



July 13, 2021

South Dakota Transportation Commission  
700 East Broadway Avenue  
Pierre, SD 57501

Honorable David Gienapp  
P.O. Box 14  
Madison, SD 57042

*SENT VIA EMAIL TRANSMISSION ONLY*

**Re: In The Matter of The Application for Authority to Exercise Eminent Domain by RCP&E Railroad, Inc.**

Dear Honorable Hearing Officer Gienapp and Honorable Commissioners:

On behalf of Dena Kinsella, I submit the following items for your consideration after reviewing Judge Gienapp's proposed findings, conclusions and recommendation:

- There was no evidence presented at the hearing by the railroad that their Hail Mary, buzzer-beating \$15,000 offer to Ms. Kinsella was a reasonable, supported or even valid number. No document, no supporting expert affidavit or testimony. Only the self-serving, evasive testimony of the railroad general manager, along with an equally unsupported submission by the Railroad's counsel on this value. If the Railroad wanted to or even could persuade the Commission in this regard, it chose not to do so for an unknown reason.

- The railroad did not negotiate in good faith with Ms. Kinsella when it made one offer mere days before the hearing in this matter - - and only because it needed to do so to appear compliant with the law.
- The evidence showed that the railroad stonewalled Ms. Kinsella at every stage of the parties' dealings in the last two years and refused to negotiate with her - - until June 14, 2021 - - one day before the pre-hearing submissions of the parties were due.
- The definition of "good faith" and "bad faith" are clear. And clarify how the railroad has acted toward Ms. Kinsella in this "takings case" and the arbitration matter:

[dictionary.law.com/](http://dictionary.law.com/) [emphasis added]

**bad faith**

- 1) *n. intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others. Most states recognize what is called "implied covenant of good faith and fair dealing" which is breached by acts of bad faith, for which a lawsuit may be brought (filed) for the breach (just as one might sue for breach of contract). The question of bad faith may be raised as a defense to a suit on a contract.*
- 2) *adj. when there is bad faith then a transaction is called a "bad faith" contract or "bad faith" offer.*

**good faith**

*n. honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled. The term is applied to all kinds of transactions.*

- Judge Gienapp states in his finding #4
  - 4] The Railroad does not have access to the bridge and adjoining track area without gaining access by crossing the Kinsella property.

The Railroad can access the subject bridge directly by rail car and its other machinery that is regularly uses to inspect and transport equipment on its lines. It does not need to cross Ms. Kinsella's land to do so.

The Commissioners should review the actual evidence before it in this case, and not only the mere arguments of counsel, and find that the Railroad did not act in good faith before seeking to take Ms. Kinsella's land via this seldom-used, onerous process. A process that should be respected and not utilized lightly.

Respectfully submitted,

Patrick R. Burns

Enclosures

Cc: Karla Engle  
Steve Williams, Esq.  
Dena Kinsella