence

South Dakota Supreme Court case law provides guidance in interpreting SDCL 1-26-1(9) which defines substantial evidence as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." The previously discussed case law is helpful to understand the meaning of substantial evidence. Physical and testimonial evidence are the two types of evidence that can be considered in making a substantive evidence determination. In *Therkildsen* the court determined that physical evidence consisting of a blood toxicity test was sufficient evidence upon which to uphold an agency decision that denied workers compensation benefits. It is not necessary for agencies to rely purely on physical evidence in reaching decisions. A combination of physical and testimonial evidence is permissible, so long as the combination results in the presentation of substantial evidence. In reaching its decision the Commission may rely on purely testimonial evidence to issue the order, so long as that testimony is specific and substantive. *In re Establishing Electrical Boundaries in South Dakota,* 318 N.W. 2d at 122. In this case, the applicant presented testimony of an expert witness that testified that he used the criteria from SDCL 49-34A-44 to determine the boundaries he recommended to the Commission. The testimony consisted of a

summary of all statutory criteria from SDCL 49-34A-44 followed by a description of how he applied the required criteria to his analysis which supported his conclusions. The sufficiency of this testimonial evidence was challenged on appeal and the South Dakota Supreme Court agreed that the record was supported by specific and substantial evidence through which the witness explained the application of the underlying statute to his recommendations. *Id* at 122. In the present case, the Applicant presented testimonial and physical evidence (consisting of maps, charts, tables, and draft plans). They offered little in the way of providing the analysis required to make the connection to a showing of substantial evidence.

A good example of substantial testimonial evidence is presented through the testimony of Staff witness Michael Houdyshell, Director of the Property and Special Tax Division, South Dakota Department of Revenue who was called upon to "explain how the Dakota Access Pipeline will be assessed for purposed of property taxation." PUC Staff Exhibit 6 page 2 line 33.

Mr. Houdyshell's testimony describes the documents he reviewed in preparing his testimony, describes South Dakota's laws governing the ad valorem system of property taxes along with the manner in which South Dakota law requires pipelines to be taxed. His testimony provided an overview of the central assessment process, described how the "unit value" is determined and described the cost, market and income approached to determining value.

Mr. Houdyshell was asked if it was possible to estimate the property taxes that Dakota Access will pay. PUC Staff Exhibit 6 page 4 line 41. In his testimony starting at line 44 he states that "It is extremely difficult to derive reliable estimates of the property tax liability of a nonexistent property such as the Dakota Access pipeline." He went on to further state that to do so would "require the Department to make several assumptions regarding valuation and levy

rates" and that the "relevant data is unknown to the Department at this time, so making an estimate is unwise and I decline to do so." PUC Staff Exhibit 6 page 5 line 1-3. Mr. Houdeyshell was also asked to comment on Dakota Access's property tax projections. PUC Staff Exhibit 6 page 4 line 11. In response to this question Mr. Houdeyshell stated that "the estimate provided by the Dakota Access Pipeline highlights the difficulties in making a reliable estimate of the property tax liability of the pipeline. There is simply not enough data available at this time. The actual cost of the pipeline does not equal the fair market value of the property and likely overstates the year 1 value of the pipeline in South Dakota." PUC Staff Exhibit 6 page 5 at lines 25-29. He goes on to state that "again, without the full array of data that Dakota Access readily admits is not available, any estimate made by Dakota Access is speculative at best." PUC Staff Exhibit 6 page5 lines 30-31.

The significance of Mr. Houdeyshell's testimony shows that, as Dakota Access admits, the information required to satisfy the requirements of SDCL 49-41B-11(10) and ARSD 20:10:22:23 is not available under the law. The witnesses' conclusion is based on an analysis of the data available as compared with the requirements of the law. Accordingly, the testimony satisfies the substantial evidence test. Because the information that is necessary to make prudent calculations that are needed to satisfy the statutory and administrative requirements does not exist under the requirements of the law, Dakota Access has not and cannot put on substantial evidence to satisfy its burden of proof.

Ability to comply with all applicable laws, rules and regulations

Central to the Commission's decision is the applicant's apparent ability to operate a facility that complies with all applicable laws, rules and regulations. Applicant alleges that it

will comply with all applicable laws, rules and regulations. Applicant Brief at 8. This goes without saying. Every facility permitted by the PUC must comply with all applicable laws, rules and regulations. The question at this stage is whether the applicant demonstrated through the presentation of substantial evidence, their ability to comply with all applicable laws, rules and regulations. The answer to this question is no. To show that it is meeting its burden of proof, DAPL presents testamentary and physical evidence. The physical evidence consists of maps, charts, and other draft documents documentary evidence and does little to corroborate the testimonial claims. The testimonial and physical evidence presented by Dakota Access do not amount to much more than an incomplete attempt to regurgitate the statutory requirements, an approach that was rejected by the Court in *M.G. Oil Co*., ruling that vague and or conclusory testimony cannot be used to base a decision because vague and conclusory testimony is not substantial evidence. Where the applicant does nothing more than restate the law claiming that they will comply with that law, without the supporting data and following analysis employed to reach those conclusions, the applicant has not presented substantial evidence.

The facts from *M.G. Oil Co.* are illustrative. In *M.G. Oil Co.*, the Rapid City Common Council denied applicants application for a conditional use permit to operate a video lottery casino based on vague and conclusory statements made at a series of public meetings, statements made by individuals claiming that crime would increase, and a statement that a City Alderman believed that real estate values could decrease upon issuance of the permit. All of these statements appeared to comply with a statute that allowed the City Council to deny the application if the Common Council concluded that issuing the permit could cause an undue concentration of similar uses, so as to cause blight, deterioration or substantively diminish or impair property value. *M.G. Oil Co.* at 822. The permit was denied and the applicant appealed

alleging that the decision was arbitrary and capricious and an abuse of discretion. The court applied the foregoing analysis and determined that the testimonial statements were not substantial evidence. Dakota Access testimony consisted of little more than a repackaging of the law followed by statements that they will comply with those laws.

The Commerce Clause Does not apply to These Proceedings

Staff's reliance on the Commerce Clause and City of Philadelphia et al v New Jersey 437 US 617 (1978) as a basis for the PUC to reject the requirements of SDCL 49-41B-1, 49-41B-11(9) and ARSD 20:10:22:10 which require the applicant to demonstrate how the project meets the energy needs of the residents of the State of South Dakota is also misplaced. *City of Philadelphia* dealt with a New Jersey law that prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State . . . ."

The statute in question before the Commission differs significantly than the New Jersey law struck down by the Supreme Court. The New Jersey law treated the same type of commerce (solid or liquid waste) differently based on its state of origin, ultimately running afoul of the constraints of the Commerce Clause which prohibits state sanctioned economic protectionalism. The South Dakota law in question treats all crude oil and pipelines the same, regardless of the origin or destination of the crude oil and the pipeline. All applicants are required to comply with the same set of facility siting rules. For this reason Staff's arguments should be rejected. SDCL 49-41B-1 provides in part 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." SDCL 49-41B-11(9) requires the application to contain a statement addressing the "estimated consumer demand and estimated future energy needs of those consumers to be directly served by the facility." Accordingly, the siting rules do not require out of state oil

producers to comply with different requirements than an instate producer would have to comply with and should not be read to prohibit their application and enforcement as Staff suggests.

ARSD 20:10:22:10 provides that "the applicant shall provide a description of present and estimated consumer demand and estimated future energy needs of those customers to be directly served by the proposed facility. The applicant shall also provide data, data sources, assumptions, forecast methods or models, or other reasoning upon which the description is based. This statement shall also include information on the relative contribution to any power or energy distribution network or pool that the proposed facility is projected to supply and a statement on the consequences of delay or termination of the construction of the facility." The application is devoid of any of this information and has not satisfied its burden of proof.

Courts are generally quick to strike down as unconstitutional state legislation that interferes with the Commerce Clause under the following criteria: 1) the statute must regulate even-handedly, 2) it must only incidentally affect interstate commerce and 3) its burden on interstate commerce cannot be clearly excessive in relation to the benefit derived by the public. Direct Auto Buying Service Inc. vs. Welsh, 308 N.W.2d 570 (SD 1981). This statute does none of those things.

Under this standard SDCL 49-41B-1 and 49-41B-11(9) regulates crude oil and pipelines even handedly, there has been no assertion or showing that the application of SDCL 49-41B-1 and 49-41B-11(9) places any burden whatsoever on interstate commerce and any burden that may exist was not shown to be clearly excessive in relation to the benefits derived from the interstate commerce in question. Under this analysis the statutes are not unconstitutional. The applicant has not provided information in the application to demonstrate compliance with SDCL 49-41B-1 and 49-41B-11(9) and has not satisfied its burden under SDCL 49-41B-22.

Furthermore, In re Nebraska Power District 354 NW2d 713 (SD 1984) is also factually and legally distinguishable from the constitutionality of the present statutes brought into question by Staff. The Court in *Nebraska Power District* addressed a statute that required a transportation facility originating and ending outside South Dakota that crossed the state and delivered twenty five percent or less of its design capacity to this state to satisfy an additional condition of public necessity and convenience, regardless of the state where the area is located. *Nebraska Power District*. The South Dakota Supreme Court held that this statute constituted an unconstitutional scheme under the Commerce Clause. The holding from *Nebraska Power District* is irrelevant to the statute presently before the Commission because the present legislative scheme only requires the applicant to demonstrate how the project satisfies the energy needs of the residents of the state of South Dakota. The scheme requires that all applicants be treated the same. Accordingly, the suggestion that the legislative scheme is unconstitutional should be rejected.

Ability to Comply with Federal Law

Staff also addresses the competency of the applicant's ability to comply with the requirements of Section 106 of the National Historic Preservation Act and SDCL 1-19A-11.1. As consistent with various portions of the application and supporting documents, DAPL provided nothing of substance to document over a year's worth of communications with various federal agencies regarding their ability to comply with numerous federal statutes. DAPL specifically left out its Level III Intensive Cultural Resources Survey prepared by Grey and Pape, Inc. with the Army Corps of Engineers as the lead agency. This report was prepared for the purposes of determining compliance with provisions of the National Historic Preservation Act of 1966 (as amended), South Dakota Codified Law 1-19A11.1(11.1), and the South Dakota Historic Preservation Office's South Dakota Guidelines for Compliance with the National Historic

Preservation and South Dakota Codified Law 1-19A11.1. This report would also be used by Dakota Access for acquiring permits from the U.S. Army Corps of Engineers, Omaha District, for crossing jurisdictional waters of the U.S., and the U.S. Fish and Wildlife Service National Wildlife Refuge System for crossing wetland and grassland easements. It is relevant to the issue before the Commission and its absence is telling.

The Applicant professes to demonstrate compliance with the requirement of the law regarding the requirements of compliance with National Historic Preservation Act, where they discuss the level III cultural assessment. Applicant Brief at 24. Dakota Access fails to mention that Dakota Access had this very valuable and helpful report in August 2015 and *failed to update its application* by submitting this report to the commission in advance of the hearing. It was only upon an inquiry into the absence of the Level III cultural survey report on cross examination of Paige Olson that Dakota Access revealed that it had the report and then offered the report as evidence. Applicant further attests to its ability to know, understand and comply with each and every applicable law rule or regulation, without telling the commission what all of those rules are. Applicant also did not provide an alternative route as required by the energy facility siting rules. An alternative route is required by the Energy Facility Siting rules and it should have been done from the start and included in the application. The alternative route requires applicants to propose more than one route and then compare the preferred route with alternatives. This requirement exists, and if followed, will form the basis for satisfaction of the substantial evidence requirement to support agency decisions on appeal. Without it, the order cannot be based on substantial evidence. The application and testimony consisted of a robust discussion of the applicant's knowledge and understanding of the applicable laws- yet the application did not contain an alternate route, as required by the energy facility siting rules. This is not

demonstrative of a company that is ready to construct and operate a crude oil pipeline through some of the most productive crop land, wildlife habitat, hunting, recreational and aboriginal land in South Dakota.

Furthermore, no THPOS's in South Dakota participated in the Section 106 consultation process with the Army Corps of Engineers and little information was presented regarding the status of consultation, even though consultation is required. To satisfy the burden of complying with all laws, the applicant has not presented sufficient evidence for the Commission to base a decision that supports that finding. Additionally, Paige Olson was surprised that DAPL did not provide the cultural assessment reports to the commission for consideration. DAPL had the reports in August and failed to update its application accordingly. Furthermore, DAP presented no evidence to show that the US Fish and Wildlife Service and the Army Corp of Engineers agrees with their assessment and no effect determination on wildlife, ecosystems, water crossings and resources or cultural resources. Documentary evidence that corroborates the testamentary evidence of the witnesses may have combined to create the basis of substantial evidence. Without it we cannot tell.

Protected Interests

The Rosebud Sioux Tribe has a protected interest in seeing that all applicable federal and state laws are complied with concerning Dakota Access's application for a permit to construct the Dakota Access pipeline in South Dakota. This includes compliance with the National Historic Preservation Act, the National Environmental Policy Act, Endangered Species Act and federally protected water rights. The applicant misunderstands the positions of the Rosebud Sioux Tribe in this case and the source of its rights. The applicant attempts to place the nexus of Tribal rights on the control of the land in question. Because of the status of federally recognized

Indian tribes, Tribes and their members enjoy rights and protections that do not derive from the present ability to control land, but rather those rights and interests are triggered because of the Tribes *past ability* to control and occupation of the land where the pipeline is routed. They are recognized within the bounds of a political relationship that exists as a sovereign with the United States. Contrary to Applicant's claims, the Rosebud Sioux Tribe is not asserting through this case that it has the right to control the land where the pipeline is routed or that the PUC has jurisdiction to determine tribal ability to control that land. Nevertheless, tribes have protected interests in what happens along the pipeline route and they have the right to have the PUC consider and protect those interests throughout the permitting process.

Applicant asserts that the PUC cannot require the company to engage in tribal consultation related to historic and cultural property located on private property. While the Commission may not have that authority, it is free to craft conditions based on mutual respect of cultural and historic interests and cooperation to reduce the risk of damage to the environment only after considerable consultation and consideration with the assistance of the State Historical Preservation office.

Conclusion

Based on the foregoing the Rosebud Sioux Tribe respectfully requests the Commission issue an order declaring that Dakota Access has failed to meet its burden of proof and denying the application for construction of the facility known as the Dakota Access Pipeline. The Rosebud Sioux Tribe also reserves the right to submit supplemental findings of fact and conclusions of law consistent with the Rules of Civil Procedure following the Commissions actual decision on the merits as anticipated on November 30, 2015.

Dated this 20th day of November, 2015.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Rosebud Sioux Tribe's Post Trial Brief on the following persons as designated and maintained on the website "Service List" at the following:

http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx

Dated this 20th day of November, 2015.

/s/ Matthew L. Rappold
Matthew L. Rappold