

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

IN THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF PUBLIC UTILITIES)
COMMISSION DOCKET HP14-001, PETITION) Civ. 324555
OF TRANSCANADA KEYSTONE PIPELINE, LP)
FOR ORDER ACCEPTING CERTIFICATION OF) **STATEMENT OF ISSUES ON APPEAL**
PERMIT ISSUED IN DOCKET HP09-001 TO)
CONSTRUCT THE KEYSTONE XL PIPELINE)
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COMES NOW Dakota Rural Action (“DRA”), by and through its attorneys Bruce Ellison and Robin Martinez, and pursuant to SDCL 1-26-31.4, hereby submits its Statement of Issues on Appeal with respect to the final decision in Public Utilities Commission (“PUC”) Docket No. HP14-001, *In the Matter of the Petition of TransCanada Keystone Pipeline, LP for an Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline* (the “Final Decision”). The issues DRA intends to raise on appeal are as follows:

1. Whether the PUC used the proper standard of proof in granting TransCanada Keystone Pipeline, LP (“TransCanada”) certification of the construction permit for the proposed Keystone XL Pipeline (“KXL”) under SDCL §41-46B-27.
2. Whether the PUC’s Final Decision was based on “substantial evidence” in the record that TransCanada “continues to meet” each and every one of the fifty conditions set forth in the Amended Final Decision and Order; Notice of Entry issued by the PUC on June 29, 2010, in Docket HP09-001 (the “Permit”).
3. Whether TransCanada’s “Certification” signed by an officer of TransCanada and originally filed as Appendix A to Petitioner’s petition seeking certification of the Permit under SDCL §41-46B-27, constituted “substantial evidence” of compliance with the conditions of the Permit.

4. Whether the lack of any, or even *di minimis* and insufficient evidence presented by TransCanada of a history of compliance with the conditions of the Permit, including those requiring compliance with all laws and regulations, constituted substantial evidence sufficient to support the PUC's Final Decision.
5. Whether the PUC's preclusion of evidence relating to climate change as an issue in the proceedings constituted a failure to consider changed circumstances relevant to TransCanada's ability to comply with the conditions of the Permit.
6. Whether the PUC erred in determining that e-mail or other recorded communications between PUC staff and TransCanada regarding the certification process in HP14-001 constituted attorney-client privileged materials when between attorneys for respective parties.
7. Whether the PUC erred in its April 17, 2015 order denying DRA's motion to compel discovery (including e-mail or other recorded communications between PUC staff and TransCanada regarding the certification process), by therefore denying DRA its statutory right to a "reasonable opportunity to inspect all documentary evidence", as guaranteed in SDCL §1-26-18(2).
8. Whether the PUC erred in granting TransCanada's Motion to Define the Scope of Discovery, in a December 17, 2014 Order Granting Motion to Define Issues, limiting the scope of discovery.
9. Whether the PUC erred in prohibiting cross-examination and/or presentation of evidence regarding TransCanada's Tracking Table of Changes in Appendix C of Petitioner's petition seeking certification, and whether the PUC's action in prohibiting cross-examination as to the purported factual changes in such Appendix C violated DRA's statutory rights to full cross-examination and presentation of evidence guaranteed in SDCL §1-26-18(2) and 1-26-19(2).
10. Whether the PUC erred in its April 22, 2015 Order Denying Joint Intervenor Motions for Special Master to oversee the discovery process.
11. Whether the PUC erred in denying the Yankton Sioux Tribe's Motion to Dismiss the Re-Certification Petition filed in HP 14-001, joined by DRA, since the Petition on its face established

the petition seeking certification was for a different hazardous transportation project than the one for which a construction permit was issued in HP09-001.

12. Whether the PUC erred in its April 22, 2015 Order Denying Motion to Stay proceedings pending the Presidential Permit decision and the conclusion of an investigation initiated by the Canadian National Energy Board regarding allegations of pipeline safety violations by TransCanada, of which Petitioner was a subsidiary.
13. Whether the PUC erred in requiring filing of pre-filed testimony for any witness a party intended to call as a witness at the evidentiary hearing as a pre-requisite to such testimony at the evidentiary hearing under ARSD 20:10:01:06, and whether the PUC's claim of authority to require such pre-filed testimony under ARSD 20:10:01:06 violated SDCL §§15-6-43(a) and 49-1-11.
14. Whether the PUC erred in its April 27, 2015 order granting TransCanada's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Pre-filed Testimony, and whether this Order violated DRA's express statutory right to present evidence under SDCL §1-26-18(2).
15. Whether the PUC's refusal to permit initial written testimony to be filed after the completion of discovery denied DRA its express statutory rights to "present evidence in support of the party's interest", enumerated in SDCL §1-26-18(2).
16. Whether the PUC erred in its July 17, 2015 Order Granting in Part and Denying in Part TransCanada's Motion in Limine, granting TransCanada's motion for the extreme sanction of exclusion of DRA Exhibits 67-128, 397-409, and 1063-1073.
17. Whether the PUC's finding that DRA's disclosure of TransCanada's own documents three weeks prior to the evidentiary hearing as "untimely" was clearly erroneous, and whether the PUC's finding that TransCanada would be prejudiced by DRA's disclosure of TransCanada's own documents three weeks before the evidentiary hearing, was clearly erroneous or arbitrary and capricious.
18. Whether the PUC erred in its May 28, 2015 order Denying Intervenors' Joint Motion to Exclude Evidence and Testimony, where TransCanada had failed to comply with disclosure of documents by April 17, 2015.

19. Whether the PUC's order referenced in paragraph 18, above, denied DRA its statutory right to a "reasonable opportunity to inspect all documentary evidence", as guaranteed in SDCL §1-26-18(2).
20. Whether the PUC exercised its decision-making authority in discovery and evidentiary rulings in an arbitrary and capricious manner in favor of TransCanada and against DRA.
21. Whether the PUC erred in its July 10, 2015 Order Granting in Part Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing, which limited cross-examination to the scope of direct examination and matters affecting the credibility of a witness.
22. Whether the PUC erred in limiting cross-examination by DRA at the Evidentiary Hearing in contravention of its Order of July 10, 2015 and in contravention of DRA's statutory right "to cross-examination", as guaranteed in SDCL §1-26-18(2).
23. Whether the PUC erred in limiting cross-examination by DRA at the evidentiary hearing in contravention of its Order of July 10, 2015 and in contravention of DRA's statutory right to conduct cross-examinations required "for a full and true disclosure of the facts", as guaranteed in SDCL §1-26-19(2).
24. Whether the PUC erred in its November 18, 2015 Order Denying Joint Motion to Strike TransCanada's Proposed Findings of Fact and Conclusions of Law.
25. Whether the PUC's failure to strike TransCanada's unsolicited Findings of Fact and Conclusion of Law in its November 18, 2015 Order was contrary to ARSD 20:10:01:25 which states that such shall be filed "[i]f requested by the Commission".
26. Whether the PUC erred in its December 29, 2015 Order Denying Motion to Dismiss either with respect to TransCanada's petition for certification, or with respect to revoking the Permit, due to the denial of the Presidential Permit which meant that TransCanada would be unable to comply with the Permit, and thus would be unable to show its Project "continues to meet the conditions upon which the Permit was issued."
27. Whether the PUC erred in issuing its Final Decision in finding that Petitioner was only "committed", but not required to comply with 59 special conditions which were only "proposed",

not required by the US Pipeline and Hazardous Material Safety Administration (“PHMSA”) for the proposed KXL project.

28. Whether the Final Decision was clearly erroneous in that Petitioner failed to provide substantial evidence to support Finding of Fact 21 as to the basis for finding Petitioner’s estimated increased costs of proposed KXL project were due to new technical requirements, inflation and additional costs due to the delay in receiving federal approval and commencing construction.
29. Whether the Final Decision was clearly erroneous in that substantive evidence was not provided to support Finding of Fact 22 as to the sufficiency of the submitted “red-lined version of the CMR Plan”.
30. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 23 in that substantive evidence was not provided to show continued compliance with Permit condition 6, by Petitioner simply being “committed” to submit updated maps “before construction begins.”
31. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 24 in that substantive evidence was not provided to show compliance with the Permit conditions by submission of only “preliminary site-specific plans” for horizontal directional drilling (HDD) to cross Bridger Creek and the Bad River, and because no evidence was otherwise presented regarding actual site-specific plans for review for other river, creek, or streams to be crossed by the KXL project.
32. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 25 in that substantial evidence was not provided to show that the High Consequence Area (“HCA”) designation of 15.8 miles was supported in light of the proposed KXL pipeline route crossing what the USGS describes as over 200 miles of “high slide risk” areas, in addition to water resources where a spill could endanger rivers, streams, creeks, tributaries, and aquifers.
33. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 38 in finding that the “on-going” assessment of the very limited HCAs being assessed constituted substantial evidence that TransCanada continues to meet Permit condition 34.

34. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 39 and whether the “on-going” “process” constituted substantial evidence of compliance with Permit condition 41, which requires TransCanada to follow all protection and mitigation efforts recommended by the US Fish and Wildlife Service and the South Dakota Game, Fish, and Parks department (SDGFP).
35. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 39 and whether the “on-going” “process” constituted substantial evidence of compliance with Permit condition 41, which requires TransCanada to “consult” with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks.
36. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 25 in that substantial evidence was not provided to support a finding that a spill that “could effect” a HCA would occur no more than once in 460 years.
37. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 28 in that substantive evidence was not provided to support a finding that TransCanada’s history shows “no evidence” of “external corrosion” on its pipelines except one instance occurring in Missouri.
38. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 28 in that substantive evidence was not provided to show the incident was caused by an “adjacent foreign utility” interfered with the active cathodic protection system on the pipeline in question.
39. Whether the Final Decision was ultimately in error by granting re-certification and whether its findings ignored unrefuted evidence showing the incident involving flagrant safety violations of federal regulations, conditions, and inspections by TransCanada, resulting in a circumstances involving corrosion up to 97% of pipeline wall thickness, and that only pure luck discovered such corrosion which could have resulted in a significant within a mile of the Missouri River near St. Louis, Missouri.
40. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 28 in that substantive evidence was not provided to support a finding that TransCanada “has since then started

installing passive anodes to protect the pipeline during construction, which goes beyond what is required by federal regulation”.

41. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 29 in that substantive evidence was not provided to show that TransCanada has “completed” the consultation process with the National Resource Conservation Service (“NRCS”) to create construction/reclamation units for the different soils along the proposed KXL pipeline route.
42. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 36 in that substantive evidence was not provided to show that TransCanada has “completed” the consultation process with the NRCS to create construction/reclamation units for the different soils along the pipeline route.
43. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 30 in that substantive evidence was not provided to support a finding that none of the parties presented evidence of “any” other factual changes to the Project since 2010, including:
 - a. Whether the addition of Williston Basin fracked crude oil to the 2010 planned hazardous transportation of Canadian tar sands oil/diluted bitumen was a material factual change to the KXL project.
 - b. Whether US Department of State’s Final Supplemental Environmental Impact Statement describing failures of design and other deficiencies in Petitioner’s plan to construct and operate the proposed KXL pipeline constituted a factual change.
 - c. Whether the PUC erred in excluding evidence concerning climate change obtained since 2010 as relevant to such factual changes.
44. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 31 in that substantial evidence was not provided by TransCanada to demonstrate actual compliance with numerous Permit conditions found to be “prospective” in nature, and whether the PUC erred, and acted arbitrarily and capriciously by not requiring TransCanada to provide evidence of actual compliance with the Permit conditions in order to grant certification.

45. Whether a mere promise on the part of TransCanada to comply with any Permit condition in the future constitutes substantial evidence required to be shown by TransCanada that it “continues to meet” each such 2010 Permit condition.
46. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 31 in its finding that “no evidence” was presented by Intervenors that Petitioner cannot satisfy any of these conditions in the future, including whether the Presidential Permit that was denied in December 2015 was an example of a permit TransCanada cannot show it can satisfy in the future. and further, whether the PUC improperly shifted the burden of proof to Intervenors by requiring Intervenors to prove TransCanada “cannot satisfy” this Permit condition.
47. Whether a mere promise to contact tribal emergency responders at some point in the future constitutes substantial evidence supporting Finding of Fact 35 that Petitioner “continues to meet” Permit conditions five years after issuance of the Permit.
48. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 41 in that substantial evidence was not provided to support the finding that Petitioner paid “commercially reasonable costs” and indemnified and “held harmless landowners for any loss”, as required by Permit condition 49, and further, whether the PUC improperly shifted the burden of proof to Intervenors by requiring Intervenors to prove TransCanada “cannot satisfy” this Permit condition.
49. Whether the testimony of Sue Sibson – who testified that after six years TransCanada had not satisfactorily reclaimed her land in the construction of the Keystone I pipeline – fails to establish that Petitioner “cannot” meet Permit condition 49.
50. Whether a promise to continue reclamation efforts until the Sibsons are “satisfied,” provided substantial evidence that TransCanada “continues to meet the conditions” upon which the Permit was granted.
51. Whether the PUC improperly shifted the burden of proof onto the Intervenors by requiring that the Intervenors prove that TransCanada “cannot satisfy” any of the Permit conditions “in the future”.

52. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 42 in that substantial evidence was not provided to support the finding of the availability of a complaint process for landowners threatened with damage or by TransCanada's failure to comply with "any" of the conditions required by Permit condition 50, and further, whether the PUC improperly shifted the burden of proof to Intervenors by requiring Intervenors to prove TransCanada "cannot satisfy" this Permit condition.
53. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 43 in that substantial evidence was not provided to support the finding that the testimony by "[m]ultiple landowners" about "their concerns about the possible adverse effects of the pipeline on groundwater resources, shallow aquifers, rivers, and streams" was "not related" to Petitioner's ability to comply with "any" conditions and instead related to Petitioner's burden of proof under SDCL §49-41B-22.
54. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 44 finding that the testimony of Dr. Arden Davis regarding the geology along the proposed KXL pipeline route and its interrelationship to potential contamination of many of South Dakota's water resources did not address any Permit condition.
55. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 45 finding that the testimony by Dr. Arden Davis was insufficient to warrant any change to the findings of the original Permit.
56. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 46 in its finding that Dr. Arden Davis did not testify that TransCanada's treatment of the proposed KXL pipeline route through hydrologically sensitive areas was inappropriate or insufficient or that TransCanada would be unable to meet Permit condition 35.
57. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 47 in dismissing Dr. Davis's concerns about benzene contamination of water resources by a pipeline leak as not disputing Heidi Tillquist's testimony that a "potential release" would "not likely" threaten water

resources and such damage “would not be expected” from an oil spill, due to “the low persistence of benzene” and the “expected” emergency response measures.

58. Whether the Final Decision was clearly erroneous with respect to Findings of Fact 69-77 regarding the testimony of Evan Vokes concerning TransCanada’s record and performance with respect to pipeline safety and construction.
59. Whether the Final Decision was clearly erroneous with respect to Finding of Fact 78 in that the record lacks substantial evidence to support the finding that TransCanada “remains eligible to construct the project under the terms of the 2010 permit,” including whether the December 2015 denial of the Presidential Permit, as required under the Permit conditions, is an example of the PUC’s Final Decision being clearly erroneous.
60. Whether the PUC erred in failing to make findings or consider in reaching its Final Decision, the documented history and causes of the leaks on the Keystone I pipeline after it was placed into operation.
61. Whether the PUC erred in failing to consider the documented history of PHMSA regulatory violations, as well as the leaks and corrosion on the Keystone I pipeline, in making its Final Decision that TransCanada continues to meet all conditions, including compliance with PHMSA regulations and special conditions.
62. Whether the PUC erred in failing to consider the documented history of PHMSA regulatory violations, as well as the leaks and corrosion on the Keystone I pipeline, in making its Final Decision as to whether TransCanada is able to meet all “prospective” conditions, including compliance with PHMSA regulations and special conditions.
63. Whether the PUC erred in accepting conclusory testimony of TransCanada witnesses in making its Final Decision, while failing to make findings or consider the lack of competence of TransCanada witnesses Goulet, Kathari, King, and others, with respect to such witnesses’ inability to provide specific details about the proposed KXL project or the various regulatory violations in construction, design, and operation of the Keystone I pipeline, for which they claimed supervisory roles.

64. Whether the PUC erred in finding that DRA witness Vokes lacked a current engineering certification, while failing to consider the absence of any United States engineering licenses or accreditation on the part of TransCanada's witnesses Goulet, Kothari, King, and others.
65. Whether the PUC erred in finding that DRA witness Vokes lacked direct knowledge of the pattern of practice of TransCanada in ignoring defective materials and construction practices, in violation of PHMSA regulations, while simultaneously accepting the conclusory testimony of TransCanada witnesses Goulet, Kothari, King, and others who lacked direct knowledge regarding the subject-matter about which they were being questioned.
66. Whether the PUC acted arbitrarily and capriciously in rendering its Final Decision given that two out of three members of the PUC were unable to devote full attention to the evidentiary hearing due to medical circumstances (Commissioner Fiegen not being present during the evidentiary hearing due to surgery, and Commissioner Hansen apparently being treated with pain medication, alternatively appearing in severe pain or seemingly asleep during portions of the evidentiary hearing).
67. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 3 in ruling that TransCanada's failure to begin construction within four years after receiving its construction permit in docket number HP 09-001 did not cause the Permit to lapse or expire.
68. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 3 of the Final Decision in ruling that TransCanada's failure to timely begin construction did not require TransCanada to prove it meets the requirements of SDCL §49-41B-22 in order to obtain re-certification of the Permit under SDCL §49-41B-27.
69. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 3, in ruling TransCanada's failure to timely begin construction required TransCanada, in its re-certification effort, to prove a "distinct burden under SDCL §49-41B-27."
70. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 8 in ruling that TransCanada "met its burden of proof."

71. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 8 in ruling that TransCanada met its burden through submission of: (1) certification signed by Goulet, (2) the documents filed with its certification Petition, and (3) the direct testimony of witnesses.
72. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 8 that despite “some updates” in facts and circumstances since 2010, “none” affected TransCanada’s “ability to meet” the amended conditions in the original Permit.
73. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 9 in ruling that with respect to “prospective conditions,” that TransCanada “is as able today to meet such conditions as it was when the permit was issued.”
74. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 9 in ruling that TransCanada’s ability to “today” meet all the amended conditions of the Permit, could be based solely upon the certification signed by Goulet alone.
75. Whether the certification signed by Goulet alone constituted substantial evidence of TransCanada’s current ability to comply with “prospective” conditions.
76. Whether the PUC used the wrong standard when it concluded in Conclusion of Law 9 that TransCanada had “offered sufficient evidence” to establish that it could continue to meet the “prospective” conditions.
77. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 9 in ruling that “[n]o evidence was offered demonstrating” that TransCanada “will be unable to meet the conditions in the future,” including:
 - a. Whether the denial of the Presidential Permit, as required by amended condition 2 of the Permit, is such evidence demonstrating an inability to meet this condition and, hence clear error with respect to Conclusion of Law 9.
 - b. Whether the PUC improperly shifted the burden of proof to the Intervenor in Conclusion of Law 9 to show TransCanada’s inability to meet conditions in the future.

- c. Whether the PUC erred in Conclusion of Law 9 by concluding Intervenors did not present evidence of TransCanada's inability to meet "prospective" conditions.
- 78. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 10 in ruling that "Intervenors failed to establish any reason why Keystone cannot continue to meet the conditions on which the permit was issued," including:
 - a. Whether the PUC improperly shifted the burden of proof in Conclusion of Law 10 in concluding Intervenors failed to show TransCanada's inability to meet "any" condition in the future.
 - b. Whether the PUC erred in Conclusion of Law 10 by concluding Intervenors did not present evidence of TransCanada's inability to meet "prospective" conditions.
- 79. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 12 in concluding that Intervenors were "afforded a full and fair opportunity to be heard," including whether such a conclusion violated SDCL §1-26-19(2) due to the limitations placed by the PUC on cross-examination of material TransCanada witness testimony and barring admission of various DRA exhibits and testimony.
- 80. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 12 in concluding that the PUC "needs no additional information to determine whether to accept Keystone's Certification under SDCL §49-41B-27."
- 81. Whether the Final Decision was clearly erroneous with respect to Conclusion of Law 13 in concluding that it met all requirements under South Dakota law to provide Intervenors "an opportunity to be heard."
- 82. Whether the PUC erred in failing to apply the public trust doctrine as an underlying principle for its Final Decision.
- 83. Whether remand is required for further hearings related to completion of discovery from TransCanada and further presentation of evidence by Intervenors which the PUC barred from admission at the evidentiary hearing.

84. Whether reversal of the Final Decision is warranted.

Respectfully submitted this 29th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of February, 2016, the foregoing Statement of Issues on Appeal was filed with the Office of the Clerk of Hughes County Circuit Court, and that a true and correct copy of the same was served upon the following via first class US Mail, postage prepaid:

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