BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF DAKOTA ACCESS, LLC FOR A PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE	**YANKTON SIOUX TRIBE'S POST-HEARING REPLY BRIEF** **HP14-002**

COMES NOW Yankton Sioux Tribe ("Yankton"), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits the following as its Post-Hearing Reply Brief pursuant to the Public Utilities Commission's order of October 21, 2015.

I. INTRODUCTION

The Public Utilities Commission ("Commission") must deny the application filed by Dakota Access, LLC ("Dakota Access") for a permit to construct the proposed Dakota Access pipeline ("Project" or "proposed project") because Dakota Access has failed to meet its burden of proof pursuant to SDCL 49-41B-22. Several matters came before the Commission at the evidentiary hearing held from September 29, 2015, through October 9, 2015. In addition to whether or not Dakota Access met its burden of proof with respect to the four elements contained in SDCL 49-41B-22, the Commission asked whether the application was filed with the content required by SDCL 49-41B-11 and ARSD 20:10:22. The application did not contain the content required by law, as shown in Yankton's Post-Hearing Brief and herein at section II(A), *infra*. The Commission further asked whether the application contains any deliberate misstatements of material facts. The application does contain deliberate misstatements of material facts, as shown in Yankton's Post-Hearing Brief and herein at section II(B), *infra*. The Commission then asked

the pivotal question in this case, whether a permit should be granted. Because Dakota Access has not complied with applicable South Dakota law, the permit must be denied.

II. QUESTIONS BEFORE THE COMMISSION

A. DAKOTA ACCESS' REVISED APPLICATION WAS NOT FILED GENERALLY IN THE FORM AND CONTENT REQUIRED BY SDCL CHAPTER 49-41B-11 AND ARSD 20:10:22.

Dakota Access incorrectly asserts that its application was filed with the Commission "in the form and contains information required of SDCL 49-14B-11 [sic] and ARSD 20:10:22." Dakota Access' Post-Hearing Brief at 7. As stated in Yankton's Post-Hearing Brief, Dakota Access failed to identify all participants in the project, including Energy Transfer Partners and Phillips 66. Yankton's Post-Hearing Brief at 7. In addition, Dakota Access has not, as of the date of the hearing, entered into a written agreement with Sunoco Logistics or Sunoco Pipeline, L.P. Due to Dakota Access' heavy reliance on the expertise and experience of Sunoco Logistics to support its claims regarding safety of the project (Ex. DA-30 at 5; Tr. 66 ln 16-19, 183 ln 16 – 184 ln 3, 523 ln 11-14), one or both of these companies should have been listed as a participant as well. The fact that an executive from Sunoco Logistics was called as a witness by Dakota Access to testify at the hearing is demonstrative of the fact that Sunoco Logistics, either itself or through its subsidiary, is a participant in the proposed facility. Although Sunoco Logistics is the company Joey Mahmoud stated would operate the pipeline (Ex. DA-30 at 5 ln 96-97; Tr. 66 ln 16-18, 183 ln 13-15, 523 ln 10-14), Sunoco Pipeline, L.P., a subsidiary of Sunoco Logistics which conducts pipeline operations for Sunoco Logistics, would likely be the entity conducting operations. This appears to be a misrepresentation by Mr. Mahmoud in his prefiled testimony and his testimony at the hearing.

While it is true that Dakota Access did eventually disclose that Sunoco would be an operator and therefore a participant in the project, it failed to amend its application to reflect this

change. ARSD 20:10:22:04(5) provides that applications are continuing, and that "the applicant must *immediately* notify the commission of any changes in facts or applicable law materially affecting the application." (emphasis added). This requirement of *immediate* notification further illustrates that the ability to update an application applies only to "*changes* in facts or applicable law." ARSD 20:10:22:04(5) (emphasis added). The testimony of Mr. Mahmoud does not constitute notification for purposes of amending an application. Changes that require notification of the Commissioners must be made through a proper docket filing. Likewise, any information shared through discovery cannot qualify as notification to the Commission because the Commission does not receive discovery. Moreover, the fact that Sunoco Logistics is the operator for the proposed project is not a change in facts. From every indication, Dakota Access intended that Sunoco Pipeline L.P. act as operator for the Project from the outset. This key piece of information which was missing from the application is therefore not an appropriate fact for supplementing the application; it is not a change in facts and it was required to be reported on the original application. Even if the Rule does allow supplementation of the application in a manner exercised by Dakota Access, Dakota Access still failed to properly identify the operator as the company Sunoco Pipeline L.P., instead naming Sunoco Logistics through testimony. Dakota Access' failure to properly identify the operator of the pipeline as a participant in the Project has left the record muddied and unclear.

Dakota Access failed to include the name, address, and telephone number of all persons participating in the proposed facility as required by ARSD 20:10:22:06. In addition, the revised application failed to estimate the number of non-local employees, failed to estimate consumer demand or consumers' future energy needs, failed to contain all witnesses, testimony, data, and exhibits, and failed to include a reasonably accurate forecast of the Project's community impact,

as discussed in detail in Yankton's Post-Hearing Brief, p. 5-8. Dakota Access' application failed to include the content required by SDCL 49-41B-11 and ARSD 20:10:22, and must therefore be denied.

B. DAKOTA ACCESS' REVISED APPLICATION AND ACCOMPANYING STATEMENTS OR STUDIES CONTAIN DELIBERATE MISSTATEMENTS OF MATERIAL FACTS.

As described in section II(A)(2), *supra*, Dakota Access has misrepresented the identity of the company that would act as primary operator of the proposed project by omission. The application failed to list Sunoco Logistics or Sunoco Pipeline L.P. as the operator of the pipeline, a crucial participant in the Project. Furthermore, due to misrepresentations made by Dakota Access during the proceeding, Dakota Access has given the false impression that Sunoco Logistics is the company that will be operating the proposed pipeline. Although Sunoco Logistics was not included as a participant in Dakota Access' application, Dakota Access has relied heavily on Sunoco Logistics' history as a pipeline operator as a basis for its claims that the pipeline would be operated safely. The history of the pipeline operator is therefore a crucial element of the analysis of the proposed project's risks, and the identity of the pipeline operator is a material fact.

Dakota Access further misrepresented the identity of the Project operator during the course of the evidentiary hearing, claiming Sunoco Logistics would operate the Project. Ex. DA-30 at 5 ln 96-97; Tr. 66 ln 16-18, 183 ln 13-15 523 ln 10-14. However, the draft facility response plan submitted by Dakota Access on July 8, 2015, is entitled "*Sunoco Pipeline L.P.* Facility Response Plan" (https://puc.sd.gov/commission/dockets/Hydrocarbon Pipeline/2014/HP14-002/responseplan.pdf) (emphasis added). The first page of this document states: "*Sunoco Pipeline L. P. has been appointed as operator of the Dakota Access Pipeline on behalf of DAPL-ETCO Operations Management, LLC.*" *Id*. (emphasis in original).

Pipeline operator history can be found on the Pipeline and Hazardous Materials Safety Administration ("PHMSA") website, http://phmsa.dot.gov/. However, a search for incident or spill history of Sunoco Logistics yields no results. Based on Mr. Mahmoud's testimony, it would appear that the operator of the Project has had no spills in its extensive history as a pipeline operator. On the other hand, the PHMSA data shows that Sunoco Pipeline L.P. has quite a record of spills just over the past six years. According to the flagged hazardous liquid pipeline accident reports for 2010 to present, crude oil pipelines operated by Sunoco Pipeline L.P. have had at least 126 incidents since January 2010, 13 of which occurred in 2015. http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip. These spills are discussed in more detail in section II(D), *infra*. The Dakota Access pipeline operator's experience was touted by Dakota Access as evidence that the pipeline would be operated safely, and its safety record must be included in the Commission's assessment of the Project. The identity of the operator is material to identifying its safety record and to the Commission's decision. The information provided to the Commission at the hearing by Mr. Mahmoud is not satisfactory under ARSD 20:10:22:04(5) if the information provided at the hearing is incorrect or misleading. Because it was misrepresented by Dakota Access by its omission from the application, and later during the evidentiary hearing, Dakota Access' application must be denied.

C. THE PROJECT WOULD NOT COMPLY WITH ALL APPLICABLE LAWS AND RULES.

1. SDCL 49-41B-22 PLACES A BURDEN ON DAKOTA ACCESS TO PROVE COMPLIANCE WITH THE LAW.

Dakota Access failed to meet its burden of proving all four elements of SDCL 49-41B-22. Dakota Access' argument suggests that compliance with all applicable laws and rules, the first element, is a foregone conclusion, and that there is no burden of proof to meet because Dakota

Access is required to comply with all applicable laws and rules. Dakota Access' Post-Hearing Brief at 8. This is simply false and it defies the intent of the South Dakota legislature. SDCL 49-41B-22 requires any applicant to prove that it will meet all four elements of that statute, including compliance with all applicable laws and rules. SDCL 49-41B-22(1). The South Dakota legislature would not have included this first prong of the statute if it did not intend for it to be applied and enforced.

Staff makes the argument that Dakota Access' awareness of applicable laws and rules proves that Dakota Access has the ability to comply with those laws and rules, and implies that Dakota Access' ability to comply with laws and rules necessarily means that Dakota Access will actually comply with the laws and rules. Staff's Post-Hearing Brief at 5, 10. This argument bears no more virtue than the argument proffered by Dakota Access. Presumably, all pipeline companies and operators are aware of applicable laws and rules, yet such companies regularly receive notices of violations from PHMSA. If knowledge of the laws and rules was a guarantee that a company would comply with those rules, PHMSA would not need its enforcement arm, the Pipeline Safety Enforcement Program. But such an arm does exist, and it exists because despite awareness of the laws and regulations, companies do violate those laws and regulations. Dakota Access' knowledge of the laws and rules is therefore not a guarantee that it will comply.

Neither knowledge of the law nor the obligation to comply with the law proves that an entity will actually comply. The burden is on the company to prove so during the evidentiary hearing. As discussed in Yankton's Post-Hearing Brief, p. 11-13, Dakota Access failed to meet this burden. Furthermore, Dakota Access' claim that Yankton could not point to any federal, state, or local law that Dakota Access would violate is incorrect. Dakota Access' Post-Hearing Brief at 8. Yankton concisely spelled out three laws and one rule that would be violated by construction

and operation of the proposed project. Specifically, the Project would violate SDCL 49-41B-1, federal law regarding aboriginal rights, SDCL 49-41B-11, and ARSD 20:10:22. Because Dakota Access failed to prove compliance with these laws, it has not met its burden of proof under SDCL 49-41B-22 and the application must be denied.

In challenging Yankton's argument that the proposed project would violate aboriginal rights on Yankton's aboriginal title land, Dakota Access erroneously alleges that Yankton "relied on facts and interpretations of law which have not been adjudicated or determined by any court and thus the Commission lacks jurisdiction and facts to make a finding the tribal intervenors desire." Dakota Access' Post-Hearing Brief at 38. Yankton's aboriginal title to land covering roughly two-thirds of the pipeline route has already been adjudicated by the Indian Claims Commission. *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 236 (1970). A plethora of federal case law supports the position that Yankton holds aboriginal rights by virtue of its aboriginal title. *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1952); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449 (7th Cir. 1998); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 205 (W.D. Wisc. 1996). The Commission therefore has not only the jurisdiction but also the duty to take into account the rights of the Yankton Sioux Tribe in determining whether or not a permit should be granted.

2. SDCL 49-41B-1 IS CONSTITUTIONAL AND THE PUC DOES NOT HAVE THE AUTHORITY TO DECLARE IT OTHERWISE.

Dakota Access and PUC Staff ("Staff") incorrectly assert that Yankton's interpretation of SDCL 49-41B-1 violates the Commerce Clause of the U.S. Constitution. Because the statute is not discriminatory and provides public benefits in excess of its burdens on interstate commerce, SDCL § 49-41B-1 does not violate the dormant Commerce Clause. Furthermore, the Commission

does not have the jurisdictional authority to determine whether SDCL § 49-41B-1 is constitutional. Dakota Access states that SDCL 49-41B-1 "does not require that facilities begin and end in the state of South Dakota to serve only South Dakota needs." Dakota Access' Post-Hearing Brief at 36. This is not Yankton's position. The correct interpretation of the statute is that any pipeline constructed in South Dakota must serve the energy needs of citizens of the state, not that it serve South Dakota needs exclusively. This interpretation does not violate the U.S. Constitution's Tenth Amendment.

a. *IN RE NEBRASKA* DOES NOT SUPPORT A FINDING THAT SDCL § 49-41B-1 IS UNCONSTITUTIONAL.

In 1981, the South Dakota Legislature amended SDCL § 49-41B-22 by adding a fifth standard for the transmission facility applicant to prove. This standard required "that the proposed trans-state transmission facility will be consistent with the public convenience and necessity in any area or areas which will receive electrical service, either direct or indirect, from the facility, regardless of the state or states in which such area or areas are located." *In re Nebraska Pub. Power Dist. Etc.*, 354 N.W.2d 713, 717 (S.D. 1984) (*quoting* SDCL § 49-41B-22(5) (1981)). A trans-state transmission facility is defined as "an electric transmission line…which originates outside the State of South Dakota, crosses this state and terminates outside the State of South Dakota; and which transmission line and associated facilities delivers electric power and energy of twenty-five percent or less of the design capacity of such line and facilities for use in the State of South Dakota." *Id*. (*quoting* SDCL § 49-41B-2(11)).[1]

[1] Although *In re Nebraska* dealt specifically with an electric transmission facility, and the Dakota Access Pipeline deals with a proposed oil pipeline, oil pipelines are also governed by SDCL § 49-41B-1 and SDCL § 49-41B-22. Further, Dakota Access also desires a permit to construct a trans-state facility where fuel will be transported to Illinois, and will not be immediately consumed in South Dakota.

In *In re Nebraska*, Nebraska Public Power District ("Nebraska") applied for a permit to construct MANDAN Trans-State Transmission Facility. *Id*. at 715. The MANDAN Project was an international electric transmission facility that began in Canada and went to substations in North Dakota, South Dakota, and Nebraska. *Id*. The Commission had refused to grant Nebraska a permit because it failed to meet the fifth requirement of § 49-41B-22. *Id*. at 716. The Court explained, "[i]f the MANDAN Project delivered more than twenty-five percent of its design capacity to South Dakota, it would be completely excused from this requirement." *Id*. at 718. The Court went on to hold that "requiring a transmission facility. . . crossing the state and delivering twenty-five percent or less of its design capacity to this state, to satisfy an *additional condition* of public necessity and convenience . . . violates the commerce clause of the United States Constitution and therefore is unconstitutional." *Id*. (emphasis added). Because § 49-41B-22(5) required trans-state transmission facilities to satisfy an additional condition of public necessity and convenience that purely intra-state facilities did not need to satisfy, the statute violated the Commerce Clause. *Id*. at 718.

The critical distinction between § 49-41B-22(5), held unconstitutional in *In re Nebraska*, and § 49-41B-1, is that § 49-41B-22(5) created a burden that only a trans-state applicant facility had to prove. Staff ignores this distinction in its Post-Hearing Brief. Staff cites *In re Nebraska* for a much broader holding than the case in fact asserts. *In re Nebraska* simply holds that it is a violation of the Commerce Clause to require <u>only</u> trans-state facilities to prove additional requirements to satisfy their burden of proof under permit proceedings.

b. <u>IT IS NOT UNCONSTITUTIONAL FOR SDCL § 49-41B-1 TO REQUIRE THAT FACILITIES ARE CONSTRUCTED IN AN ORDERLY AND TIMELY MANNER SO THAT THE ENERGY REQUIREMENTS OF THE PEOPLE OF THE STATE ARE FULFILLED.</u>

Although § 49-41B-22(5) was properly declared unconstitutional, § 49-41B-1 states a different and universally applicable requirement that the Commission, "ensure that [] facilities are constructed in an orderly and timely manner so that the *energy requirements of the people of the state are fulfilled*." SDCL § 49-41B-1. (emphasis added). The statute does not specify the amount of energy the facility must provide to fulfill the requirements of the people of the state, but it is clear that it must be more than zero. From the plain language of the statute, facilities constructed pursuant to SDCL § 49-41B-1 must fulfill energy requirements of the people of South Dakota. To sustain another position would require ignoring the ordinary meaning of the plain language. *TVA v. Hill*, 437 U.S. 153, 173 (1978). Thus, an applicant must show that the facility was constructed to fulfill at least some of the energy requirements of South Dakota residents. Because SDCL § 49-41B-22 requires that the applicant establish that "the proposed facility will comply with all applicable laws and rules," Dakota Access must show how it complied with SDCL § 49-41B-1. Here, Dakota Access did not meet its burden of production and did not comply SDCL § 49-41B-1. In fact, Dakota Access' witness Mr. Mahmoud testified that he had not received a commitment from the shippers with a guarantee that their product will certainly return to South Dakota. Tr. 1983 ln 13-17.

Article 1, § 8, cl. 3, the Commerce Clause of the United States Constitution, states that Congress has the power to "regulate commerce . . . among the several states." Under negative, or dormant, Commerce Clause jurisprudence, a court can strike down state laws that unduly interfere with interstate commerce. *Energy and Environment Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015). However, "[i]t has long been recognized that, 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate

it.'" *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669-70 (1981) (*quoting Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945)).

State laws cannot "clearly discriminate" against those out-of-state. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988). The old § 49-41B-22(5) did discriminate as it required an additional condition for intrastate facilities to prove. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc*., 397 U.S. 137, 142 (1970).

SDCL § 49-41B-1 does not discriminate against trans-state pipelines on its face or practically. Unlike SDCL § 49-41B-22(5), the requirement to fulfill the energy needs of the people is imposed on both in-state and trans-state facilities. Additionally, the statute is not practically discriminatory because the required actions, providing energy to South Dakota residents, are the same for both in-state and trans-state facilities. There is no differential treatment. Both in-state and intrastate pipeline facilities must show that they give some energy to the residents of South Dakota. In fact, if a trans-state facility did not have to show that the facility contributed to the energy needs of South Dakotans, it would have less to establish under its burden of proof for a permit than an in-state facility.

South Dakota has a legitimate public interest in ensuring that energy facilities benefit state residents. When the South Dakota legislature enacted § 49-41B-1, it acknowledged "the significant impact energy development has on 'the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state.'" *In re Otter Tail Power Co*., 2008 SD 5, ¶ 2, 744 N.W.2d 594, 596, (S.D. 2008) (*citing* SDCL § 49-41B-1). The pipeline will extend approximately 274 miles through South Dakota. Tr. 56 ln 20.

Because "[t]he pipes for transportation of the gas must be laid in [South Dakota's] soil; they must cross [its] farms, pass through [its] towns, and cross [its] highways," the State is concerned about potential negative consequences. *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555 (Ind. 1891) (holding that a statute requiring gas to be transported below a specified pressure was not a burden on interstate commerce because it was "a regulation universal in its application, and justified by the nature of the gas." *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (explaining the court's holding in *Jamieson*). Because of the significant deleterious impacts that energy transmission facilities can have, South Dakota was within its authority to require that some energy from new energy transmission facilities benefit South Dakotan residents.

In this situation, the South Dakota legislature found a legitimate public interest in "the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state." The burden on interstate commerce is only that the applicant must show the facility will give some energy to the residents of South Dakota. This burden is not clearly excessive in relation to the local benefits. Because the statute is not discriminatory and provides public benefits over burdens on interstate commerce, § 49-41B-1 does not violate the dormant Commerce Clause.

c. THE COMMISSION DOES NOT HAVE JURISDICTIONAL AUTHORITY TO DECIDE THE CONSTITUTIONALITY OF SDCL § 49-41B-1.

Administrative agencies only have "such adjudicatory jurisdiction as is conferred upon them by statute." *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 S.D. 77, 648 N.W.2d 342. Further, "[a]n agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *O'Toole*, 2002 S.D. at ¶ 15, 648 N.W.2d at 346. The

Commission is an administrative agency. *See In the Matter of the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, S. Dakota, Against AT&T Commc'ns of the Midwest, Inc. Regarding Failure to Provide Serv.*, CT02-021, 2003 WL 26640747 (Sept. 26, 2003). Under SDCL § 49-41B-1, all transmission facilities must receive a permit from the Commission before construction can begin. The Commission has jurisdictional authority to deny or grant permits in accordance with the requirements laid out by the legislature in Title 49. The grant of authority to issue permits, however, does not give the Commission authority to determine the constitutionality of the criteria for receiving a permit that was laid out by the legislature. That is the function of the courts. The Commission's own actions reaffirm this conclusion. For example, in *In re Nebraska* the Commission had previously declined to rule on the constitutional issue raised by Nebraska, leaving the issue for the South Dakota courts.

D. THE PROJECT WOULD POSE A THREAT OF SERIOUS INJURY TO THE ENVIRONMENT AND TO THE SOCIAL AND ECONOMIC CONDITION OF INHABITANTS OR EXPECTED INHABITANTS IN THE SITING AREA.

For the reasons expressed in Yankton's Post-Hearing Brief, the Project would pose an unacceptable threat to the environment and to the social and economic condition of inhabitants in the siting area. Dakota Access talks repeatedly about mitigating the threat of serious injury, rather than eliminating the threat. Yankton Sioux Tribe's Post-Hearing Brief at 19. This means that even Dakota Access admits that the threat of serious injury exists. Because the potential for devastating consequences posed by the Project exceeds any minimal benefit to the State of South Dakota, this threat is unacceptable.

In order to most accurately evaluate the threat of serious injury the Project poses to the social and economic conditions of South Dakotans, an environmental impact statement must be performed. *See* Yankton's Post-Hearing Brief at 16-20. The Commission simply does not have a

full picture of the risks and impacts posed by the Project without this comprehensive environmental study. No such study has yet been conducted by the State, and no such study will be conducted by any federal agency. The interests of the State of South Dakota would be best served by the Commission exercising its discretion to require that an environmental impact statement be prepared pursuant to the South Dakota Environmental Policy Act. Only then can the Commission veraciously determine the acceptability of the severe threat posed by the proposed pipeline. Notwithstanding the lack of an environmental impact statement, and based on the limited information the Commission does have, it is clear that Dakota Access has failed to meet its burden of proof with respect to SDCL 49-41B-22(2).

Dakota Access states that "[t]o completely prevent any and all risk at all is to prevent any construction of infrastructure of any type and to cause our society and state development to freeze as it remains now." Dakota Access' Post-Hearing Brief at 20. Stopping the particular project at issue would have no such effect, and Dakota Access has shown no evidence of any harm that will be caused if the Project is not built. Intervenors have not asked for a blanket moratorium on pipeline construction, they simply request that this pipeline application be denied because Dakota Access has failed to meet its statutory requirement to show, *inter alia*, that the Project poses no threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area, and because the severity and lack of justification for this threat makes it unacceptable.

Dakota Access asserts that "[n]one of the intervenors pointed to any potential serious environmental injury that can occur during <u>normal</u> pipeline operations." Dakota Access' Post-Hearing Brief at 23 (emphasis added). However, the primary concerns of the intervenors and of Yankton in particular relate to construction and abnormal operations. Dakota Access boasts of the

experience of Sunoco Logistics[2] as a pipeline operator, and of the safety and mitigation measures it would implement, in an attempt to minimize the magnitude of the threat posed by the proposed project. Ex. DA-30 at 5; Tr. 66 ln 16-19, 183 ln 16 – 184 ln 3, 523 ln 11-14. However, history and the data compiled by PHMSA show that the threat is not only real, but quite significant. Because it appears as though Sunoco Pipeline L.P. will be operating the proposed pipeline, it is necessary in order for the Commission to reach an informed decision to consider Sunoco Pipeline L.P.'s safety record.

As previously stated, between 2010 and 2015, pipelines operated by Sunoco Pipeline L.P. incurred 126 incidents involving crude oil that are included in the Hazardous Liquid Pipeline Accident Reports of flagged data. http://phmsa.dot.gov/staticfils/PHMSA/downloadablefiles/Pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip. This is an average of more than 20 spills per year, and it does not include spills of other materials from pipelines operated by Sunoco Pipeline L.P. These flagged reported spills were not always contained; 36 spills occurred on the pipeline right-of-way and 12 spills originated on operator-controlled property, but then flowed or migrated off the property. *Id*. 53 of the spills that occurred between 2010 and 2015 were considered "large," and over that period of time 4,966.4 barrels or 208,588.8 gallons of crude oil were unintentionally released. *Id*. This is an average of more than 34,764.8 gallons per year. 1,046 barrels have been released so far in 2015 alone. *Id*. 40 of the incidents were caused by equipment failure. *Id*. Five were caused by material failure of pipe or weld. *Id*. This demonstrates that the construction of pipelines is not infallible and is a cause of crude oil pipeline spills. 60 of the spills were caused by corrosion, demonstrating that the anti-corrosion techniques relied upon for pipeline integrity and safety are ineffective. *Id*. The source of

[2] Again, Dakota Access' testimony relates to Sunoco Logistics, however, the draft facility response plan submitted by Dakota Access on July 8, 2015, is entitled, "Sunoco Pipeline L.P. Facility Response Plan".

identification of the incidents was provided for only 62 of the accidents contained in the report. Out of those 62 accidents, 16 spills were identified through notification from the public. This means that over one-fourth of these incidents went undetected until they were spotted by a member of the public. Only five (less than one-twelfth) of these incidents were identified through a CPM leak detection system or through SCADA-based information. While technological advances have been made, they are still insufficient to adequately prevent or detect spills. Dakota Access has failed to address this reality either through testimony or in its brief.

Dakota Access' Post-Hearing Brief also virtually ignores the threat posed to local communities by the influx of pipeline workers. Dakota Access' Post-Hearing Brief does not address the issues raised regarding the influx of workers and the sexual violence and other risks that influx would pose to local communities. Instead, it dismisses the issue, stating that "the only intervenor group to express concern regarding the influx of employees was the Tribal groups [sic] who do [sic] not own land or have members residing in the immediate pipeline vicinity." Dakota Access' Post-Hearing Brief at 27. Dakota Access attempts to minimize the severity of the threat by assuming that the geographic distance between the proposed route and the Tribe's casino means that pipeline workers will not patronize the casino. However, due to the remoteness of the southern part of the Project in South Dakota and its proximity to the Fort Randall Casino, it is likely that workers will visit the casino. Ex. YST-7 at 3, YST-11 at 4; Tr. 1064 ln 25 – 1065 ln 3. The threat posed by pipeline workers to local communities certainly includes Yankton Sioux Tribal members due to the proximity of the pipeline to its casino and its members that reside in the Sioux Falls area, and it is a grave threat that Tribal members should not be exposed to. Any potential benefit to South Dakotans from the proposed project is easily outweighed by the dangers it poses to local communities, particularly young women in those communities.

The social welfare of the Yankton Sioux Tribe would also be particularly impacted by a spill affecting the Missouri River or the James River, as discussed in Yankton's Post-Hearing Brief and during the hearing. Yankton's Post-Hearing Brief at 23; Tr. at 1033 ln 20 – 1034 ln 17, 1037 ln 18 – 1038 ln 10. Yankton has significant history, which is vital to preservation of the culture, along the James River. Ms. Spotted Eagle testified "we know that we have many, many cultural sits along the James River. And that was a prime camping area because the pattern, the relationship that we have with the James River, we knew the flood times, and it wasn't as dangerous as the Missouri River. So they would go back between those two water bodies." Tr. 1038 ln 4-10. The James River and the Missouri River are also key locations for Yankton Sioux Tribal members to gather plants for medicinal and spiritual purposes, and a spill affecting that region could destroy their ability to do so, causing harm to their culture. Tr. 1033 ln 20-21, 1034 ln 4-10, ln 14-17. As Ms. Spotted Eagle testified, "the way we survive is we depend on our culture." Tr. 1034 ln 2-3. The potential for spills therefore poses an unacceptable threat to Yankton's culture and social conditions.

Dakota Access admits that reclamation "if not properly done can negatively affect the social and economic condition of an area." Dakota Access' Post-Hearing Brief at 25. Dakota Access' brief cites to the testimony of Sue Sibson and Kent Moeckly, claiming their experiences are unrelated and irrelevant to the proceeding at hand. Dakota Access' Post-Hearing Brief at 26. Their experiences are not only relevant but directly on point to the proceeding at hand because they demonstrate the consequences of pipeline construction and the fact that reclamation does not always go as planned. Dakota Access further attempts discredit to Ms. Sibson's and Mr. Moeckly's testimony by pointing out that neither landowner utilized the complaint process available at the Commission. This is not relevant. The point of the testimony is not that the

landowners have exhausted all available remedies to no avail; the point is that they should not have to. If landowners are forced to seek redress through the Commission, something is clearly wrong with the way reclamation is being conducted. Resolution through the Commission is not part of the Agricultural Mitigation Plan, and if Dakota Access is saying that landowners have to go to the Commission to have their land properly reclaimed, that is a problem in and of itself. Dakota Access claims that "[t]he history of pipeline construction in general…tells the rest of the story." Dakota Access' Post-Hearing Brief at 28. If Dakota Access is referencing its own history, that story has no ending because Dakota Access has never before constructed a pipeline or been responsible for cleaning up spills. Tr. 67 ln 2-5. If Dakota Access is referencing the history of pipeline construction in the United States or in the world, there is still nothing for the Commission to rely on because Dakota Access has offered no evidence of U.S. or world pipeline construction history. The only evidence of historical pipeline construction was put on by intervenor witnesses whose testimony revealed the significant damage caused by pipeline construction and operation.

Staff takes the position that the Commission does not need to assess whether an interstate pipeline poses an unacceptable threat because that is done at the federal level through PHMSA. Staff's Brief at 16-17. If this was the case, there would be no reason for the South Dakota legislature to include it as part of an applicant's statutory burden of proof. If PHMSA standards satisfied the requirement contained in SDCL 49-41B-22(2), this requirement would not exist. PHMSA standards are not the Commission's standards, and PHMSA does not regulate whether or not a pipeline can be built. The Commission is the body with authority to determine whether or not a pipeline can be constructed in South Dakota, and it is up to an applicant to prove to the Commission that it will meet the requirements imposed by South Dakota law. Staff also notes that "[b]y avoiding HCAs and USAs, the Applicant demonstrated that they attempted to minimize the

threat of serious injury to the environment, to the extent practicable, should the Pipeline spill." Staff's Brief at 17. An applicant's attempt to minimize threats is not the standard imposed by the statute and it does not meet the applicant's burden of proof. A minimized threat may still be an unacceptable threat. It is up to the Commission to determine the acceptability of a threat for the State of South Dakota. In the instant case, even if minimized, the threat posed by the proposed project remains unacceptable. Because Dakota Access has not proven otherwise, it's application must be denied.

E. THE PROJECT WOULD SUBSTANTIALLY IMPAIR THE HEALTH, SAFETY OR WELFARE OF THE INHABITANTS.

The damage caused by spills would substantially impair the health, safety, and welfare of inhabitants if the Project is built. As reflected in the PHMSA data for Sunoco Pipeline L.P., spills are inevitable. As also shown in the PHMSA data, spills are not always contained to the pipeline property or even to the pipeline right-of-way. Many of these spills are significant: an average of almost 10 spills per year by Sunoco Logistics L.P. are considered spill type "large." http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip. Common sense dictates that a large spill of toxic crude oil affecting landowner property and property not controlled by the pipeline company would substantially impair the health, safety, and welfare of the inhabitants. Moreover, as many of these spills migrate and the proposed project would cross 288 waterbodies (Ex. DA-1 at 25) which could further distribute the toxic substance, there is a significant risk that South Dakota's waterbodies could become substantially impaired along with the wildlife and vegetation that rely on those waterbodies. Such a spill would also endanger unprotected cultural sites, which are crucial to the welfare of Yankton Sioux Tribal members. In addition, the Project is proposed to cross the Missouri River twice before it reaches South Dakota. Due to the inevitability of spills, this would

place the drinking water for thousands of South Dakotans in jeopardy. A shortage of clean drinking water due to crude oil contamination would, without doubt, impair the health of South Dakotans. While Dakota Access testified at length about its safety and mitigation measures, it did not and cannot prove that spills will not occur or that spills will be adequately contained. Sunoco Pipeline L.P.'s history is a testament to the contrary. Because spills would be inevitable and would not always be small or contained if the pipeline is constructed, substantial impairment to health, safety, and welfare of inhabitants would likewise be inevitable.

Even Dakota Access admits that "abnormal operating conditions and spills and/or leaks cannot always be prevented" and that "[a]bnormal operations, such as a spill can negatively affect the environment and the people around it." Dakota Access' Post-Hearing Brief at 30. As shown by the PHMSA data discussed in section II(E), *supra*, Sunoco Pipeline L.P.'s track record responding to spills does not comport with Dakota Access' argument that the Project does not pose a threat of serious injury to the environment or to social and economic conditions. While Dakota Access may have a "Spill Response Plan" (the document entitled "Sunoco Pipeline L.P. Facility Response Plan" and listed as Exhibit 6 on Dakota Access' Witness and Exhibit List), it is a matter of public record that pipelines operated by Sunoco Pipeline L.P. not only spill, but their spills are not well contained and they are sometimes significant in volume.

Dakota Access cites the testimony of Staff's witness Kim McIntosh, who stated that she "is not aware of any permanent natural resource damage from a petroleum pipeline release in South Dakota." Dakota Access' Post-Hearing Brief at 31, citing Ex. Staff-3. The witness' lack of knowledge is not proof that such damage does not exist, let alone that it cannot or will not exist. The witness further testified that she "do[es] not believe there are any petroleum spills that can't be remediated given sufficient time and resources." *Id.* The witness did not, however, specify

what constitutes sufficient time and resources. Over the course of 500 years and with unlimited funds and tools, she may very well be correct, but South Dakotans are concerned with the present and near future as well as the distant future and Dakota Access does not have unlimited funds. Ms. McIntosh's testimony therefore has no probative value for purposes of the Commission's analysis.

Dakota Access claims that it "is responsible for any spill and has sufficient resources to do so." Dakota Access' Post-Hearing Brief at 31. However, Mr. Mahmoud testified that the parent companies of Dakota Access may be financially responsible for a spill due to Dakota Access' limited resources. Tr. 65 ln 22-23, 66 ln 7-11, 189 ln 4-8, 237 ln 16-19. Furthermore, Dakota Access provided no testimony about the financial capabilities or assets of Dakota Access or its parent companies or of the financial cost associated with a spill. Tr. 239 ln 7-15. The Commission therefore has no evidence of Dakota Access' ability to fulfill its financial responsibility for a spill to consider.

Staff's expert David Nickel alleged that "the proposed Project is not likely to substantially impair the health, safety or welfare of the inhabitants of South Dakota." Dakota Access' Post-Hearing Brief at 32, citing Ex. Staff-11. However, Mr. Nickel's testimony did not address all aspects of health, safety, and welfare and the scope of his expertise does not include all aspects of health, safety, and welfare as they relate to the proposed project. Furthermore, Mr. Nickel's opinion is not a substitute for the opinions of the Commissioners as the decision-makers. Upon evaluation of the record, the Commissioners should find that Dakota Access failed to prove that the Project would not substantially impair the health, safety, or welfare of the inhabitants of the siting area and that the application for a permit must be denied.

F. THE PROJECT WOULD UNDULY INTERFERE WITH THE ORDERLY DEVELOPMENT OF THE REGION AND DUE CONSIDERATION WAS NOT GIVEN TO THE VIEWS OF GOVERNING BODIES OF AFFECTED LOCAL UNITS OF GOVERNMENT.

Contrary to Dakota Access' Post-Hearing Brief, Dakota Access failed to give due consideration to the views of all affected local units of government. SDCL 49-41B-22(4) requires an applicant to give due consideration to the views of governing bodies of affected local units of government. Dakota Access states that it had extensive conversation with all of the affected governing bodies along the route. Dakota Access' Post-Hearing Brief at 16. It lists the entities it considers to be local government entity intervenors, namely Lake County, Lincoln County, Minnehaha County, the City of Hartford, and the City of Sioux Falls. *Id*. Dakota Access does not include local tribal governments within that list. Dakota Access further claims that "[n]one of the local governments offered testimony at the hearing." *Id*. However, the Yankton Sioux Tribe did provide testimony during the hearing (Ex. YST-6, YST-7, YST-11; Tr. 1028-1070), and while it did not provide testimony, the Rosebud Sioux Tribe ("Rosebud") participated extensively in the hearing.

Like the Yankton Sioux Tribe Reservation and the Rosebud Sioux Tribe Reservation, the City of Hartford and the City of Sioux Falls are near the pipeline route, but the pipeline route does not cross actually through them. In addition, the Project would cross directly through a vast portion of Yankton's aboriginal territory. *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208; Ex. YST-8, YST-10. Dakota Access provided no explanation for how it defined "local units of government" or why it did not include Yankton or Rosebud in its treatment of local units of government except to say that the pipeline does not cross through them. However, this is clearly not the criteria used by Dakota Access, as it treated the City of Sioux Falls and the City of Hartford as local units of government despite not crossing through them. Moreover, Yankton and Rosebud are clearly units of government as explained in Yankton's Post-Hearing Brief, page 24, and they

would be affected by the Project in a number of ways described in Yankton's Post-Hearing Brief, pages 12-13 and 20-24.

Dakota Access asserts that "none of [the landowners or Tribal entities] called a single witness to contradict Dakota Access's testimony on [this] subject." Dakota Access' Post-Hearing Brief at 32. To the contrary, Yankton called two witnesses and entered into evidence the prefiled testimony for a third who testified to Dakota Access' failure to give due consideration to the views of the Yankton Sioux Tribe. Ex. YST-6, YST-7, YST-11; Tr. 1028-1070. Dakota Access falsely claims that it "consulted all local bodies of government along the pipeline route *or affected by the proposed pipeline*." Dakota Access' Post-Hearing Brief at 33 (emphasis added). This cannot be true, as Dakota Access also admitted that it did not consult with the governing body of the Yankton Sioux Tribe. Tr. 71 ln 19 – 72 ln 4, 83 ln 23 – 84 ln 2; Dakota Access' Post-Hearing Brief at 33. Dakota Access cites the "lack of proximity to the project" as its excuse for failing to consult with Yankton and Rosebud. Dakota Access' Post-Hearing Brief at 33. However, Yankton's casino is in sufficient proximity to the proposed pipeline that, due to the nature of the establishment as the nearest entertainment venue to parts of the pipeline, it would most certainly be affected by construction of the proposed project. Furthermore, Dakota Access' reasoning fails to account for the potential impact of a spill in the Missouri River or the James River which would also significantly affect Yankton as described in section II(D), *supra*.

G. A PERMIT FOR THE PROJECT SHOULD BE DENIED.

Because Dakota Access has failed to meet its burden of proof, the Commission should deny Dakota Access' application for a permit. SDCL 49-41B-22 requires an applicant to meet each of four specific burdens of proof. As discussed in Yankton's Post-Hearing Brief and in sections II(C) through II(F), *supra*, Dakota Access has failed to meet all four burdens. Furthermore, Dakota

Access' application failed to contain the content required by SDCL 49-41B-11 and ARSD 20:10:22. Dakota Access' application also contained deliberate misstatements of material facts, one of which was further misrepresented by Dakota Access' witnesses during the evidentiary hearing. Dakota Access' incomplete application, deliberate misrepresentations to the Commission, and inability to meet its burden of proof require the Commission to deny the permit application.

H. IF A PERMIT IS GRANTED, TERMS AND CONDITIONS OF THE CONSTRUCTION AND OPERATION OF THE PROJECT ARE APPROPRIATE.

Should the Commission grant Dakota Access a permit notwithstanding its noncompliance with South Dakota law and its failure to meet its burden of proof, the imposition of terms and conditions on the permit would be necessary to ensure the safety and welfare of South Dakotans. The terms and conditions Yankton would ask the Commission to impose include requiring complete cultural surveys that involve tribal representatives, requiring consultation with tribes and treatment of tribes as local units of government, requiring completion of an environmental impact statement and a finding that the requirements of SDCL 49-41B-22 are fully met in light of the information, and prohibiting Dakota Access from interfering with Yankton's aboriginal rights. Yankton's proposed conditions are more fully addressed in Yankton's Post-Hearing Brief, pages 25-27. These conditions would not guarantee the safety and protection of Yankton's and South Dakotans' rights, which can only be done by denying the permit, but they would lessen the risks and the damage that would be caused by the proposed project.

The conditions proposed by Dakota Access are not only inadequate because they do not include those recommended by Yankton, but also because they contain additional flaws that must be addressed if a permit is granted. Dakota Access' condition 17(j) addresses the discharge of saline water on landowners' lands. Dakota Access failed to disclose that saline water would be

discharged onto landowner property during the hearing. During discovery, Dakota Access informed Yankton that there would be no chemicals in the water that would be discharged. **Exhibit A** (Response to Interrogatory No. 54(E): "No byproducts or chemicals will be contained in the discharge water"). Sodium chloride, when mixed with water is called saline, is a chemical. The fact that discharge water would include saline is a material fact that was not disclosed by Dakota Access. Any permit should therefore prohibit Dakota Access from discharging saline water.

Dakota Access' proposed condition 17(p) would allow Dakota Access to meet its reclamation duty by establishing revegetation at only 70% of the density and cover of vegetation on adjacent lands. This means that landowners and the public would be deprived of 30% of the vegetation that currently exists, and that the land would not in actuality be fully reclaimed. Any permit should require 100% reclamation, including restoring vegetation to 100%.

With respect to Dakota Access' proposed condition 33, any permit should require Dakota Access to obtain a determination by the Commission that the facility emergency response plan, written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies, and the integrity management plan will adequately protect the interests of South Dakota and its citizens prior to construction. These materials should be filed with the Commission and made available to the public for an opportunity to comment prior to the Commission making its determination

Dakota Access' proposed condition 41 is inadequate to protect cultural resources that would be disturbed by the proposed project. Any permit should require Dakota Access to have a certified archeologist on site at all times during construction and to immediately and directly notify Yankton and any other potentially affected tribes in the event of an unanticipated discovery. Yankton reiterates its position that no permit should be granted because Dakota Access has not

met its burden of proof pursuant to SDCL 49-41B-22, but in the event that a permit is nonetheless granted, this and the foregoing recommended changes as well as the conditions contained in Yankton's Post-Hearing Brief must be incorporated into the conditions of any such permit.

III. GENERAL ISSUES RAISED BY POST-HEARING BRIEFS

There are a couple of general issued raised by the post-hearing briefs submitted by the parties that merit additional discussion and consideration by the Commission.

In its Post-Hearing Brief, Dakota Access claims that "during the first full year of operation the pipeline will generate an estimated $14 million in new property taxes for local governments." Dakota Access' Post-Hearing Brief at 4. While Dakota Access may have estimated this figure, it has provided no basis for the estimate and no proof of the amount of property taxes that would actually be generated. Dakota Access' source for this statement is DAPL-1, Section 23.2. DAPL-1 is Dakota Access' application to the Commission for a permit. This statement in the application does not constitute evidence any more than the statement contained in Dakota Access' brief does. The statement rings hollow and was discredited by Staff's witness, Michael Houdyshell. "It is extremely difficult to derive reliable estimates of the property tax liability of a nonexistent property such as the Dakota Access Pipeline." Ex. Staff-7 at 4. "The relevant data is unknown to the Department [of Revenue] at this time, so *making an estimate is unwise* and I decline to do so." *Id*. at 5 (emphasis added). Mr. Houdyshell noted that there are a number of assumptions that would need to be made in order to calculate an estimate, including levy rates in various taxing districts. *Id*. at 4-5. Dakota Access is certainly not more qualified than the South Dakota Department of Revenue to make these assumptions. Mr. Houdyshell further states that "[t]he estimate provided by the Dakota Access Pipeline highlights the difficulties in making a reliable estimate of the property tax liability of the pipeline," indicating that Dakota Access' estimate is not reliable, and

that the "actual cost of the pipeline does not equal the fair market value of the property *and likely overstates the year 1 value of the pipeline* in South Dakota." *Id*. at 5 (emphasis added). When asked whether there is any way for a county or other taxing district to know how much revenue they would receive in taxes from the proposed project, Mr. Houdyshell replied "no." Tr. 1603 ln 18-21. "[A]ny estimate made by Dakota Access is speculative at best." Ex. Staff-7 at 5. Dakota Access' estimate should therefore not be relied upon by the Commission in its assessment of the proposed project and its decision on the permit.

The second general issue is Dakota Access' allegation that tribal intervenors asked the Commission to either violate existing private property law or make new property law by requesting that tribal consultations take place at all places along the route on private property (Dakota Access' brief at 18); tribal intervenors made no such request. Tribes provided evidence that cultural resource surveys would be more complete and accurate if they included the perspective of tribal members, who have unique knowledge of the culture and history that non-members do not possess. Including tribal members in these surveys alongside the company's archaeologists or surveyors would mean that tribal surveys could be conducted with the same consent granted to the company as part of that survey. Nothing precludes Dakota Access from allowing tribal representatives to participate in conjunction with its survey. To do so where Dakota Access has permission to survey would violate no law or property rights. There is no need to conduct a separate survey and certainly no need to trespass in order to allow tribal members to participate in the company's surveys. At no point did tribes ask the Commission to force landowners to allow them to survey property or imply that this would be required. Dakota Access' claim that "some intervenors also don't want Dakota Access to follow the law" is absurd; following the law is precisely what the intervenors

are asking the Commission to do in denying the revised permit application. Dakota Access' Post-Hearing Brief at 19.

IV. CONCLUSION

The Yankton Sioux Tribe and other intervenors outlined multiple reasons for the Commission to deny Dakota Access' Revised Application for a permit for the proposed project. Dakota Access must prove compliance with each of the statutory requirements addressed by questions one through six that were posed by the Commission in its Order for and Notice of Evidentiary Hearing. Failure by Dakota Access to meet its burden of proof or production with respect to any one of these questions mandates denial of the Revised Application.

Dakota Access' Revised Application was not filed generally in the form and content required by SDCL Chapter 49-41B-11 and ARSD 20:10:22. Dakota Access' Revised Application and accompanying statements or studies contain deliberate misstatements of material facts. The Project would not comply with all applicable laws and rules. SDCL 49-41B-1 is constitutional and the PUC does not have the authority to declare it otherwise. The Project would pose a threat of serious injury to the environment and to the social and economic condition of inhabitants or expected inhabitants in the siting area. The Project would substantially impair the health, safety or welfare of the inhabitants. The Project would unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government. Because Dakota Access has failed to meet its burdens with respect to all six of these questions, the permit must, by law, be denied.

Dated this 20th day of November, 2015.

Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird, SD Bar No. 4415

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EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE	**YANKTON SIOUX TRIBE'S SECOND INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DAKOTA ACCESS, LLC** **HP14-002**

Answering Dakota Rural Action's First Interrogatories to Dakota Access, LLC, Dakota Access, LCC states and alleges as follows:

INTERROGATORIES

INTERROGATORY NO. 43:
State the name, current address, and telephone number of the person answering these interrogatories.

ANSWER:
Joey Mahmoud
Vice President - Engineering
1300 Main Street
Houston, TX 77002

Chuck Frey
Vice President - Engineering
1300 Main Street
Houston, TX 77002

Keegan Pieper
Associate General Counsel
1300 Main Street
Houston, TX 77002

Monica Howard
Director – Environmental Science
1300 Main Street
Houston, TX 77002
Jack Edwards
Project Manager
11103 Aurora Ave.

Urbandale, IA 50322

Damon Daniels
Vice President – Commercial Operations
1300 Main Street
Houston, TX 77002

Micah Rorie
Senior Manager – ROW
1300 Main Street
Houston, TX 77002

Jennifer Fontenot
Senior Manager – Business Development
One Flour Daniel Drive
Sugar Land, TX 77478

Chad Arey
Senior Manager – Integration
1820 Highway 80 West
Longview, TX 75604

Chris Srubar
Associate Engineer
1300 Main Street
Houston, TX 77002

Stephen Veatch
Senior Director – Certificates
1300 Main Street
Houston, TX 77002

Todd Stamm
Vice President – Pipeline Operations
One Flour Daniel Drive
Sugar Land, TX 77478

INTERROGATORY NO. 44:
State the name, current address, and telephone number of any person, other than legal counsel, who Dakota Access talked with about answering these interrogatories, who assisted Dakota Access in answering these interrogatories, or who provided information that Dakota Access relied on in answering these interrogatories.

ANSWER: See the response to INTERROGATORY NO. 43.

INTERROGATORY NO. 45:
What is the legal relationship between Dakota Access and Energy Transfer Partners, L.P. (ETP)?

ANSWER: Dakota Access Holdings, LLC is owned 100 percent by Energy Transfer Partners, L.P. ("ETP"), a master limited partnership publicly traded on the New York Stock Exchange ("NYSE"). Energy Transfer Equity, L.P. ("ETE"), also a master limited partnership publicly traded on the NYSE, indirectly owns the general partner of ETP and certain of that partnership's limited partner units. ETP owns the general partner of Sunoco Logistics Partners, L.P. ("SXL") and certain of its limited partner units. (ETE and ETP are together referred to herein as "Energy Transfer"). Energy Transfer maintains its corporate headquarters at 3738 Oak Lawn Avenue, Dallas, Texas 75219.

INTERROGATORY NO. 46:
What is the legal relationship between Dakota Access and Energy Transfer Equity, L.P.?

ANSWER: Dakota Access Holdings, LLC is owned 100 percent by Energy Transfer Partners, L.P. ("ETP"), a master limited partnership publicly traded on the New York Stock Exchange ("NYSE"). Energy Transfer Equity, L.P. ("ETE"), also a master limited partnership publicly traded on the NYSE, indirectly owns the general partner of ETP and certain of that partnership's limited partner units. ETP owns the general partner of Sunoco Logistics Partners, L.P. ("SXL") and certain of its limited partner units. (ETE and ETP are together referred to herein as "Energy Transfer"). Energy Transfer maintains its corporate headquarters at 3738 Oak Lawn Avenue, Dallas, Texas 75219.

INTERROGATORY NO. 47:
What is the relationship between the Dakota Access pipeline and the Energy Transfer Crude Oil (ETCO) pipeline?

ANSWER: Objection. The question is vague.

INTERROGATORY NO. 48:

A. What is the status of construction and/or conversion and/or operation of the ETCO pipeline?

B. If this pipeline is not already operational, when is the expected date of operation?

ANSWER: Objection. The requested information is not relevant to the proposed Dakota Access pipeline.

INTERROGATORY NO. 49:

A. Does Dakota Access own or operate any crude oil pipelines that are currently operational?

B. If so, please identify these pipelines.

C. Has Dakota Access ever owned or operated any crude oil pipelines in the past?

D. If so, please identify these pipelines and the reasons they are no longer owned or operated by Dakota Access.

E. Please identify any non-crude oil pipelines owned or operated by Dakota Access and the product transported by said pipelines,

ANSWER: None.

INTERROGATORY NO. 50:

A. Does ETP own or operate any crude oil pipelines that are currently operational?

B. If so, please identify these pipelines.

C. Has ETP ever owned or operated any crude oil pipelines in the past?

D. If so, please identify these pipelines and the reasons they are no longer owned or operated by ETP.

E. Please identify any non-crude oil pipelines owned or operated by ETP and the product transported by said pipelines.

ANSWER: ETP and ETP affiliates operate and have ownership interest in 5,848 miles of crude oil pipeline. ETP owns and operates the Rio Bravo pipeline. In addition to the ETP crude oil pipeline, the Sunoco Logistics Crude Oil Pipeline System contains approximately 5,800 miles of crude oil trunk and gathering pipelines. The Sunoco Logistics Crude Oil Pipeline System includes the West Texas Gulf Pipe Line Company ("West Texas Gulf"), a wholly-owned subsidiary containing approximately 600 miles of crude pipelines, a controlling financial interest in Mid-Valley Pipeline Company ("Mid-Valley") containing approximately 1,000 miles of pipeline, and an equity interest in SunVit Pipeline LLC ("SunVit"). In addition, SXL owns a 37 percent undivided interest in the approximately 100-mile Mesa Pipe Line.

INTERROGATORY NO. 51:

Are there any potential points of destination along the proposed pipeline route before it reaches the terminus at Patoka, Illinois? If so, please identify the facility and location of each potential point of destination.

ANSWER: Objection. Calls for speculation.

INTERROGATORY NO. 52:
What is the final destination for the product transported by the proposed pipeline at which the product will be refined?

ANSWER: Objection. Calls for speculation. The applicable transports the product; it is not the party determining to which refineries in particular such product is ultimately transported.

INTERROGATORY NO. 53:
What will the product transported by the proposed pipeline be used for at the consumer consumption level?

ANSWER: Objection. Calls for speculation, the applicant transports the product.

INTERROGATORY NO. 54:

A. When Dakota Access does apply for water use or discharge permits within the State of South Dakota, from which agency or agencies do you anticipate applying?

B. What water sources in South Dakota does Dakota Access intend to use for the proposed project?

C. How much water does Dakota Access anticipate the proposed project will require from water sources in South Dakota?

D. How does Dakota Access intend to dispose of waste water or other discharged water resulting from the proposed project in the State of South Dakota?

E. What byproducts, chemicals, or other substances will be contained in waste water or other discharged water resulting from the proposed project?

ANSWER:

A) Applicable water appropriation and discharge permits will be sought from the South Dakota Department of Environment and Natural Resources. We anticipate submitting applications in the third quarter of 2015.
B) Water souces to be utilized for the project have not been determined.
C) The volume and sources of test water are still being investigated. It is not known if the all of the water for testing needs in South Dakota will be sourced from South Dakota. Some volumes may be "pushed" from one test segment to another in lieu of discharging and filling each test section. Additionally, test sections cross state lines, and the source for that segment may originate at either end, or be pushed from a test segment on either side.

D) As stated in the December 2014 PUC Application, two types of discharges will occur during Project construction; hydrostatic testing and trench dewatering. Typically water is discharged to vegetated upland areas through appropriate energy dissipating devices and/or discharge structures and monitored. All discharges will be done in accords with applicable permit conditions.
E) No byproducts or chemicals will be contained in the discharge water.

INTERROGATORY NO. 55:
When does Dakota Access expect to hire or retain contractors for construction of the proposed project?

ANSWER: The date has not been determined.

INTERROGATORY NO. 56:
When does Dakota Access expect to begin construction in South Dakota if a permit is granted by the PUC?

ANSWER: 1st Quarter 2016.

INTERROGATORY NO. 57:

A. Why has Dakota Access not yet completed cultural surveys of the entirety of the proposed route?

B. When does Dakota Access anticipate surveying the land along the proposed pipeline route that has not yet been surveyed?

C. Please identify the location(s) of land along the proposed pipeline route that has not yet been surveyed.

ANSWER:

A. To date, inventory surveys have been completed across all land tracts where access was voluntarily granted by individual landowners, which constitutes 97.3% of the route and 100% of the areas requiring surveys based on the probability model submitted to the SHPO in August of 2014.
B. Dakota Access maintains a stand-by archaeological field crew that is responsible for conducting additional surveys as needed.
C. Tracts that are not 100% complete for cultural survey include 1.2 miles in Spink, 3.6 miles in Minnehaha, 0.4 miles in Turner, and 2.3 miles in Lincoln Counties.

INTERROGATORY NO. 58:
What tools and/or training will be provided to inspectors and contractors to enable them identify an unanticipated discovery as such?

ANSWER: All inspectors and contractors will receive project specific training on the identification of cultural resources in the field and on the requirements of the unanticipated discovery plan for the Project prior to initiating work on the right-of-way. Contractors and Inspection staff will have stop work authority to cease operations in any given area if any potential resources are identified. Environmental inspection staff will receive additional training in the identification of cultural resources and will have direct access to Company environmental management and qualified archaeologists to confirm any finds and communicate with the respective agencies as detailed in the unanticipated discovery plan.

INTERROGATORY NO. 59:

A. Is or has the U.S. Army Corps of Engineers or any other federal agency conducting or conducted an Environmental Assessment (EA) of the proposed project?

B. If so, what is the status of the EA?

ANSWER: In South Dakota, a draft EA is under review by the US Fish andWildlife Service for respective federal easements crossed South Dakota (please note this EA includes 5 easements in North Dakota).

INTERROGATORY NO. 60:

What goods and services, and in what quantities, will Dakota Access procure from local businesses in South Dakota in conjunction with construction of the proposed pipeline?

ANSWER: Objection. Calls for speculation and the question is overly broad and unduly burdensome.

INTERROGATORY NO. 61:

How is the share of Bakken oil production that Dakota Access plans to transport by pipeline currently being transported, and by whom?

ANSWER: Objection. The request is irrelevant.

INTERROGATORY NO. 62:

A. In which towns in South Dakota and for what duration of time will construction workers for the proposed pipeline temporarily reside during the construction process?

B. How many workers will be temporarily located in a particular town at a time?

C. Have you identified lodging for these workers?

D. If not, how do you know adequate lodging exists at these locations?

ANSWER:

A. **The temporary construction workers will typically exhaust all options available to meet their housing needs. The options include, but are not limited to, hotels or motels, rental properties, and trailer camp sites. The warehouse locations to be utilized for the Project are strategically placed for not only logistic efficiencies, but to take advantage of the local living accommodations for the workforce.**

B. **The temporary construction workers will typically exhaust all options available to meet their housing needs. The options include, but are not limited to, hotels or motels, rental properties, and trailer camp sites. The warehouse locations to be utilized for the Project are strategically placed for not only logistic efficiencies, but to take advantage of the local living accommodations for the workforce.**

C. **The temporary construction workers will typically exhaust all options available to meet their housing needs. The options include, but are not limited to, hotels or motels, rental properties, and trailer camp sites. The warehouse locations to be utilized for the Project are strategically placed for not only logistic efficiencies, but to take advantage of the local living accommodations for the workforce.**

D. **The temporary construction workers will typically exhaust all options available to meet their housing needs. The options include, but are not limited to, hotels or motels, rental properties, and trailer camp sites. The warehouse locations to be utilized for the Project are strategically placed for not only logistic efficiencies, but to take advantage of the local living accommodations for the workforce.**

REQUESTS FOR PRODUCTION OF DOCUMENTS

DOCUMENT REQUEST NO. 8:

Please provide a copy of any Environmental Assessment or Environmental Impact Statement prepared in anticipation of the proposed project. If only a draft of said document has been released, please provide a copy of the draft.

RESPONSE: See Yankton Sioux Tribe – Second Interrogatories – Document Request No. 8. Please note that this is a draft and subject to change.

DOCUMENT REQUEST NO. 9:

Please provide all interrogatories posed by each intervener to Dakota Access and all corresponding responses submitted by the respective intervener.

RESPONSE: Due to the volume of materials, a drop box link will be provided via e-mail.

DOCUMENT REQUEST NO. 10:

Please provide all requests for production of documents served by each intervener on Dakota Access and all corresponding responses submitted by the respective intervener.

RESPONSE: Due to the volume of materials, a drop box link will be provided via e-mail.

Dated this ____ day of June, 2015.

BY:_____

State of Texas)
)ss
County of Harris_____)

On this the _____ day of June, 2015, before me the undersigned officer, personally appeared Stephen Veatch, who acknowledged himself to be an authorized individual of Dakota Access, LLC, a corporation, and that he being authorized so to do, executed the foregoing name of the corporation by himself as Stephen Veatch.

IN WITNESS WHEREOF I hereunto set my hand and official seal this _____ day of June, 2015.

_____
Notary Public
Notary Print Name:
My Commission Expires:

(SEAL)

As to the objections, these interrogatory answers are signed by Kara C. Semmler this 22 day of June, 2015.

MAY, ADAM, GERDES & THOMPSON LLP

BY:_____
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CERTIFICATE OF SERVICE

Kara Semmler of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 22 day of June, 2015, she mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at her last known addresses, to-wit:

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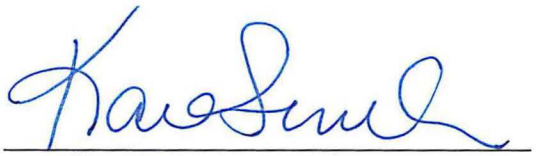

KARA C. SEMMLER

CERTIFICATE OF SERVICE

I certify that on this 20th day of November, 2015 the attached **POST-HEARING REPLY BRIEF** in docket number HP14-002 was filed on behalf of the Yankton Sioux Tribe electronically via the South Dakota Public Utilities Commission e-filing website and a true and accurate copy was sent via email or U.S. Mail, first class postage prepaid, to the following:

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