BEFORE THE PUBLIC UTILITIES COMMISION
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	**INTERVENORS' POST-HEARING REPLY BRIEF** **HP14-002**

COME NOW, Peggy Hoogestraat and other parties represented by Breit Law Office, P.C. (the "Intervenors"), by and through their counsel of record, and hereby respectfully submit their Post-Hearing Reply Brief.

REPLY

1. Dakota Access Has Made Misstatements of Material Fact.

a. Dakota Access Has No Eminent Domain Authority Until The Commission Issues A Permit.

In its Applicant's Post Hearing Brief, Dakota Access states "Neither the application nor accompanying statements... contain any deliberate misstatements of material fact." Applicant's Post Hearing Brief at 7. This statement is false. During the pendency of its application, Dakota Access commenced multiple lawsuit against South Dakota landowners on the premise that it is already a common carrier with an "inherent" right to survey land and take property through eminent domain.

Circuit Court Judge Bradley G. Zell analyzed Dakota Access's statement and concluded that "Dakota Access entry upon Defendants' land would constitute 'a taking' under South Dakota law. Such a taking is impermissible without first obtaining the PUC permit in accordance with SDCL §49-41B-1." Judge Zell further found that "the Legislature has not granted a pipeline applicant condemnation rights for survey purposes,

nor has this Court been granted such jurisdiction." (Exhibits I26 and I27)(Order and Findings of Fact and Conclusions of Law dated September 2, 2015 in *Dakota Access, LLC v. Hilt, et al* (Lincoln Co. Civ. 15-145) and *Dakota Access, LLC v. Stratmeyer, et al.* (Lincoln Co. Civ. 15-138)).

The actions of Dakota Access to gain unlawful entry upon land were nothing more than oppressive bullying tactics designed to force landowners to "cry mercy" before having to shell out their hard-earned money on attorney's fees. Dakota Access supports its application by touting that 88.14% of the land required has already been secured, indicating that nearly all affected South Dakota citizens are alleged to be in favor of the pipeline. Applicant's Post Hearing Brief at 16. But what percentage of these easements were procured by bad faith and oppressive tactics as found in Lincoln County, without giving the landowners a true understanding of the law, and instead providing them false statements concerning Dakota Access's "inherent" eminent domain authority?

Despite Judge Zell's crystal clear ruling against Dakota Access, it nevertheless has now sued landowners under eminent domain, even though it has no permit from the PUC. All statements made by Dakota Access indicating that it already has eminent domain authortiy, namely, the statements contained in the its Verified Petitions and Complaints in these lawsuits, are false statements of material fact.

Dakota Access does not mention Judge Zell's holding in its brief, despite the rule that a litigating party must disclose to the tribunal legal authority that is directly adverse to its position. *See* In re Discipline of Arendt, 684 NW2d 79 (SD 2004). The failure of Dakota Access to acknowledge Judge Zell's order is a material omission of fact and tantamount to a material misstatement of fact.

Instead of helping the Commission interpret the law and apply the same to the order made by Judge Zell, pages 16 and 17 of Dakota Access's Brief display a purely self-serving interpretation of South Dakota law with no supporting citations. Dakota Access wrote:

- "*Other states may require a permit to construct before eminent domain can be utilized. South Dakota does not.*"
- "*The shipper contract reached as a result of the Open Season are incontrovertible evidence that Dakota Access is a common carrier pipeline entitled to eminent domain. No statutes hold to the contrary.*"
- "*Dakota Access followed and is following all SD laws on the books pertaining to a common carriers right to condemn private property if easements cannot be negotiated.*"

Applicant's Post Hearing Brief at 16-17. These statements are not supported by any legal authority, are contradicted by a controlling circuit court judge's ruling, and are materially false. Further mischaracterizations of South Dakota law and the facts of this case on pages 17 and 18 are too numerous to mention.

According to Dakota Access "Some intervenors also don't want Dakota Access to follow the law." *Id.* at 19. Is that so? Intervenors respectfully request the Commission to carefully review Judge Zell's conclusions of law (Exhibits I26 and I27) and compare the same to pages 16-18 of Petitioner's Post Hearing Brief. It shows clearly which party is not following the law and instead making it up as they go along.

b. Dakota Access Routed the Pipeline Through the Greater Sioux Falls Area Only Because It Was The Shortest Route.

Another misstatement of material fact made by Dakota Access concerned the route selection through Sioux Falls, Tea and Harrisburg. Throughout the hearing testimony and its post hearing brief, Dakota Access asserts that it had "extensive" discussions with the leaders of Sioux Falls, Tea, Harrisburg and other affected communities and that none showed up to testify against the pipeline. However, Dakota Access admitted that these cities were not given any option whatsoever.

> **Mr. Boomsma:** Here's my question. You will agree, will you not, that the pipeline route goes through a growth area of Tea and Harrisburg? Yes or no?
>
> **Mr. Mahmoud:** Well, Mr. Boomsma, if we're going to play word games, please rephrase the question so you're not adding prefaces or prepositional phrases **in** front of my answer because I can't follow it. I'll be happy to answer it, but you can't ask me a question with a double negative or positive of whatever it is you've got to help me understand so I can answer it.
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> *** *** ***
>
> **Mr. Boomsma:** Do you agree that the pipeline route as presently proposed goes through a growth area not only by Tea but also by Harrisburg and also by Sioux Falls? Yes or no? This is not trickery.
>
> **Mr. Mahmoud:** No.
>
> **Mr. Boomsma:** You don't think the pipeline goes through a growth area?
>
> **Mr. Mahmoud:** The whole United States is a growth area, so I guess in general terms, yes. But we moved outside of what the predetermined growth areas were for these communities based upon their feedback.
>
> *** *** ***
>
> **Mr. Boomsma:** Did you give them the option of not having the route at all going through their growth area?
>
> **Mr. Mahmoud:** No. Of course not.

HT at 2047-2057.

Dakota Access cannot equate or infer that an absence at the hearing by these cities constitutes approval of the proposed route. These cities were not given a choice and their lack of participation at the hearing cannot be interpreted as support of the pipeline, as Dakota Access suggests. The testimony concerning the pipeline route through the Sioux Falls area contains material false statements to the extent of any alleged justification besides the fact that it is the cheapest route.

Commission Hanson's questioning of Mr. Mahmoud is worth restating:

> **Commissioner Hanson:** Would future growth of these communities increase community impact of the expected inhabitants and the economic development - - and the economic impact?
>
> **Mr. Mahmoud:** *It certainly could. Sure.*

HT at 2118.

> **Commissioner Hanson:** ... Are you aware of any environmental reason why the route of the pipeline cannot be moved farther away from the Harrisburg - - high growth areas of Harrisburg and Tea?
>
> **Mr. Mahmoud:** I would have to look. *No, sir. I'm not.*

HT at 2119.

These are undisputed facts of this case, and results in no other finding other than the fact that Dakota Access has failed to meet its burden under SDCL 49-41B-22(2), (3), and (4).

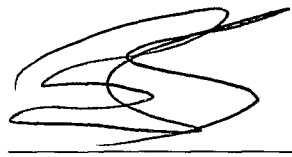
CONCLUSION

In light of the foregoing, it is evident that Dakota Access has not met their burden to prove that it has not made material misstatements of fact, violated any rules or laws, and their pipeline does not pose a threat of serious injury to the citizens of South Dakota.

The Intervenors respectfully request the Commission to deny the permit application filed by Dakota Access, LLC.

Dated this 20 day of November, 2015.

BREIT LAW OFFICE, PC



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