IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF PUC DOCKET HP 14-001, ORDER ACCEPTING CERTIFICATE OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	Appeal No. 28331, 28332, 28333 **KEYSTONE'S RESPONSE TO CLERK'S LETTER DATED APRIL 6, 2018, ADDRESSING APPELLATE JURISDICTION**

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By letter dated April 6, 2018, the Clerk of this Court directed the parties to address whether the Court has appellate jurisdiction in these related appeals under SDCL § 49-41B-30, and invited written responses on or before April 13, 2018. For the following reasons, Appellee TransCanada Keystone Pipeline, LP ("Keystone") agrees with the Clerk's letter that "it does not affirmatively appear that there is appellate jurisdiction to consider this appeal," and respectfully requests that the appeals be dismissed for lack of jurisdiction.

1. Under established jurisdictional principles, the appeals must be dismissed

This Court has only "'such appellate jurisdiction as may be provided by the legislature. The right to appeal is statutory and therefore does not exist in the absence of a statute permitting it.'" *State v. Schwaller*, 2006 S.D. 30, ¶ 5, 712 N.W.2d 869, 871 (quoting *Dale v. City of Sioux Falls*, 2003 S.D. 124, ¶ 5, 670 N.W.2d 892, 894). The issue of jurisdiction may be raised by the Court sua sponte. *Id.* ¶ 5, 670 N.W.2d at 871. In determining whether the Court has appellate jurisdiction, "the rules of statutory interpretation apply." *Double Diamond Constr. v. Farmers Co-op Elevator Ass'n*, 2003 S.D. 9, ¶ 7, 656 N.W.2d 744, 746. "An attempted appeal from

which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it." *Elliott v. Board of Cty. Comm'nrs of Lake County*, 2005 S.D. 92, ¶ 15, 703 N.W.2d 361, 368.

2. The certification proceeding was not a "permit issuance proceeding" under SDCL § 49-41B-30

As the Clerk's letter states, SDCL § 49-41B-30 provides that a party to a "permit issuance proceeding" may appeal from a final decision of the Public Utilities Commission on "an application for a permit." SDCL § 49-41B-30. The term "permit issuance proceeding" is not statutorily defined. This Court must, however, interpret a statute based on its plain language. *Peters v. Great Western Bank,* 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. No dispute exists that the statutory reference to an application for a permit is clear based on its plain and ordinary meaning.

SDCL Ch. 49-41B, the South Dakota Energy Facilities Act, requires pipelines to obtain a permit from the Public Utilities Commission before commencing construction. SDCL §§ 49-41B-1, -4. A permit is defined as "the permit issued by the Commission under this Chapter required for the construction and operation of a facility." SDCL § 49-41B-2(5). Keystone sought a permit to construct and operate the Keystone XL Pipeline in Docket HP09-001. Its permit application was an extensive, 120-page document explaining the project. *See* www.puc.sd.gov/commission/dockets/hydrocarbonpipeline/2009/hp09-001/application.pdf. SDCL § 49-41B-15 establishes the procedure that the Commission must follow after receipt of a permit application, but SDCL § 49-41B-27 is silent about what the Commission can or cannot do after a utility files a certification under SDCL § 49-41B-27. After proceeding in Docket HP09-001 as required by SDCL § 49-41B-15, the Commission held that Keystone met its burden for a permit under SDCL § 49-41B-22 and entered a final decision and order granting a permit subject to conditions. That decision was not appealed and constitutes a final order, as the Commission

concluded in the certification docket, HP14-001. (Final Decision & Order, Conclusions of Law ¶ 2.)

Under SDCL § 49-41B-27, the permit does not expire with the passage of time. The Commission expressly found that Keystone had "no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22." (*Id* ¶ 3.) No party in the pending appeals has challenged that conclusion of law. Rather, after four years passed without construction, Keystone, per SDCL § 49-41B-27, was obligated to certify that the project could still be constructed consistently with conditions imposed by the Commission in the 2010 permit, which is what Keystone did in Docket HP14-001.

There can be no reasonable dispute that a certification filed under SDCL § 49-41B-27 is neither an application for a permit under SDCL Ch. 49-41B nor a permit as defined in SDCL § 49-41B-2(5). Thus, the appeals before the Court do not concern the issuance of Keystone's permit, but Keystone's certification filed under SDCL § 49-41B-27, leaving this Court without appellate jurisdiction and requiring dismissal.

3. Jurisdiction does not exist under SDCL Ch. 1-26

The Commission's final decision and order included a notice at the end stating that the parties had a right to appeal to circuit court by proceeding under SDCL § 1-26-31. (Final Decision & Order at p. 28.) That statute is procedural, and does not itself confer a right to appeal. Two other statutes in SDCL Ch. 1-26 relate to the right to bring an appeal. The first, SDCL § 1-26-30.2, provides that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency." A contested case is defined as a proceeding "in which the legal rights, duties, or privileges of a party are required by

law to be determined by an agency after an opportunity for hearing." SDCL § 1-26-1(2).[1] Nothing in SDCL § 49-41B-27 required a hearing on Keystone's certification.

The second statute, SDCL § 1-26-30, provides more broadly that "[a] person who has exhausted all administrative remedies available within an agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." Assuming that this section creates a right to appeal from decisions in an agency matter that does not constitute a contested case, it would nevertheless not create a right to appeal from a certification proceeding under SDCL § 49-41B-27. Several canons of statutory interpretation, which apply to the Court's determination of jurisdiction, *see Double Diamond Constr.*, ¶ 7, 656 N.W.2d at 746, preclude either statute in SDCL Ch. 1-26 from negating SDCL § 49-41B-30.

First, if the statutes in Chapter 1-26 were read to create an unlimited right of appeal in a proceeding under SDCL Ch. 49-41B despite the language of § 49-41B-30, then SDCL § 49-41B-30 would be unnecessary. This Court must assume that "no part of the statutory scheme was intended to be 'mere surplusage.'" *Double Diamond Constr.*, 2003 S.D. 9, ¶ 7, 656 N.W.2d at 746 (quoting *Faircloth v. Raven Indus.*, 2000 S.D. 158, ¶ 6, 620 N.W.2d 198, 200).

Second, the statutes in SDCL Ch. 1-26 and § 49-41B-30 all deal with appellate jurisdiction over decisions by an administrative agency. Because they address the same subject matter, the statutes are *in pari materia* and must be considered together and treated harmoniously if possible. *Lewis & Clark Regional Water System v. Seeba*, 2006 S.D. 7, ¶ 15, 709 N.W.2d 824, 831 (rule of statutory interpretation for statutes that are *in pari materia* is based on the

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[1] This definition specifically includes licensing, defined as "the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license." SDCL § 1-26-1(5). A "license" is defined to include "the whole or any part of an agency permit." SDCL § 5-1-26(4). Here, Keystone's permit did not expire, so the certification proceeding, which did not involve the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of the permit, is clearly different than a licensing proceeding.

supposition that the statutes are "'governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions'" (quoting *MB v. Konenkamp*, 523 N.W.2d 94, 97-98 (S.D. 1994)); Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS §39, at p. 252 (2012) ("laws dealing with the same subject—being *in pari materia* (translated as 'in a like matter')—should if possible be interpreted harmoniously"). The statutes in SDCL Ch. 1-26 therefore cannot be read in isolation, i.e., without regard to § 49-41B-30, which specifically applies to a matter arising under SDCL Ch. 49-41B.

Third, "the more specific statute governs the more general statute." *Peterson v. Burns*, 2001 S.D. 126, ¶ 28, 635 N.W.2d 556, 567. *See also* READING LAW § 28, at p. 183 (explaining that a specific statute is treated as an exception to the general rule created by a more general statute when they conflict). Because it addresses proceedings under SDCL Ch. 49-41B, section 49-41B-30 is more specific than the general provisions of SDCL Ch. 1-26, which generally create appeal rights from final decisions of an administrative agency involving contested cases. SDCL § 49-41B-30, however, creates a more limited appeal right in the specific circumstances of a proceeding under SDCL Ch. 49-41B. SDCL § 49-41B-30 is in effect a limitation on what can be appealed under SDCL Ch. 49-41B, while the statutes in SDCL Ch. 1-26 are a more general permission applying to all administrative proceedings involving contested cases. By applying the general/specific canon, the Court would read the statutes harmoniously by treating the more specific statute as an exception to the more general rules stated in SDCL Ch. 1-26. READING LAW, § 28, at p. 185 (explaining that provisions can exist in harmony because "[t]he specific provision does not negate the general one entirely, but only in its application to the situation that the specific provision covers").

Fourth, a more recent statute supersedes an older statute. *Peterson*, 2001 S.D. 126, ¶ 29, 635 N.W.2d at 567. SDCL § 49-41B-30 was enacted in 1977, after the more general provisions in SDCL § 1-26-30 and 1-26-30.2, which were enacted in 1966 and 1975 respectively. Thus, the South Dakota Legislature knew of the right to appeal afforded in SDCL Ch. 1-26 when it enacted SDCL § 49-41B-30. To give it meaning, § 49-41B-30 must mean that the only appeals allowed from decisions of the Commission acting under SDCL Ch. 49-41B are appeals from applications for a permit, as SDCL § 49-41B-30 expressly states. As explained in READING LAW, when the later statute is the more specific, this rule of interpretation makes the general/specific canon unnecessary. READING LAW § 28, at p. 186.

By applying these principles, the Court can readily harmonize the statutes and conclude that under SDCL Ch. 49-41B, an appeal is statutorily authorized only from a final decision in a permit proceeding.

Conclusion

Based on the plain language of SDCL § 49-41B-30 and well-established canons of statutory construction, this Court lacks jurisdiction over the separate appeals from the Commission's acceptance of Keystone's certification. The appeals must be dismissed for lack of jurisdiction.

Dated this 13th day of April, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

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Certificate of Service

I hereby certify that on the 13th day of April, 2018, I electronically served via e-mail, a true and correct copy of Keystone's Response to Clerk's Letter Dated April 6, 2018, Addressing Appellate Jurisdiction the foregoing:

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