IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR AN ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

#28333

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable John L. Brown

APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S BRIEF

Notice of Appeal was filed on July 19, 2017

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PRELIMINARY STATEMENT

The Appellant, Dakota Rural Action, will be referred to as "DRA," or "Appellant." Appellee, the South Dakota Public Utilities Commission, will be referred to as the "Commission." Appellee, TransCanada Keystone Pipeline, LP, will be referred to as "Keystone." The 39 persons who were granted intervention in the case and did not withdraw as parties will be referred to collectively as "Intervenors." The Petition for Order Accepting Certification under SDCL § 49-41B-27 filed by Keystone on September 15, 2014, will be referred to as the "Petition." The Keystone XL Pipeline project will be referred to as the "Project" or "Keystone XL." The Appendix to this brief will be referred to as "Apx" with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as "AR" followed by the appropriate page number(s). The transcript of the evidentiary hearing held before the Commission on July 27-31, 2015, and continuing August 1 and 3-4, 2015, will be referred to as "TR" followed by the applicable page number(s). Exhibits offered into evidence at the evidentiary hearing will be referred to as "Ex" followed by the exhibit number and page number(s) where appropriate. The Final Decision and Order; Notice of Entry issued by the Commission in Docket HP14-001 on January 21, 2016, will be referred to as the "Decision." The Amended Final Decision and Order; Notice of Entry issued by the Commission in Docket HP09-001on June 29, 2010, will be referred to as the "KXL Decision." The 50 conditions set forth by the Commission in Exhibit A to the KXL Decision will be referred to as the "KXL Conditions" followed by the Condition number(s) when specific condition(s) are referenced. References to the United States Department of State's Final Supplemental Environmental Impact Statement will be referred to as "FSEIS" followed by the appropriate Volume and Chapter number or

Appendix letter followed by the section and/or page number where appropriate. The Circuit Court's Order and Memorandum Decision is designated as "Order." The Appendix to this brief includes the following documents: (1) HP09-001 Amended Final Decision and Order; Notice of Entry, Apx A2-A40, (2) HP14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry, Apx A41-A68, (3) SDCL 1-26-36, SDCL 49-41B-24 and SDCL 49-41B-27.

JURISDICTIONAL STATEMENT

The Commission accepts DRA's jurisdictional statement.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Issue A. Whether the Commission improperly applied the burden of proof given the statute at issue in this case and whether sufficient evidence was presented to justify the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Circuit Court affirmed the Commission and found the Commission properly applied the burden of proof given the statute at issue in this case and that sufficient evidence was presented to justify the Commission's Decision.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue B. Whether sufficient evidence was presented to support the findings of fact set forth in the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Circuit Court affirmed the Commission and found sufficient evidence was presented to support the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification.

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Issue C. Whether the Commission properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product, and whether, if the Commission's determination was incorrect, such ruling resulted in sufficient prejudice to DRA to justify reversal of the Decision?

The Circuit Court affirmed the Commission and found that it properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product.

SDCL 49-41B-27

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Issue D.1. Whether the Commission's rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a sufficient process of discovery prior to hearing?

The Circuit Court affirmed the Commission and found that its rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a very thorough process of discovery prior to hearing involving a very significant number of responses to interrogatories and the production of thousands of documents.

SDCL 49-41B-27

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Issue D.2. Whether the Commission's issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was clearly erroneous and whether such orders resulted in substantial prejudice to DRA?

The Circuit Court affirmed the Commission and found that its issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was not erroneous and did not in any case result in substantial prejudice to DRA due to the evidence at hearing regarding the matters to which the excluded exhibits pertained.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue D.3. Whether the proceedings conducted by the Commission were handled fairly and competently and comported with state law and whether the Commission acted with bias in rendering its decision?

The Circuit Court affirmed the Commission and found that the proceedings conducted by the Commission were handled fairly and competently and comported with state law and that the Commission did not act with bias in rendering its decision.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Dakota Rural Action on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled "In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline." The Commission granted intervention to all forty-two persons and organizations that applied for intervention. The Commission approved withdrawal from Docket HP14-001 to three intervenors who requested to withdraw. The Commission heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

"The separation-of-powers doctrine proscribes de novo review of administrative action that is not quasi-judicial." *S.D. Dep't of GF&P v. Troy Twp.*, 2017 S.D. 50, ¶ 51, 900 N.W.2d 840, 858. The administrative act of accepting a company's certification is not quasi-judicial. Therefore, the correctness of the Commission's decision to accept the certification at issue may not be reviewed; this Court may consider only whether the Commission acted arbitrarily. "The [appellants] have the burden of proof." *Id.*

If the Court determines that the administrative act of accepting a company's certification is quasi-judicial, the standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company,* 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. "[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the 'same review of the administrative tribunal's action as did the circuit court.'" [citations omitted] "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. "A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency's decision only if it is 'clearly erroneous in light of the entire evidence in the record.'" *In Re Pooled Advocate Trust,* 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep't of Soc. Serv.,* 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, "[a]n agency is usually given a

reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." *Krsnak v. S. Dakota Dep't of Env't & Natural Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916.

"A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II,* 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.,* 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labo*r, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or decision is inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion,* 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

ISSUE A.

WHETHER THE COMMISSION IMPROPERLY APPLIED THE BURDEN OF PROOF GIVEN THE STATUTE AT ISSUE IN THIS CASE AND WHETHER SUFFICIENT EVIDENCE WAS PRESENTED TO JUSTIFY THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION?

A central issue in this proceeding boils down to what is meant by the term "certify" in SDCL 49-41B-27 and what effect does the use of that term have on issues such as the certifying party's *prima facie* case and burden of proof. In terms of statutory

construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone 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 siting 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. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word "establish," the word "prove," or the word "demonstrate." The language of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

> 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 modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however,

> that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "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, 636 N.W.2d 675, 683. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit, indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22, or apply for a new permit. In this case, the statute 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."

The Commission's Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

> An unappealed administrative decision becomes final and should be accorded res judicata effect. See *Joelson v. City of Casper, Wyo.*, 676 P.2d 570, 572 (Wy 1984) (if judicial review is granted by statute and no appeal is taken, the decision of an administrative board is final and conclusive); *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (final adjudicatory decision of administrative agency is regarded as res judicata).

Jundt v. Fuller, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. Apx A2-A39.

Instead, the statute 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." The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> 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 statute must be given their plain 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.

The word "certify" is a precise and narrow verb. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Black's Law Dictionary (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." *Id.*; *Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 ("Words and phrases in a statute must be given their plain meaning and effect."). Thus, under the plain meaning of the language of the statute, Keystone'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 KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. Apx A26-A39. Keystone's obligation to "certify" could certainly be construed to mean that Keystone met its burden under the statute by filing with the Commission a certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of

implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Although the Certification standing alone would seem to have met the "must certify" requirement set forth in SDCL 49-41B-27, Keystone 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. Due to Keystone's simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission's prior history of handling the receipt of certifications, however, the Commission opened a docket to consider Keystone's Petition and Certification, despite the fact that the ministerial, non-quasi-judicial administrative act of accepting a certification pursuant to statute failed to deprive anyone of "life, liberty, or property". *S.D. Dep't of GF&P* at ¶21.

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must "certify," it can certainly be reasonably argued that Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

> Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17 Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

Even if the Court determines that the Certification standing on its own is insufficient to shift the burden of production to Intervenors, however, the Commission believes that sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. Keystone did not rest on its Certification standing alone. Along with its Certification, Keystone submitted the Petition and the accompanying three informational appendices at the time of initial filing, fourteen sets of pre-filed direct, rebuttal, and surrebuttal testimony for eight witnesses, nine of which were admitted in evidence as exhibits, and the evidentiary hearing testimony of seven witnesses lasting nearly six days.

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind

might accept as being sufficiently adequate to support a conclusion." Substantial evidence "'does not mean a large or considerable amount of evidence ...,' *Pierce v. Underwood*, 487 U.S., 564-65, 108 S.Ct., 2549, 101 L.Ed.2d, 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 (1938)." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

Corey Goulet, the certifying officer for Keystone, spent approximately eight hours on the witness stand and testified that Keystone continues to meet, or with respect to prospective conditions will be able to meet, and has made a commitment to meet, the 50 KXL Conditions. Since the vast majority of the KXL Conditions are prospective and cannot be performed until the construction and operational phases of the Project, Mr. Goulet testified that Keystone intended to fully comply and "meet" such prospective conditions at the appropriate time. TR 151 (AR 024109); TR 512-514 (AR 024643 – 024645); Ex 2001, ¶ 15 (AR 020505). With respect to conditions that don't come into action until the future, there is really no more that the permit holder can produce to demonstrate that its intention is to fully comply with all such permit conditions at the time they come into being as active conditions. As to Intervenors argument that the Decision should be overturned because Keystone did not produce substantial evidence specific to each prospective condition that it will be able to meet such prospective conditions in the future at the appropriate time for each such condition, such an argument is tantamount to an interpretation that a "certification" essentially goes even beyond a retrial of the original permit proceeding. If the Legislature had intended such a

construction, it would not have employed in SDCL 49-41B-27 the phrase "certify that it continues to meet the conditions upon which the permit was issued," but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4, Apx A26, #4, is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Conditions 7 through 9, Apx 27-28, #7, 8, and 9, require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Keystone appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline project. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone's appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed six annual reports and twenty-nine quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

With respect to the remaining conditions that are not prospective, or at least not fully prospective, the record demonstrates that Keystone has taken steps to comply with such conditions to the extent feasible at this stage of the process. Condition 10, Apx A28, #10, requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that, despite the fact that it is likely significantly more than six months before construction will commence, it has already started making some of those contacts and will continue. TR 662 (AR 024793), 827 (AR 025248), 1292 (AR 025771), 2395 (AR

027282), 2405 (AR 027292), 2409 (AR 027296), 2447 (AR 027334), Petition, Appendix B, Condition 10. Apx A28, #10. Intervenors presented no evidence indicating this wasn't the case.

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, # 15.

Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees will be done as part of the process of acquiring easements. TR 151 (AR 024109); Petition, Appendix B, Condition 19. Apx A31, #19. There is no evidence that Keystone has failed to comply with this condition or is unable or unwilling to comply with this condition.

Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662 (AR 024793), 670 (AR 024801), 699 (AR 024830), 718 (AR 024849); Apx A35, #34. Intervenors produced no evidence that this process is not ongoing or will not continue to be so, but rather focused on whether Keystone had sought out local knowledge from tribes, particularly the Cheyenne River Sioux Tribe.

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630 (AR 024761), 637 (AR 024768); Petition, Appendix B, Condition 41. Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41; Apx A36-37, #41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965 (AR 026769); Ex 1003 (AR 002918-002920). Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978 (AR 026781-026782). She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307 (AR 026779, 026782, 024304-024305). Corey Goulet testified that Keystone was committed to continue reclamation

efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306. There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. Under these circumstances, the Commission's decision to accept the certification as valid and accurate was not "a choice outside the range of permissible choices." *State v. Stenstrom*, 2017 S.D. 61, ¶17 (quoting *MacKaben v. MacKaben*, 2015 S.D. 86, ¶ 9, 871 N.W.2d 617, 622).

Despite DRA's arguments, throughout its Statement of the Case and Facts, that the Commission and the Circuit Court "chose to ignore" certain testimony and evidence, it is the Commission, as the adjudicatory fact finder under SDCL 1-26-36 who is to

determine what credibility and weight to give the evidence in this case. (DRA Brief at 12). It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its decision, that the Commission took this matter seriously. The Commission should not be faulted for deciding to handle this non-quasi-judicial administrative act in a quasi-judicial fashion. This case is not a retrial of the original permitting proceeding in Docket HP09-001. Intervenors simply did not provide any significant evidence indicating that Keystone does not currently comply with KXL Decision Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

ISSUE B.

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE FINDINGS OF FACT SET FORTH IN THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION

Sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision and Order entered by the Commission. The Commission has set forth above in response to DRA's issue A. a detailed recitation of the evidence supporting the Decision and basis for the Commission's Decision.

Importantly, this administrative certification proceeding was not a revocation proceeding under SDCL 49-41B-33(2), but rather a certification proceeding under SDCL

49-41B-27. The issue of revocation was not raised during the proceedings. Does this mean that the Commission will never take action to revoke the Keystone XL permit, and the permit will remain in effect in perpetuity? It does not. At a point where Staff or the Commission determines that KXL Conditions cannot be complied with by Keystone, Staff or the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived and that this proceeding was not the appropriate proceeding in which to take such action.

ISSUE C.

WHETHER THE COMMISSION PROPERLY DETERMINED THAT COMMUNICATIONS BETWEEN STAFF AND COUNSEL FOR KEYSTONE WERE PRIVILEGED AS ATTORNEY WORK PRODUCT, AND WHETHER, IF THE COMMISSION'S DETERMINATION WAS INCORRECT, SUCH RULING RESULTED IN SUFFICIENT PREJUDICE TO DRA TO JUSTIFY REVERSAL OF THE DECISION?

The only communications between the Commissioners, its advisor, or Commission Counsel and Keystone involving the Keystone XL Project since the hearing concluded in 2010 were the quarterly and annual reports that are publicly available on the website for Docket HP09-001 and the scheduling email exchange between Keystone's attorney Willian Taylor and Commission Counsel John Smith early in the process in November 2014, that is also on file in the record and publicly available on the web page for Docket HP14-001. Obviously, Staff, and in certain instances Commissioners and Commission advisors, had significant post-decision follow-up contact with Keystone regarding Keystone I construction issues, particularly reclamation issues, the most notable of which was on the Sibson's property, which was addressed at hearing and elsewhere in the record.

With respect to Staff communications and the "regulatory capture" theory, first of all it is important to note that the Staff does not advise the Commissioners in a contested case. 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 Staff. The Commission accordingly does not direct Staff as to what positions Staff should take regarding the issues presented in a case. The Commission's decisions sometimes are in accord with Staff's positions in a case and sometimes they are not. As far as DRA's assertion that Staff counsel met with Keystone's counsel "behind closed doors" during the short break during the December 9, 2014, Commission meeting, there is nothing in the transcript from the proceedings occurring after the break indicating that an impermissible meeting between Staff and counsel for Keystone occurred during the brief recess. (AR 001432-001527). The Commission also simply sees no basis in the record for DRA's statement that Staff and Keystone are aligned in an almost *de facto* attorney/client relationship.

SDCL 15-6-26(b)(3) states the following with respect to attorney work product:

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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. As stated in *Kaarup v. St. Paul Fire and Marine Insurance Company*, 436 N.W.2d 17 (S.D. 1989):

> "The test we apply for determining whether a document or tangible thing is attorney work product is whether 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2024 (1970) at 198.

Furthermore, DRA made no showing that they had a substantial need, or any need at all, for the requested correspondence. See, April 14, 2015, motion hearing transcript 344-351 (AR 004526-004532); Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery. AR 003627-003635. The proponent of excluded evidence must also attempt to offer the excluded evidence at trial and make an offer of proof. *Joseph v. Kerkvliet,* 2002 SD 39, ¶ 7, 642 N.W.2d 533, 535 (quoting *State v. Norville,* 23 S.W.3d 673, 685 (Mo. Ct. App. 2000)). DRA did not.

Lastly, DRA has provided no evidence concerning prejudicial injury resulting from the Commission's denial of the Motion to Compel. Given the enormous amount of material produced through discovery in this proceeding, the lengthy hearing, and the fairly limited participation by Staff, it is difficult for the Commission to believe that any information produced under Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery would have had any significant influence on the outcome of this case.

ISSUE D.1.

WHETHER THE COMMISSION'S RULINGS ON DISCOVERY WERE BASED ON A PROPER CONSTRUCTION OF SDCL 49-41B-27 AND RESULTED IN A SUFFICIENT PROCESS OF DISCOVERY PRIOR TO HEARING?

The scope of discovery is set forth in SDCL 15-6-26(b):

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . (emphasis supplied)

In its Order Granting Motion to Define Issues and Setting Procedural Schedule issued on December 17, 2014, the Commission determined that the subject matter issue to which discovery requests must be relevant is whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the KXL Decision. This ruling was based on the Commission reading of the statute at issue in this docket, SDCL 49-41B-27.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

> 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 modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "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, 636 N.W.2d 675, 683. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit or indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22. In this case, the statute 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."

Furthermore, the proceedings in this case following the Commission's issuance on December 17, 2014, of its Order Granting Motion to Define Issues and Setting Procedural Schedule involved a very large number of motions filed by numerous parties, including motions to compel discovery filed by DRA and other Intervenors, several of which were granted, at least in part, by the Commission. In response to such motions to compel, Keystone produced 42.54 GB of electronic data, consisting of 6,214 total files, plus numerous additional documents that it had already produced. AR 002475, 005072, 005240, 005247-005250, 005256-006303, 021109.

Again, as stated previously, the issue in this case is a narrow one, i.e., whether Keystone's certification that it continues to meet the conditions upon which the permit was granted is valid. The massive amount of documents and discovery responses produced by Keystone went far beyond what should have been required for making such a determination. The Commission's proceedings in this docket resulted in a record consisting of over 31,000 pages, including a hearing lasting nine days. DRA's argument that the Commission committed prejudicial error in that portion of its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule concerning discovery limitations has no merit. "'[T]he extent of discovery permitted by either side rests in the discretion of the court'" *State v. Erickson*, 525 N.W.2d 703, 711 (S.D. 1994). The Commission did not abuse its discretion in its oversight of discovery conducted by the parties over a period of many months.

ISSUE D.2.

WHETHER THE COMMISSION'S ISSUANCE OF THE ORDER GRANTING IN PART AND DENYING IN PART MOTION *IN LIMINE* (DRA EXHIBITS) AS MODIFIED BY ITS ORDER GRANTING IN PART MOTION FOR RECONSIDERATION OF PARTIAL GRANTING OF MOTION *IN LIMINE* TO EXCLUDE EXHIBITS WAS CLEARLY ERRONEOUS AND WHETHER SUCH ORDERS RESULTED IN SUBSTANTIAL PREJUDICE TO DRA?

On July 7, 2015, DRA submitted its exhibit list identifying 1,073 exhibits that DRA stated it may introduce at hearing. On July 10, 2015, Keystone submitted Keystone's Protective Motion *in Limine* Regarding Dakota Rural Actions Exhibit List Dated July 7, 2015. Keystone's motion requested that any of the documents set forth on DRA's exhibit list that were not identified in DRA's responses to Keystone's discovery requests be precluded from admission in evidence at hearing. On July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine*

(DRA Exhibits). On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine*. As a result of the two orders, 86 of the 1,073 exhibits on DRA's exhibit list were precluded from admission at hearing.

The Commission has broad discretion in imposing sanctions for failure to comply with discovery orders. SDCL 15-6-37(c). *Schwarts 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 Court further stated:

> Prohibition of evidence offered by a party who has not complied with the discovery rules "'is designed to compel production of evidence and to promote, rather than stifle, the truth finding process.'" *Schrader*, 522 N.W.2d at 210 (quoting *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D.1986)). Imposing a sanction such as the exclusion of the testimony should result when failure to comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

Id. at 610. The Court also has made it clear that it takes seriously deadlines for discovery and compliance with the discovery process. The Court has stated that ". . . order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in this manner should not be heard to complain that a sanction was too severe." *Schwarts v. Palachuk, supra.*

The Commission does not believe that its issuance of the order on reconsideration violated the above principals of discovery sanctions. Out of the 1,073 documents listed on DRA's exhibit list, the Commission's order resulted in the preclusion of the admission of only 86 documents. The Commission doesn't believe this action was overly severe under the standards set forth above.

Furthermore, the Commission asserts that such preclusion of those 86 documents resulted in little if any prejudice to DRA. The Sibson photos, etc. were introduced by other Intervenors and admitted in evidence. Judicial notice was taken by the Commission of the entirety of the FSEIS record. With respect to the Evan Volkes' emails and communications concerning the Houston Lateral events, the PHMSA notices and other documents, and the pipe and inspection issues, Mr. Volkes testified concerning those matters at some length during the hearing. It is highly unlikely that any of the documents that were precluded would have materially influenced the outcome of the hearing and the Commission's Decision.

ISSUE D.3.

WHETHER THE PROCEEDINGS CONDUCTED BY THE COMMISSION WERE HANDLED FAIRLY AND COMPETENTLY AND COMPORTED WITH STATE LAW AND WHETHER THE COMMISSION ACTED WITH BIAS IN RENDERING ITS DECISION?

The record in this case does not support DRA's contention that the Commission's Decision in this case was arbitrary and capricious. The South Dakota Supreme Court has set forth the standard for concluding that an agency's action was arbitrary and capricious as follows:

> "'An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.'" *Huth v. Beresford*

Sch. Dist. # 61–2, 2013 S.D. 39, ¶ 14, 832 N.W.2d 62, 65 (quoting *Hicks v. Gayville–Volin Sch. Dist.*, 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73).

In re Jarman, 2015 S.D. 8, 860 N.W. 2d 1. In its brief, DRA does not point to any record evidence of "personal, selfish, or fraudulent motives," or "false information" on which to base its claim of arbitrary and capricious decision-making. The reason is simple. It doesn't exist.

The record in this case clearly demonstrates the opposite, i.e., that the Commission entertained a very large number of Intervenor procedural and discovery motions over a many month period, which required the Commission to hold a very large number of motion hearings and required Keystone to produce an enormous quantity of documents. The Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages. The parties to this case were certainly afforded procedural due process. The Commission's Decision contains specific cites to the transcript and the administrative record for its Findings of Fact. With respect to evidence which was conflicting at hearing, of which there was virtually none, it is the Commission's responsibility, as the trier of fact, to analyze such evidence and give it the credibility and weight it deserves. The fact that a party disagrees with an administrative decision does not render the decision arbitrary and capricious.

Furthermore, the South Dakota Supreme Court has consistently held that new theories may not be argued or reviewed for the first time on appeal. *Alvine Family Ltd. Partnership v. Hagemann*, 2010 SD 28, ¶ 21, 780 N.W.2d 507, 514, (citing *Boever v. Bd. of Accountancy,* 526 N.W.2d 747, 750 (S.D. 1995). See also *Mortweet v. Eliason*, 335 N.W.2d 812 (S.D. 1983); *Ward v. Viborg School Dist. No. 60-5,* 319 N.W.2d 502 (S.D.

1982); *Weaver v. Boortz,* 301 N.W.2d 673 (S.D. 1981); *Estate of Assmus,* 254 N.W.2d 159 (S.D. 1977); *In re Estate of Grimes,* 87 S.D. 187, 204 N.W.2d 812 (1973).

In *Pearson v. Adams,* 279 N.W.2d 674, 676 (S.D. 1979) (citations omitted) the Court stated:

> On appeal, the record and the transcript, if included in the record, imparts an absolute verity and is the sole evidence of the trial court's proceedings. While all parties are expected to protect themselves on the record, and all parties are obligated to see that the settled record contains all matters necessary for the disposition of the issues raised on appeal, the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant.
>
> If the record is incomplete or incorrect, the remedy is by appropriate action or proceedings in the trial court to secure a correction thereof.

The settled record, the exhibits contained therein, and the hearing transcripts do not contain any allegation by DRA that the Commission was acting subject to "regulatory capture." Appellant did not raise the issue of "regulatory capture" in any of the documents and pleadings in the settled record, nor at the evidentiary and motion hearings held before the Commission. The Commission asserts that DRA failed to preserve its "regulatory capture" as an appealable issue for review.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Decision.

Dated this 4th day of December, 2017

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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