BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	HP 14-001

STANDING ROCK SIOUX TRIBE
POST–HEARING REBUTTAL BRIEF

I. TransCanada Bears the Burden of Proof to Demonstrate Continuing Compliance with the Permit Conditions in Light of New Evidence

TransCanada's case depends upon an extremely narrow and misinformed view of the certification requirement of SDCL §49-41B-27. It argues in its Post-hearing Brief:

> This is not a new proceeding and Keystone is not required to re-prove what it proved in 2010… Keystone has the initial burden to show that it can continue to meet the fifty permit conditions imposed in 2010… Keystone met its burden through its certification, shifting the burden to the Intervenors… Keystone submitted its certification, accompanied by the Appendices (and) [b]y doing so, Keystone met its burden of proof under SDCL §49-41B-22, subject to some other party proving otherwise…

Applicant's Post-Hearing Brief, pp. 2-4.

TransCanada's arguments lack legal citation to any authority – these are legal arguments without foundation and which misportray the petitioner's evidentiary burden in this docket. The argument seems to be that the mere filing of the petition and appendices requires the Commission to grant certification without further inquiry. However, TransCanada conceded "Rather than accept the certification *ipso facto*, the Commissioned opened a new docket… and ultimately conducted a nine-day certification hearing." *Id.* at 1. Thus, TransCanada's contention that its petition and appendices are entitled to some weight or deference beyond those of any pleading has already been rejected by the Commission, as implicitly acknowledged by the petitioner itself.

TransCanada's petition and appendices, including the tracking table of changes, are mere pleadings containing allegations, which, like any other allegations, must be proven by competent evidence at the hearing. ARSD §20:10:01:15.01 (referencing "factual *allegations* which form the basis of the complaint, counterclaim, application or petition") (emphasis added); SDCL §15-6-8(e)(1) (pleading contain mere "averments").

TransCanada, being the petitioner, bears the burden of proof. ARSD §20:10:01:15.01 ("In any contested case proceeding… petitioner has the burden of proof") ; *see also e.g. Good Samaritan Center v. North Dakota Dept. of Human Services*, 611 N.W.2d 141 (N.D. 2000); *Three Sons, LLC v. Wyoming Occupational Health and Safety Comm'n*, 160 P.3d 152 (Wyo. 2005) (general rule is that the moving party has the burden of proof in an administrative hearing). TransCanada must prove its case by substantial evidence. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816, 822 (SD. 2011); *Therkildsen v. Fisher Bev.*, 545 N.W.2d 834 (1996). The fact that TransCanada's petition is for re-certification of an existing permit does not shift the burden of proof onto the intervenors. See TRANSCRIPT, *In re the Application of TransCanada Keystone Pipeline LLP for a Permit Under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Keystone XL Pipeline*, p. 10, (hereinafter cited as "Tr."), Statement of John Smith, Commission Counsel.

TransCanada stated in it Post-Hearing Brief that "the Intervenor's burden under SDCL §49-41B-27 is to prove that Keystone, having certified that it can continue to meet the permit conditions in the Amended Final Order, in fact cannot." Applicant's Post-Hearing Brief, p. 4. That is a fiction, made up, and without legal citation. It is totally wrong.

Under ARSD §20:10:01:15.01, the burden is on the petitioner, TransCanada, to demonstrate that it continues to meet the conditions attached to the permit, in light of any new information that may be available. *See Jundt v. Fuller*, 736 N.W.2d 508, 512 (S.D. 2007) ("When the grounds (for reconsideration) involve the consideration of additional evidence, the agency should determine… whether the evidence was in existence and at hand at the time of the original hearing").

The obvious, clear purpose of SDCL §49-41B-27 is to authorize the Commission to hear evidence on new information that was not available when the permit was granted.

See Matter of SDDS, Inc., 472 N.W.2d 502, 509 (S.D. 1991) (must interpret statute by plain meaning of words). Section 27 of the statute is in the nature of a statutorily-mandated reconsideration of the permit, requiring the commission to determine whether any new information may have arisen during the four-year since the permit was issued, and which affects the project's ability to meet the permit conditions. *See e.g. Tokyo Kikai Seiskusho Ltd. v. U.S.*, 529 F.3d 1352, 1359-1360 (Fed. Cir. 2008) (reviewing statutorily-required reconsideration proceeding by agency).

TransCanada's entire case is based on the theory that this is not a retrial of the 2010 permit. That redundant argument misses the point. It is a certification hearing on whether *new* evidence that was not in existence when the Commission issued the 2010 permit renders the project non-compliant with the permit conditions.

It is a bedrock principle of administrative law that if the data relied upon by an agency is outdated, the agency must collect and analyze new data. *Dow Agrosciences LLC v. National Marine Fisheries Service,* 707 F.3d 462 (4th Cir. 2013) (reversing agency action for relying on outdated data). Significantly, that is what SDCL 49-41B-27 requires. Agencies such as the PUC routinely reconsider prior decisions, based upon new information. *See Jundt v. Fuller*, 736 N.W.2d at 512. This docket is a reconsideration of the Amended Final Order in HP-009, mandated by the legislature because so much time has passed since the permit was issued, to hear any new evidence that did not exist four years ago. *See Public Utility Com'n of Texas v. Texas Telephone Ass'n,* 163 S.W.3d 204 (Tex. App. 2005) (agency may modify prior order upon changed circumstances).

Any evidence introduced by the intervenors that was not in existence or available during HP 09-001 and relates to TransCanada's ability to comply with the permit conditions is relevant to the issue of certification. Such evidence in the record must be considered by the Commission in determining whether TransCanada met its burden of proof – it cannot be ignored. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (agency must consider entire record in rendering decision).

TransCanada cited *Jundt v. Fuller,* 736 N.W.2d 508, for the proposition that 2010 permit is a final order entitled to preclusive effect. *Applicant's Post-hearing Brief*, p. 4. In actuality, in that case the South Dakota Supreme Court recognized that res judicata is

not applied when new evidence becomes available *after* the order was issued; instead an agency may engage in reconsideration. *Jundt v. Fuller*, 736 N.W.2d at 512. In order for an agency to preclude consideration of an issue, there must have been an opportunity to litigate it in the prior proceeding. *Small v. State*, 659 N.W.2d 15 (S.D. 2003), *see also Johnson v. Kolman*, 412 N.W.2d 109 (S.D. 1987); *Nursement v. Astrue*, 477 Fed. Appx. 453 (9th Cir. 2012) (no preclusive effect to prior disability claim, based upon new medical evidence). By definition, no issue involving new evidence is subject to preclusion. *Id.*

The legislature has authorized the Commission to hear any new and competent evidence relating to TransCanada's ability to comply with the permit conditions. SDCL §49-41B-27. For its part, TransCanada chose to ignore the vast majority of the permit conditions, deeming them prospective and unworthy of the production of evidence. Consequently, certification must be denied for failure to meet the burden of proof. *Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (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"); *Helms v. Lynn*, 542 N.W.2d 764, 766 (S.D. 1996).

II. Uncontroverted Evidence Shows Keystone Violates Conditions 1, 2, 3 and Other Permit Conditions

Moreover, Standing Rock other intervenors have shown that the Keystone XL Pipeline violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§4231-4370f, National Historic Preservation Act, 16 U.S.C. §§470a-470x-6, and the state and federal Clean Water Acts, SDCL Chap. 34-2, 33 U.S.C. §§1251-1387, in contravention of permit conditions 1, 2 and 3.

With respect to compliance with NEPA, Standing Rock expert witness Dr. Kevin Cahill testified – and his testimony is uncontroverted – that the *Final Supplemental Environmental Impact Statement on the Keystone XL Pipeline Project* (Final SEIS) violates the NEPA requirement for socioeconomic analysis of the project. 40 CFR §1508.8. Rather than try to rebut or impeach Cahill's excellent and persuasive testimony, TransCanada argues "Dr. Cahill's testimony is irrelevant to any permit condition because it is the legal obligation of the Department of State, not Keystone, to prepare the FSEIS." *Applicant's Post-Hearing Brief*, p. 16.

That argument fails on every level. The Commission already determined that Dr. Cahill's testimony is relevant, by granting the Tribe's pre-hearing motion to reconsider the prior exclusion of his testimony on relevancy grounds. *See Order Granting Motion to Reconsider Exclusion of Kevin Cahill* (July 27. 2015). The Commission decided the issue of relevancy of Cahill's testimony prior to the hearing – TransCanada already lost that argument. *Id*.

The Keystone XL Pipeline **does not** "comply with all applicable laws" as required in condition 1, if the Final SEIS violates NEPA. 42 U.S.C. §4321. If the Final SEIS is inadequate under NEPA and TransCanada nevertheless tried to build Keystone XL it will face serious legal jeopardy. For example, in *South Fork Band Council of Western Shoshone of Nevada v. United States Department of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009), the circuit court issued an injunction against a mining project for failure by the agency preparing the EIS to properly evaluate proposed mitigation measures for impacts to a Native American sacred site. The mining company, Barrick-Cortez, Inc., was a defendant in the case and subject to the injunction. *Id.* The argument that a corporation may undertake a project that has not been legally approved by its regulatory agency is an invitation to anarchy.

TransCanada chose not to present professional expert testimony in an attempt to rebut Cahill. Instead, inexplicably, in its *Post-hearing Brief*, TransCanada selectively edited Cahill's testimony in an attempt to make him appear uncertain. TransCanada stated:

> Dr. Cahill was asked whether the issues that he addressed related to Keystone's inability to meet any permit conditions. He responded "I'm not sure that I can answer that."

Applicant's Post-Hearing Brief, p. 16.

That is a boldly dishonest edit. The full statement makes clear that the Final SEIS is inadequate and condition is violated:

> I'm not sure that I can answer that. What I can say is the Keystone Pipeline as proposed doesn't appear to – needs to follow – according to Amended Condition 1 needs to follow applicable laws and regulations and 3 says it needs to comply with the FSEIS.
>
> And I think Mr. Walsh's testimony is incorrect with respect to both.

Tr. at 1693-1694.

Cahill provided precise, straightforward and persuasive testimony that the Final SEIS failed to adequately consider the potential costs to South Dakota of the Keystone XL Pipeline, in violation of NEPA. *See also* Congressional Research Service, *CRS Report for Congress: Oil Sands and the Keystone XL Pipeline, Background and Selected Environmental Issues* (2012), p. 17, SRST Exhibit 8014; Letter of Cynthia Giles, EPA, to Department of State, dated February 15, 2015. Exhibit B to *Standing Rock Sioux Tribe Joint Post Hearing Brief*. Cahill's testimony was not controverted in any respect – TransCanada merely argues that it is not relevant, an argument already rejected by the Commission and totally frivolous.

Moreover, the testimony of Phyllis Young highlighted additional NEPA requirements that are violated by Keystone XL. Tr. at 1739. This includes 40 CFR §1508.7 (cumulative impacts) and Executive Order 12898 (Environmental Justice).

Consequently, the evidence in this case clearly demonstrates that the Keystone XL Pipeline Project as currently formulated violates NEPA and condition 1 of the 2010 permit. For this reason, certification must be denied.

With respect to the National Historic Preservation Act, Phyllis Young also testified that there was a lack of consultation in the preparation of the Programmatic Agreement and Unanticipated Discoveries Plan included in the Final SEIS. TransCanada argues *post hoc* that the State Department listed Standing Rock as a Tribe that was consulted, but that is self-exculpation that carries little weight. *See also* Testimony of Steve Vance, Tr. at 1533-1534. Significantly, pre-filed testimony of the South Dakota SHPO was never entered into the record. Thus, her testimony is uncontroverted as well. Keystone XL as currently formulated violates section 106 of the NHPA and its implementing regulations, and consequently violates permit condition 1. 16 U.S.C. §470f; 36 CFR §§800.2, §800.13(b).

With respect to the Clean Water Act, SRST Exhibit 8013 (S.D. DENR *Integrated Water Quality Report*) and the TransCanada testimony of Jon Schmidt, Tr. at 552, prove that Keystone XL will cut open trenches for pipeline construction in the South Fork of the Grand River, in violation of the South Dakota and federal Clean Water Act. *See*

Exhibit 8013. It is admitted in TransCanada's own testimony. Tr. at 552. This is not something that may be "left to DENR" as urged by TransCanada, because it violates Amended Permit Conditions 1 and 2.

For these reasons, certification must be denied.

III. TransCanada's Proposed Findings of Facts and Conclusions of Law Should be Struck from the Record

TransCanada filed Proposed Findings of Fact and Conclusions of Law on September 30, 2015. The PUC regulations authorize such a filing only upon the request of the Commission. ARSD 20:10:01:25. Otherwise, there is no statute or rule authorizing the filing of this document. It is an invalid filing, and as such should receive no consideration and be struck from the record.

RESPECTFULLY SUBMITTED this 30th day of October, 2015

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