

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)	
APPLICATION OF DAKOTA)	HP14-002
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO CONSTRUCT)	APPLICANT’S POST HEARING BRIEF
THE DAKOTA ACCESS PIPELINE)	
PROJECT)	

A hearing in this matter was held in Pierre over the course of two weeks beginning on September 29 and ending on October 9, 2015. Pursuant to the South Dakota Public Utilities Commission (PUC) scheduling order, Applicant Dakota Access, LLC (Dakota Access) submits the following initial post-hearing brief in support of its application.¹

Project Description

In its siting application, filed with the PUC on December 15, 2014, Dakota Access proposes to construct the Dakota Access Pipeline Project (Project), a crude-oil pipeline. Once commissioned, the proposed project will then be operated by Sunoco Logistics. Tr. at 523.

The proposed Project is a 1,168-mile-long,² 12-inch to 30-inch diameter³ pipeline that will connect the rapidly expanding Bakken and Three Forks production areas in North Dakota to existing crude oil infrastructure in Illinois. Ex. DAPL-1, Section 8.0.

The project originates in the northwest portion of North Dakota and traverses southeast through South Dakota for 270 miles⁴ then through Iowa, and Illinois and terminates at the existing

¹ References throughout this brief to the hearing transcript are denominated “Tr. at ____.” Exhibits will be labeled, “DAPL ____.”

² Tr. at 56, line 22.

³ The South Dakota portion of the pipeline will be 30 inches in diameter.

⁴ Tr. at 331, line 6.

Patoka, Illinois hub. The pipeline is proposed to transport approximately 450,000 barrels per day (bpd) initially, with an anticipated capacity up to approximately 570,000 bpd. Once the crude arrives at the existing tank farms in Patoka, shippers will be able to access and distribute their crude to multiple markets, including Midwest and Gulf Coast markets via existing and proposed pipeline infrastructure. Ex. DAPL-1, Section 10.

Approximately 270 miles of the 1,168-mile-long pipeline will be constructed within South Dakota, crossing 13 counties in the eastern half of the state. Tr. at 331. The Project enters South Dakota in Campbell County approximately 17 miles east of the Missouri River, and continues southeast through McPherson, Edmunds, Faulk, Spink, Beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner, and Lincoln Counties. The Project crosses the Big Sioux River approximately 14 miles south of Sioux Falls, and continues in a southeast direction through Iowa. One pump station is located within South Dakota, approximately seven miles southeast of Redfield in Spink County. Ex. DAPL-1, Section 11.

The South Dakota pump station will be located in Spink County, approximately seven miles southeast of Redfield, South Dakota at milepost (MP) 332.2. The pump station consists of approximately nine acres, and was acquired in fee. The pump station will be fenced and contain three pumps driven by electric motors, an electrical and controls building, electrical substation, a surge tank, a communications tower, and parking area for station personnel. Electricity will be utilized for all pumps, lights, and heating in the buildings. Design and construction of the pump station will meet the requirements of the National Electric Code and American Petroleum Institute (API) 500. *Id.* As a new large load, Dakota Access has filed a Petition with the Commission to take electric service from NorthWestern Energy. See PUC Docket EL15-023.

The pump station will be fully automated for unmanned operation. Remote start/stop, set point controls, unit monitoring equipment, and station information will be installed at each location. Backup power at the pump station will consist of batteries to maintain communications between the

pump station and the pipeline control center and to provide lighting and power for minor facility procedures if the local utility power supply is disrupted. The pipe entering and exiting the pump station will be located underground; however, some of the piping within the pump station yard (after entering and prior to exiting the pump station facilities) will be aboveground. *Id.*

Dakota Access plans to install 40 main line valves (MLV) along the route in South Dakota which is far in excess of what is required by federal pipeline safety code. Tr. at 187, line 25. The MLVs will be constructed within the 50-foot permanently maintained ROW, and sites will be approximately 75-feet-long and 50-feet-wide. These valve sites will be located within an easement obtained from landowners. The spacing intervals between the MLVs along the ROW is based upon environmental conditions, pipeline safety regulations and Dakota Access's commitment to install a pipeline equipped with significant safety features. All valves will have remote actuators so that in the unlikely event of an emergency, these valves can be quickly activated from the operational control room to isolate sections of the pipeline to minimize environmental impacts. Ex. DAPL-1, Section 11.

Typically, the pipeline construction corridor will be 125 feet wide, consisting of the 50 foot wide permanent right of way and the remainder for temporary work space. See Typical Drawings attached to Ex. DAPL-32. If a permit is granted, Dakota Access intends to begin construction in the spring of 2016 with construction activities in South Dakota expected to last nine months. Dakota Access plans for 2 partial and 1 full construction spread with 900 to 1,000 construction personnel on each spread. Tr. at 301. It is expected that most non-local Project workers will use temporary housing, such as rental units, hotels, motels, campgrounds, and recreational vehicle parks. Ex. DAPL- 1, Section 23.1. In the South Dakota counties that the pipeline corridor crosses, there are approximately 2,500 available rental units, 4,700 motel rooms, and 1,900 campground/recreational vehicle spaces. *Id.* It is customary and expected that the construction contractor will work around special events and important times of year for tourism within the state. Previous reservations or arrangements made by hotels and campgrounds to meet the needs of residents or tourists will not be

disturbed by the Project. The above listed accommodations are all within approximately 10 to 40 miles of the pipeline corridor. It is anticipated that most of the temporary workers will seek housing in the more populated, service-oriented towns located within a reasonable commuting distance to the work site. Ex. DAPL-1, Section 23.1.

The increased economic activity that results during construction of the pipeline will generate additional sales, use, gross receipts, and lodging taxes of approximately \$36 million for state government, plus \$3 million for local governments. Once the pipeline goes into operation South Dakota State and local governments will realize ongoing annual sales, use, and gross receipts of about \$197,000. Also, during the first full year of operation the pipeline will generate an estimated \$14 million in new property taxes for local governments. Ex. DAPL-1, Section 23.2

The Permit Application

On December 15, 2014 Dakota Access filed a siting permit application with the PUC pursuant to SDCL 49-41B-2.1(3). Dakota Access filed a revised application on December 23, 2014. The revised application, along with all other changes or updates to application attachments and exhibits, was admitted as Exhibit DAPL-1 at the September/October hearing.

After receipt of the initial application, the PUC held public input meetings on January 21, 2015 in Bowdle, and Redfield, SD and on January 22, 2015 in Iroquois and Sioux Falls, SD. On May 4, 2015 the PUC entered an order granting party status to 31 individuals, 9 entities, the Rosebud Sioux Tribe, the Yankton Sioux Tribe and The South Dakota Department of Transportation. In addition, several affected local governments were granted party status including: Lake County, Lincoln County Board of Commissioners, Minnehaha County Board of Commissioners, City of Hartford and the City of Sioux Falls.

On March 11, 2015, the PUC entered an order establishing a procedural schedule which established deadlines for discovery and pre-filed written direct testimony. Dakota Access, PUC Staff, The South Dakota Association of Rural Water, the City of Sioux Falls, and sixteen landowners affected by the proposed pipeline and two landowners not affected by the proposed pipeline filed written direct testimony.

The sixteen affected landowners who filed written testimony represent five individual family groups and six tracts of land in the proposed Project footprint. To date, Dakota Access negotiated easements for 89.64% of the Project footprint. Thus, the landowners who submitted testimony representing six tracts of land are clearly the minority of landowners affected by the Project.

The City of Sioux Falls' concerns were targeted and specific to its landfill and one of its water providers, the Lewis and Clark water system. Dakota Access must cross Lewis and Clark facilities, and Sioux Falls wanted to assure that crossing was properly planned. Dakota Access resolved all Sioux Falls' issues during the course of the hearing. As a result Sioux Falls did not call a witness and did not introduce its pre-filed testimony as an exhibit.

The South Dakota Association of Rural Water Systems (SDARWS) concerns shifted several times but ultimately were targeted and specific to the Lewis and Clark water pipeline, a member of the Association. The interest was again a result of the planned Dakota Access waterline crossing. Every party involved wants to assure the crossing is successful, safe and done in a way. Dakota Access and Lewis and Clark fully negotiated all issues related to crossing and were satisfied with the result. However, Lewis and Clark then refused to execute the crossing agreement unless Dakota Access agrees to pay all costs associated with having Margo Northrup, the Association's Counsel at the two week long PUC hearing. While the

breakdown in negotiations over a non-substantive issue is unfortunate, Dakota Access remains committed to safely cross the Lewis and Clark pipeline and will do so according to applicable federal code, a negotiated agreement or both, whichever is applicable.

Rebuttal testimony was filed by two landowners directly affected by the proposed pipeline and one that is not affected by the proposed Project. In addition, the Indigenous Environmental Network (IEN) and Dakota Rural Action (DRA) aligned their interests and filed rebuttal testimony. The Yankton Sioux Tribe (YST) also submitted rebuttal testimony. Much like the unaffected landowners, IEN, DRA and YST did not provide evidence of direct impacts of the proposed Project and proposed no conditions or solutions during the hearing. Rather, it appears they opposed the project in theory or out of principle only. The concerns of the Tribe intervenors are discussed at length below.

The hearing began on September 29, and concluded on October 9, 2015. Mere hours before the hearing began on September 29, 2015, Rosebud Sioux Tribe (RST), DRA and IEN filed a Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement. The Commission denied the Motion and proceeded with the hearing. However, based on an inquiry by Commissioner Hanson regarding an EIS as a permit condition, Dakota Access submitted a brief on October 6, 2015 and stands by the arguments made therein.

During the evidentiary hearing the PUC heard from witnesses on behalf of Dakota Access, witnesses on behalf of Intervenor and witnesses on behalf of the Commission Staff. A number of exhibits were introduced into evidence including the pre-filed direct and rebuttal testimony of a number of witnesses. In addition to the above listed Intervenor who pre-filed written testimony, RST appeared at the hearing to cross examine witnesses through its Counsel of record. RST did not pre-file testimony and did not call witnesses at the hearing.

Pursuant to SDCL 49-41B-24, the PUC has until December 15, 2015 to make findings of fact and conclusions of law and to determine whether Dakota Access should be granted a permit and, if so, under what conditions.

Dakota Access's Burden of Proof

Dakota Access's burden of proof is established by statute. Dakota Access met the burden of proof and satisfied each of the statutory criteria. Dakota Access must prove, by a preponderance of the evidence, that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. SDCL § 49-41B-22.

Additionally, in its Order for and Notice of Hearing, the PUC listed the following considerations:

- (1) Whether the Application was filed generally in the form and content required by SDCL Chapter 49-41B-11 and ARSD 20:10:22.

Dakota Access's application is in the form and contains information required of SDCL 49-14B-11 and ARSD 20:10:22.

- (2) Whether the Application or any accompanying statements or studies required of the Applicant contain any deliberate misstatements of a material fact?

Neither the application nor accompanying statements or studies required of the applicant contain any deliberate misstatements of material fact.

Argument

I. Dakota Access will comply with all applicable laws and rules.

Dakota Access will comply with all applicable laws, rules and regulations. Dakota Access doesn't have a choice. The law is the law and Dakota Access must follow it, as does everyone else without regard to the South Dakota Energy Facilities Siting Act. From pipeline safety down to local government road crossings, Dakota Access is required to understand and follow the law. No witness at the hearing testified that Dakota Access could not, would not, or did not have a plan in place to comply with all applicable laws or regulations.

The South Dakota PUC Staff submitted testimony from sixteen witnesses. None of them identified a law or regulation that Dakota Access failed to consider or did not plan to follow. Sixteen South Dakota landowner intervenors filed testimony and none of them identified a federal, state or local law that Dakota Access failed to identify and did not plan to meet. Five local governments intervened and only one of them filed testimony. Again, none of them identified a federal state or local law that Dakota Access failed to consider and meet. Finally, RST and YST could not point to any federal state or local law that Dakota Access would violate. The tribal intervenors brought forth un-adjudicated legal theories pertaining to water and land rights as the basis of their opposition.

The size and scope of the project requires Dakota Access to put significant resources toward learning, understanding and tracking federal, state and local laws. From employment law and finance and securities regulation to local speed limits, it is unnecessary and impossible to list all laws and regulations that exist within the United States or any particular state along the proposed route. However, a few of the "largest" regulatory schemes at play are implicated and

worth discussing. These very significant laws protect people and the environment and bear discussion, below:

A. Dakota Access will comply with applicable Federal Laws

Pipeline Safety Act

The Pipeline Safety Act is a major Federal act implicated by the Dakota Access project. Both during construction and during operations, Dakota Access's primary regulator is the Pipeline Hazardous Materials Safety Administration (PHMSA) of the U.S. Department of Transportation (DOT). Dakota Access is obligated to follow 49 CFR Part 195 which is enforced by PHMSA. Many witnesses called by Dakota Access testified to the Company's commitment to meet or exceed PHMSA's requirements which contributes to the safety of the proposed pipeline. Tr at 277, 292, 448, 561 573, 576-578,609, 2214-2216, Ex. DAPL-34.

Dakota Access's spill response plan and identification of High Consequence Areas (HCAs) demonstrates its commitment to meet or exceed PHMSA standards. Todd Stamm, an expert in pipeline operations and oil spill response, testified to Dakota Access's operations plans and emergency response planning. The pipeline is not yet permitted, and it already has drafted operational plans to assure the Project utilizes available science and technology to exceed safety regulations. Tr. at 525-527, Ex. DAPL-34. Ultimately PHMSA will review the pipeline's plans to confirm Dakota Access's efforts satisfy code requirements. Tr. at 527.

There was significant testimony regarding the definition of High Consequence Areas (HCA) during the hearing. HCA's are solely a creature of and defined within federal pipeline safety rules at 49 CFR 195.450 and 195.6.⁵ The determination of HCA's implicate the pipeline's

⁵ §195.450 High consequence area means:

Integrity Management Plan (IMP). HCA's do not dictate routing or construction techniques. Tr. at 1592. Identification of the HCAs is an essential step to an effective and complete Integrity Management Program (IMP). *Id.* Proper identification of HCA's is done through review of the PHMSA operator maps and through consultation with US Fish and Wildlife Service (USFWS) to identify areas defined as unusually sensitive per 49 CFR 195.6. Tr. at 1594. Dakota Access conducted the analysis and its IMP reflects the fact that at this time, the Project does not pass through any HCAs. Tr. at 2169-2205.

An IMP is required per federal code. As the environment along the route changes, the IMP requirements can also change and thus the IMP must change as well. If it becomes apparent either before or after the pipeline is operational, that an HCA exists along the route, the IMP will change as well. Tr. at 2214. However, it is important to note and remember that nothing about the pipeline routing, design or construction changes as a result of determination of an HCA. Tr. at 1592. Rather, it merely the IMP that is implicated. Dakota Access is situated and prepared to modify its IMP as necessary to account for any HCA that may develop.

The Dakota Access pipeline design meets or exceeds the requirements of the Pipeline Safety Act. Specifically, Chuck Frey testified that:

(1) A *commercially navigable waterway*, which means a waterway where a substantial likelihood of commercial navigation exists;

(2) A *high population area*, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile;

(3) An *other populated area*, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area;

(4) An *unusually sensitive area*, as defined in §195.6.

(i) Dakota Access performed quality control inspections of the pipe mills prior to any of those mills being allowed to bid on supplying pipe;

(ii) Dakota Access placed an inspector in each of the mills for the duration of the time the pipe was being rolled and produced for Dakota Access;

(iii) Dakota Access required all the mill pipe meet a specification that has more stringent testing and recordkeeping requirements than are established in the code;

(iv) Dakota Access requires nondestructive testing of 100% of the welds on the Project;

(v) Dakota Access will provide a minimum cover of 48 inches in cultivated land whereas code only requires 36 inches;

(vi) Dakota Access will provide a minimum of 60 inches of cover at road ditches where the code requires 36 inches;

(vii) Dakota Access will provide 60 inches of cover at all water crossings where the code requires 48 inches;

(viii) Dakota Access will provide a minimum separation of 24 inches between the pipeline and existing drain tile where the code only requires 2 inches;

(ix) Dakota Access will construct 40 mainline valves on the pipeline;

(x) all valves have actuators with the ability for them to be monitored and controlled from the control center;

(xi) Dakota Access is using heavier wall and thicker pipe at all drills and bores (and all crossings there where the Topeka Shiner is present);

(xii) Dakota Access has not and will not make a request for an alternate operating pressure or any other special conditions;

(xiii) Dakota Access performs aerial patrols weekly when code requires 26 times per year; and

(xiv) Dakota Access prepared a Spill Response Plan in accordance with a new API recommended practice 1174. Tr. at 2139-2141.

Staff witness Robert McFadden reviewed the application for compliance with federal code and he confirmed that the pipeline is in compliance with all PHMSA regulations. Tr. at 1558. No one contradicted him.

Section 404/401 of the Clean Water Act

The Clean Water Act is another Federal Act which applies to the Project. Specifically, Section 404(e) and 401 of the Clean Water Act applies and requires Dakota Access submit an application for a Nationwide Permit 12 which is enforced by the U.S. Army Corps of Engineers. Ex. DAPL-1 at Table 5.0-1, DAPL-33. More specifically, the U.S. Army Corps of Engineers (USACE) has the authority to issue general permits on a nationwide basis for certain classes of activities involving discharge into waters of the United States including wetlands. The USACE uses nationwide permits for projects which the USACE believes, when conducted in accordance with the permit general conditions, will have minimal or insignificant impacts, both individually and cumulatively, on the waters of the United States. 33 U.S.C. §1344. Dakota Access applied for the permit, consulted with the USACE regarding the permit and expects it will be issued. Ex. DAPL-33. Dakota Access will comply with the permit and any other requirements or conditions imposed upon it by the USACE. *Id.*

Section 7: Endangered Species Act

The Nationwide Permit 12 process also requires a determination whether the Project will affect federally listed threatened and/or endangered species. The determination is required per

Section 7 of the Endangered Species Act. 16 U.S.C. § 1531 et seq. Under the Act, Federal agencies (such as the USACE in this case) must consult with USFWS when any action the agency carries out, funds, or authorizes such as through a Nationwide Permit 12 *may affect* a listed endangered or threatened species. In this case, the Topeka Shiner is the only protected aquatic species potentially affected by the Nationwide Permit 12. Ex. DAPL-1, Section 17.4. Between Dakota Access’s decision to use HDD as a water crossing method where the Topeka Shiner is implicated, and Dakota Access’s use of the Programmatic Biological Opinion for a Nationwide Permit in South Dakota, an inadvertent “taking” is permissible. Dakota Access is in compliance with the Endangered Species Act. *Id.*, Tr. at 2173-2174.

National Historic Preservation Act

Similar to Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act requires federal agencies and their authorized designees to consider the effects of their undertakings. 16 U.S.C. § 470. Section 106 requires consultation to determine the effect on archeological and historic properties listed on or eligible for the National Register of Historic Places. Projects that have been determined by a federal agency to be federal undertakings (involving federal funding, a federal license or permit, or some other federal assistance) are submitted by the federal agency to the state and tribal historic preservation office for consultation under Section 106 of the Act. *Id.*, Tr. at 799. The law is very clear that it is the federal agency that initiates the consultation. In this Project, the only “federal undertaking” where the USACE has jurisdiction is over waters of the U.S. which includes rivers, lakes and wetlands. Tr. at 2168. In those jurisdictional areas, the Corps must initiate consultation with state and tribal historic preservation offices. Dakota Access is and will remain in complete compliance with the National Historic Preservation Act.

IEN called a witness, Waste'Win Young, who seemed to attempt to expand the application of Section 106 of the National Historic Preservation Act. Specifically, she testified on behalf of IEN that the Act applies to all lands on the project route. Tr. at 1543. Her testimony in that regard is simply not correct. Upon cross-examination it became apparent Ms. Young was not an expert on the application of Section 106 of the National Historic Preservation Act. Tr. at 1543-1544. The application of Section 106 of the National Historic Preservation Act is not a matter of argument, interpretation or application. Rather, it is a matter of law and Ms. Young was often mistaken. However, Ms. Young was correct when she testified the USACE, not Dakota Access, coordinates the Section 106 consultation. Tr at 1541. While it appears that Ms. Young and IEN take issue with how the USACE implements or reads Section 106 of the National Historic Preservation Act, the Commission need not consider their arguments. The inaccurate testimony has no bearing on this matter and should be disregarded.

Section 10 Permit: Navigable Waters Act

In addition to the Nationwide Permit 12, Dakota Access also submitted an application for a Section 10 Permit which, if granted, authorizes the Project to cross navigable waters of the United States. Ex. DAPL-1, Table 5.0-1. 33 U.S.C. §403. The permit application, again submitted to the USACE, was submitted in December 2014, and the USACE review and consultation process is ongoing. Dakota Access expects the permits will be issued. Dakota Access will follow the conditions in the federal permit.

The Project will also pass through private land subject to USFWS wetland and grassland easements. Ex. DAPL-1, Table 5.0-1. The land is privately held and is not government land. Rather the land is under an easement bought by the Government through the USFWS and has restricted uses as a result. Project review by USFWS and consultation with USFWS is ongoing.

Dakota Access is committed and required to follow any and all recommendations and requirements made by USFWS. Tr. at 2214, 2045, Ex. DAPL-1, Table 5.0-1. Dakota Access will comply with all applicable federal law.

B. Dakota Access will comply with applicable State and Local Law

Just as it would take a book to fully recite all the federal laws applicable, the same situation exists for state law. Commission Staff called witnesses from the Department of Revenue, Department of Game, Fish and Parks, Department of Environment and Natural Resources (DENR), and SD State Historical Preservation Office. None of these agencies, all with jurisdiction over the Project, identified a state law that Dakota Access had failed to consider or planned to meet.

In addition to state agencies, Dakota Access will affect local governments. For example, Dakota Access will use local roads and is very aware of concerns that result therefrom. Local roads are some times unable to withstand heavy construction traffic and can be damaged in the construction process. Dakota Access will work with local governments to meet their expectations and comply with ordinances pertaining to road use and crossing. In addition, Dakota Access will repair all roads damaged in the construction process. Ex. DAPL-1, Section 23.1.

SDCL 49-41B-38 dictates that the Commission shall set the form, terms and conditions of an indemnity bond for damage to roads and bridges caused by construction or survey work. The required bond shall be in lieu of any county or township indemnity bond pursuant to SDCL §§ 31-12-43 and 31-13-55, and shall run in favor of, and for the benefit of, such townships, counties, or other governmental entities whose property is crossed by such trans-state transmission facility or transmission facility to insure that any damage beyond normal wear to

public roads, highways, bridges, or other related facilities shall be adequately compensated. Dakota Access will meet this obligation. Initially Dakota Access offered testimony supporting a bond amount of \$15 million based upon the proposed construction schedule and the particular route. Ex. DAPL-36. However, Commission Staff proposed a much higher bound of \$24 million. Ex. PUC STAFF-1. Rather than debate the formula or the amount, Dakota Access agrees to supply a bond in the amount requested by Staff. Tr. at 1925. Dakota Access is confident in its construction process and fully prepared to ensure post-construction roads in the same or better condition than when construction begins.

Dakota Access had extensive conversation with all of the affected governing bodies along the route. Some of those government bodies intervened in the PUC process. The list of local government entity intervenors includes: Lake County, Lincoln County, Minnehaha County, the City of Hartford, and the City of Sioux Falls. None of local governments offered testimony at the hearing. The Commission did not hear from any local government that Dakota Access has not fully planned to comply with their local ordinances.

At the time of hearing, Dakota Access had easements to cross over 88.14% of the proposed pipeline route. To negotiate those easements Dakota Access followed South Dakota laws regarding property rights. South Dakota law separates the permitting process from the land acquisition process, completely. Other states may require a permit to construct before eminent domain can be utilized. South Dakota does not. South Dakota requires a pipeline to hold itself out as a common carrier in order to seek remedies through eminent domain. Dakota Access has and does hold itself out as a common carrier, through the Open Season process. The shipper contracts reached as a result of the Open Season are incontrovertible evidence that Dakota Access is a common carrier pipeline entitled to eminent domain. No statute holds to the contrary.

Ironically, the property owners who testified expressed their dissatisfaction with Dakota Access's decision to follow the law. 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.

The first phase of crossing private property is the survey process. Dakota Access requests landowners allow the company to access private property for purposes of a survey. Very simply, Dakota Access has no ability to study unique or individual land characteristics or landowner concerns if it does not have access to the land. Furthermore this survey process provides landowners and Dakota Access with an opportunity to have an open dialogue to best facilitate proper routing. Fostering an open dialogue with impacted landowners is important to Dakota Access and to the landowners and according to the numbers of easements obtained, has been successful. As such, Dakota Access appreciates the Commission's open and transparent process for communication and dedicating nearly two full weeks to this hearing. However, as was shown by the testimony, some landowners chose not to engage in any sort of communication prior to the hearings and as a result came to the hearing and testified against the pipeline without an actual understanding of where the pipeline was even proposed to be located.⁶

After surveys are complete, the process requires easement negotiation. The PUC does not have any jurisdiction over land acquisition. However, as the Commission is well aware, South Dakota has various statutes, under the jurisdiction of the Circuit Courts, which address easements.⁷ Dakota Access is in compliance with those statutes. There was not a single

⁶ The Stofferahn family based its opposition and testimony on an initial surveyed pipeline route that is no longer valid. Had the family been willing to communicate with Dakota Access representative, they would have understood the route was altered. Additional routing adjustments may occur. However, to date the family has denied survey access and cut off all communication. Tr. at 1157.

⁷ SDCL 43-13.

landowner at the hearing that testified that Dakota Access easements violate South Dakota law. Rather, those that testified refuse to negotiate an easement, and do not believe Dakota Access should utilize the laws which permit eminent domain. None of the landowners offered any evidence to show Dakota Access has not or will not follow the law. Quite the opposite, they don't want Dakota Access to follow the law. The landowners who testified don't want Dakota Access to use the laws codified in chapters SDCL 49-7 and 21-35. Our government and court systems do not permit nullification of law because the judge, jury or administrator of the law does not like the result of compliance. The landowners want the Commission to make a decision it cannot make. If the siting burden of proof is met, the Commission cannot deny the pipeline simply because a group of landowners do not believe it is "fair" that the proposed route impacts them.

The tribal intervenors also 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. However, the Commission appears to lack the authority to order that the Tribes be allowed on to private property for purposes of seeking cultural objects which might have been left behind by prior inhabitants. The landowners are vested with all rights conferred upon them by South Dakota law as property owners. If those people want to open their property to tribal representatives for inspection, they are certainly able to do so. However, per South Dakota law, neither Dakota Access nor the Commission can force that upon any of the private property owners in our State. Dakota Access is following the law with regard to surveys for cultural objects.

In conclusion, intervenors appeared to take opposing positions among themselves. First, intervenors worked hard to try to show Dakota Access is out of compliance with the law.

However, some intervenors also don't want Dakota Access to follow the law. The Justice system of this Nation does not permit the legal administrators to select the laws they want to follow. Rather, all laws must be followed as they are passed by the legislature. Dakota Access must follow those laws that restrict its actions and may take advantage of those laws that permit it to take action. Dakota Access cannot be punished for doing so.

II. The proposed Project does not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area.

The credible testimony was that the normal operation of the pipeline poses absolutely no threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area. The testimony was also that abnormal operations of the pipeline are and can be mitigated without permanent damage. All normal facets of everyday life along and through the siting corridor can and will be maintained. The existence of the pipeline is compatible with existing land uses.

A. The Project does not pose a threat of serious injury to the environment under normal operating conditions.

Under normal operating conditions, the pipeline will be mostly invisible to all who host it or cross it on a daily basis. It will lie in the ground, four or more feet deep, performing its task and without fanfare or recognition. It is silent, emits no fumes or odor, and invisible. The sophisticated and complex routing process, the open and transparent permitting process, the federal and state regulations pertaining to construction, operations and integrity management requirements combine to protect people and the environment from permanent effects and mitigate the threat of serious injury.

To 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. Stagnant development is not the goal or purpose of this second factor in the siting law. See. *In the Matter of OtterTail Power Company on Behalf of BigStone II*, 744 N.W.2d 594, 2008.

The South Dakota PUC Staff was the only party to call witnesses to testify regarding whether the proposed Project posed a threat of serious injury to the environment. The Staff offered testimony from Mr. Tom Kirschenmann, from SD Game Fish and Parks. Staff also called Mr. Derric Iles, Ms. Kim McIntosh and Mr. Brian Walsh from SD Department of Environment and Natural Resources. In addition Staff hired outside consultants David Nickel, Ann Curnow, Andrea Thorton, Camron Young and Ryan Ledin regarding this second aspect of Dakota Access's burden of proof.

In his written and oral testimony, Staff witness, Mr. Kirschenmann noted areas of concern for his agency, the SD Game Fish and Parks. For example, he expressed concern about loss of native prairie and other habitat, concern for waterfowl production and other conservation easement areas in addition to a general concern for the sensitive species found in the state of South Dakota. However, Mr. Kirschenmann also testified, the best practices that Dakota Access will utilize, which include consultation with USFWS, resolved his concerns. Tr. at 931-940. Mr. Kirschenmann left nothing open for question or debate. To the extent possible, Dakota Access addressed and resolved all his concerns.

In his written and oral testimony, Staff witness, Mr. Derric Iles noted no areas of concern for his agency, the SD Geologic Survey. The types of soils underlying Dakota Access make it almost inconceivable that ground water could be affected. Tr. at 1802-1803, 1808. Mr. Iles left

nothing open for question or debate. To the extent possible, Dakota Access addressed and resolved all his concerns.

The testimony Staff submitted from outside consultants originally included a list of recommendations. However, after receipt of Dakota Access's rebuttal, all concerns were resolved or Dakota Access agreed to comply with the recommendation. More specifically Staff witnesses include:

Ann Curnow

Ms. Curnow provided testimony regarding air quality issues. Dan Flo adopted her testimony at hearing. Dakota Access already has plans to implement her recommendations.

Cameron Young

Ms. Young provided testimony regarding whether Dakota Access adequately assessed and dealt with impacts to threatened and endangered species and water bodies. Dan Flo adopted her testimony and agreed with Mr. Kirschenmann that Dakota Access's consultation and compliance with USFWS recommendations resolves the concern for identified sensitive species. Tr. at 1782, 1785, 1786. Furthermore, the recommendations made pertaining to construction and to mitigation of impact on water bodies are all already incorporated into Dakota Access's best management and practice plan and compliance with the Corps and SD DENR recommendations further satisfies all concerns. Tr. at 1782. As a result, there are no open issues pertaining to Cameron Young's recommendations. Dakota Access satisfies all Cameron Young's concerns.

Ryan Ledin

Mr. Ledin provided testimony regarding the impact on hydrology, the Agricultural Impact Mitigation Plan and the Draft Storm water Pollution Prevention plan. Dan Flo testified at

the hearing and adopted the written testimony prepared by Mr. Ledin. Through rebuttal and clarification, once again, Dakota Access satisfied all stated concerns.

Dakota Access explained how it utilizes environmental inspectors to make the most environmentally prudent water body crossing decision based on the environmental conditions in “real time.” As such, the purpose and reason for Mr. Ledin’s recommendation regarding inclusion of a wetland and water body table is satisfied and the table is not necessary. Tr. at 1636-1638. Dakota Access also demonstrated that its best management practices fully satisfy all of Mr. Ledin’s concerns regarding weed management and in-stream activities. Tr. at 1789. Staff witness Dan Flo did not leave the witness stand without resolving of all his and Ryan Ledin’s concerns.

Andrea Thornton

Ms. Thornton provided written testimony which was adopted by Mike Timpson at the hearing. Specifically, the consultant agreed that in and out tables to reflect soil types and areas of erosion concern are unnecessary as Dakota Access collected, recorded and accounted for the information in a different format. Tr. at 1636-1638. Content rather than formatting is important and proper content is not in question. Neither Ms. Thornton nor Mr. Timpson take issue with the format Dakota Access used after understanding that the proper content is included. The consultants are satisfied that Dakota Access has and will utilize best practices which resolves any concerns pertaining to erosion control, Dakota Access will consult with NRCS to get a correct seed mix and for noxious weed control and finally Dakota Access agrees to use 70% as the measure for successful measure for re-vegetation. Tr. at 1636-1641, 2150.

Dakota Access also agrees to prepare and produce a winter stabilization plan, should one be necessary for reclamation purposes. Tr. at 2150. However, all parties agreed, a winter

construction plan is unnecessary as Dakota Access does not plan winter construction. Mr. Timpson did not leave the witness stand without resolving all of his and Ms. Thorton's concerns. Dakota Access already has plans in place to address and resolve all of the expert's concerns or questions.

Michael Timpson

In addition to adopting the testimony of Ms. Thorton, Mr. Timpson submitted his own written testimony. Ex. Staff-17. He specifically reviewed the Agricultural Impact Mitigation Plan and found that it adequately addresses all agricultural based reclamation concerns. Tr. at 1638.

Other intervenors cross examined both Dakota Access and Staff witnesses in an attempt to identify an environmental concerns that were missed. However, they were ineffective. None of the intervenors pointed to any potential serious environmental injury that can occur during normal pipeline operations. In the end, the Commission did not hear any testimony to contradict Staff Expert David Nickel's testimony, "the project is not likely to pose a threat of serious injury to the environment." Ex. Staff-11, Page 4.

B. The Project does not pose a threat of serious injury to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

The social and economic condition of any given area change as our South Dakota communities grow and evolve. The Project does not currently threaten the social and economic condition of the inhabitants or expected inhabitants in the area. Regardless of growth and evolution, the Project will not threaten the condition of inhabitants or expected inhabitants in the Project footprint in the future.

An aspect of an area's "social condition" includes preservation of its history. Dakota Access appreciates the concern that Tribal intervenors in particular have regarding cultural resources along the Project route. Dakota Access views it as imperative to establish the proper process to protect those resources before during and after development so as not to impair or damage the historic aspect of social health. Dakota Access has a process and has followed it.

The first step in the process is to follow the law. The federal government established the Historic Preservation Act on Federal undertaking areas. The Act was previously discussed. In addition South Dakota has law on topic. Dakota Access exceeded South Dakota law and not only identified all listed cultural resources along the route (as SD law requires), it identified all cultural resources *eligible* for listing along the route. Tr. at 2165. The result is a Level III cultural resource survey. Dakota Access also established an unidentified cultural resource plan, approved by the State Historic Preservation Office, in the event resources not previously identified are found during construction. Tr. at 2191.

The Level III Cultural Resource survey has 341 pages of detailed maps. Of those 341 pages, RST identified eight maps or areas of particular concern and sensitivity to the Tribes. Tr. at 815-832. Dakota Access understands all eight of those areas are sensitive and has plans in place to address that sensitivity. Specifically, Dakota Access incorporated the sensitive nature of those areas into its routing process. Tr. at 2155-2165. In seven of the identified areas Dakota Access simply rerouted the Project for complete avoidance. *Id.* In one of the identified areas, Dakota Access chose to utilize Hydrologic Directional Drilling, and plans to bore ninety feet below the surface. Ex. DAPL-53, Tr. at 2157-2158. Further, Dakota Access agreed to prohibit all traffic of any kind on top of the HDD. *Id.* History is an important part of an area's social condition. Dakota Access conducted robust studies to avoid impacting historically important

areas by either routing around or utilizing construction techniques to minimize or avoid impacts altogether.

From water lines to power lines to gas lines, communities depend on utility infrastructure and grow around them. As to those impacted areas wherein landowners desire development, the pipeline will not stunt it or prevent it. Not only is this evident by looking at communities across the country, but we can look as close as Sioux Falls for an example of pipeline integration into a community. DAPL Exhibits 51 and 52 demonstrate how the city has developed among and around various pipelines including refined petroleum product pipelines. The impacted landowners testified that their social and economic condition will forever be negatively impacted as a result of the pipeline. They believe, if the pipeline is built, development around it will stop. Tr. at 1078, 1087, 1171, 1176, 1248, 1414, 1429. However, none of the landowners could utilize facts or history to prove their intended point. Rather, they all relied on emotion as there are simply no facts or historic examples that support their statements. Pipelines, as one of many types of utility infrastructure, do not negatively impact the social or economic condition of an area whether the land is intended for development, used as a corn field or rangeland.

With that said proper reclamation of the impacted land is very important and if not properly done can negatively affect the social and economic condition of an area. Dakota Access will utilize an Agricultural Mitigation Plan to properly, efficiently and uniformly reclaim affected land. Ex. DAPL-5. All of the impacted landowners who testified against the project questioned Dakota Access's commitment to reclamation. However, none of them testified to any flaw in the agricultural mitigation plan and many of the admitted they had not read it. Tr. at 1090, 1204, 1455. Several others tried to compare reclamation done on the Lewis and Clark

waterline without any basic understanding of the reclamation plan in that case and how it differs from the reclamation plan Dakota Access will utilize. Tr. at 1096, 1126.

The intervening landowners also called Sue Sibson and Kent Moeckly to testify. Ms. Sibson and Mr. Moeckly claim to have been negatively affected by a different pipeline, a different pipeline company with a different restoration plan. Ex. I-11, I-18. Not only is their experience unrelated and irrelevant to the proceeding at hand, but neither of the landowners utilized the complaint process available for them at the PUC. Tr. at 1207, 1388. Had they done so, due process and the rules of evidence would have been applied to determine the facts and fashion a remedy for the alleged problems. As a result of her failure to utilize the PUC process, we are left with Mr. Moeckly's unsubstantiated angry statements and Sue Sibson's photos of recently sprayed and killed vegetation without any other context, foundation or story. Tr. at 1215. It is not a mystery why the brown dead area has nearly perfectly straight lines, nor is there any question why it abruptly ends. The purpose of the Dakota Access hearing was not to determine what a different pipeline company did or did not do on a different project in a different location years ago. Rather, the question is whether Dakota Access's agricultural and mitigation plan is lacking in some regard. Sue Sibson's photos of recently sprayed vegetation don't help answer the question. Her testimony was as unreliable, irrelevant and useless as Kent Moeckly's testimony. Neither of the witnesses read Dakota Access's agricultural mitigation plan. Tr. at 1204, 1391. Neither of the witnesses could testify whether it was different in any way from the plan utilized by the company that constructed a pipeline on their land.

The landowners hired Brian Top as an expert witness regarding farm land reclamation. While Mr. Top has a significant amount of experience, he does not have any experience reclaiming land. Ex. I-23. Mr. Top did not testify regarding any deficiency in the agricultural

mitigation plan. *Id.*, Tr.at 1102-1119. Rather, he tried to make one point: it will be better if the land is just not disturbed to begin with. However, that is not the question.

The question is, whether Dakota Access will cause a serious threat to the environment or social and economic condition of the inhabitants. Dakota Access has extensive plans to reclaim the land such that neither the environment nor social and economic condition of the inhabits is threatened. Mr. Top was not able to testify to the actual burden of proof, because he has no experience in designing or completing reclamation of this type. As a result, he could not testify to the completeness or deficiency of the agricultural mitigation plan. *Id.*

In contrast to Mr. Top, Aaron Dejoia, an expert called by Dakota Access to testify, has extensive experience in reclamation. Mr. DeJoia testified to the completeness of the agricultural mitigation plan. If the plan is followed, he expects reclamation to be a success. Tr. at 1875, Ex. DAPL-39. In addition to Mr. DeJoia, Mike Timpson testified regarding the completeness of the agricultural and mitigation plan. Mr. Timpson, a Staff expert witness, has performed agricultural impact and mitigation assessments for more than 3,000 miles of natural gas and petroleum pipelines across the Unites states. He found the plan sufficient and he had no concerns and had no recommendations regarding amendments, additions or changes. Tr. at 1664.

During any type of construction project wherein the population changes whether short or long term, social impacts are possible. However, the only intervener group to express concern regarding the influx of employees was the Tribal groups who do not own land or have members residing in the immediate pipeline vicinity. Faith Spotted Eagle testified on behalf of Yankton Sioux Tribe testified regarding the social impact an influx of construction workers will have on Native People. Ex. YST-7. She did not provide any evidence. Rather, she testified merely

regarding her biased opinion based on her perception of the pipeline industry despite the fact she has no actual experience in the industry. Tr. at 1031-1048.

Opening the ground, digging trenches and running large heavy equipment across the land certainly has the potential to cause serious problems and that is where the opposition likes to end its exploration of the pipeline construction process. The opposition tends to gloss over what happens after construction. The history of pipeline construction in general, Dakota Access's extensive reclamation plans along with its offered commitment to reclaim the land tells the rest of the story. The Project does not pose a threat of serious injury to the social and economic conditions of inhabitants or expected inhabitants in the citing area.

C. Dakota Access plans to implement all appropriate measures to prevent an accident or incident on the pipeline.

From construction to operation, safety is a priority. Exceeding PHMSA's safety requirements demonstrates the efforts Dakota Access puts into prevention of accidents or incidents along the pipeline. In addition to the design efforts, Dakota Access operates its control center, utilizes an Advanced Supervisory Control and Data Acquisition system, maintains and inspects the pipeline and educates the public to prevent accident or incident. There is no one thing that prevents accidents or abnormal operations. Rather it is a combination of elements, all which will be utilized by Dakota Access. Ex. DAPL-34, Tr. at 600-602.

The operations control center (OCC) is state of the art. The OCC coordinates all operations through the system, including flow rate, pressure and the opening and closing of valves. *Id.* The control center is operated all day, every day, year round. Strict operations procedures will be prepared and used to direct the OCC operator's actions. *Id.*

The pipeline will be equipped with a SCADA system, or an Advanced Supervisory Control and Data Acquisition system. The SCADA system constantly monitors sensing devices along the pipeline to track the pressure, temperature, density and flow of liquid petroleum and displays status to the control room. *Id.* Through these systems the pipeline operators can maintain the pipeline within established operating parameters and can remotely shut down the pump stations and isolate pipeline segments if conditions so warrant. In addition to remote monitoring, the pipeline can be controlled locally. *Id.*

Corrosion prevention, mitigation and control are also paramount in pipeline safety. The pipeline is coated with Fusion Bonded Epoxy which provides a barrier between the steel pipe surface and corrosive environments such as soil or water. The pipeline will also be protected by a cathodic protection system. The system will be an impressed current system consisting of multiple transformer/rectifier units and anode installations along the pipeline route. *Id.* The coating prevents corrosion of the underlying steel pipeline surface and the cathodic protection system prevents corrosion in areas where the coating may be damaged. *Id.*

The next element in safe operations is the inspection, surveillance and maintenance program utilized by Dakota Access. The pipe undergoes testing to verify integrity of the coating. *Id.* In addition to coating tests, the welds are all examined by non-destructive testing and the entire length of the line is hydrostatically tested prior to putting the pipeline in operation. Tr. at 608-609. Maintenance on a pipeline such as this is very detailed and again, Dakota Access will exceed PHMA regulations in this regard. Also, visual patrols both from the ground and the air serve as a less technical form of inspection. Not only do the patrol personnel look for signs of abnormal conditions, they look for nearby construction or other 3rd party activity that could interfere with normal operations. Tr. at 600-602, 533-534.

Public education is the final element in the combined effort to keep the pipeline, the environment and those around it safe. A public awareness program, signage and use of the SD one call system together build the foundation of proper community awareness. Tr. at 533-535. Communities across the nation are dependent on utility infrastructure and those that live around the infrastructure are positioned to play a role in keeping it safe. With that said, local communities are not expected to bear the burden of any type of emergency response should the need arise. Rather, Dakota Access has an emergency response plan in place.

D. The Project does not pose a threat of serious injury to the environment or to the social and economic conditions of inhabitants or expected inhabitants in the siting area under abnormal operating condition

Although infrequent, and despite Dakota Access's state of the art operations plans, abnormal operating conditions and spills and/or leaks cannot always be prevented. As a result of the possibility, Dakota Access plans, trains and prepares for abnormal operations. Abnormal operations, such as a spill can negatively affect the environment and the people around it. However, the goal is for the negative effect to be short-term. As a result, Dakota Access developed a spill model and a resulting Spill Response Plan to minimize impacts. See Ex. DAPL- 6 and 7.

Personnel and equipment necessary in an emergency are placed along the pipeline route by Dakota Access. Tr. at 536-538. The equipment is maintained and the people are trained to respond if necessary. A detailed plan is currently in draft form and will be finalized prior to pipeline operation. Tr. at 526. For planning purposes Dakota Access examined both ideal conditions and the extreme worst-case scenario and has equipment and people ready to handle all

such scenarios. Intervenors did not identify a worst case scenario that Dakota Access had not already included in its planning.

A spill of any size will likely be a temporary and isolated emergency. However, the science and history shows that containment, clean up and remediation is very possible. Not only is it possible, but historically it has been very successful. Kim McIntosh, a staff expert witness and employee from the SD DENR testified that she “is not aware of any permanent natural resource damage from a petroleum pipeline release in South Dakota.” Ex. Staff-3. She also testified that, “I do not believe there are any petroleum spills that can’t be remediated given sufficient time and resources.” *Id.*

Dakota Access is responsible for any spill and has sufficient resources to do so. As Joey Mahmoud testified, “the Dakota Access, LLC as the company would be the initial primary company that would have responsibility. If they were to fail in their actions, then that liability transfers upward into the corporate structure of the affiliates and parents of those companies.” The parent companies include are Energy Transfer Partners, Phillips 66 and Sunoco Logistics. Tr. at 66, 1974. The parent company “Energy Partners” is the largest in the U.S. from an administering perspective, the third large energy company in the U.S. and the fifth largest energy company in the world. Tr. at 1971. Dakota Access does and will have sufficient resources to remediate a spill should it be necessary. Tr. at 237, 248.

III. The facility will not substantially impair the health, safety or welfare of the inhabitants

The historically tested, well known science of reclamation along with the state of the art operating, monitoring and safety plans all discussed in the above subsections also apply to this “health, safety and welfare” standard. Despite hours and days of cross examination, the

Commission did not hear any testimony to contradict Staff Expert David Nickel’s testimony, “the proposed Project is not likely to substantially impair the health, safety or welfare of the inhabitants of South Dakota.” Ex. Staff-11.

IV. The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

Local South Dakota Government intervenors include: Lake County, Lincoln County Board of Commissioners, Minnehaha County Board of Commissioners, City of Hartford and the City of Sioux Falls. None of them provided testimony at hearing. None of the parties with actual responsibility for orderly development appeared to say they hadn’t been consulted or their views considered or to claim the Project will interfere with the orderly development of their community. Rather, landowners and Tribal entities desiring to stop the project repeatedly played the “orderly development” card. However, none of them called a single witness to contradict Dakota Access’s testimony on the subject. Dakota Access testified that it communicated with, worked with, adjusted for and ultimately received no objection from communities along the proposed pipeline path. Tr. at 1944-1947. Joey Mahmoud testified at great length regarding the efforts made to work with affected communities. Mr. Mahmoud explained the process by which the affected communities ultimately helped design the route that those communities believe will have the least impact. *Id.*

Dakota Access consulted extensively with cities and counties along the route, as seen in Dakota Access Exhibit 54 and 55 prepared at a Commissioner’s request and entered into evidence. Ex. DAPL-54 and 55.

Sioux Falls, SD and the surrounding areas are developing, and doing so around pipelines. With proper planning such as seen here, pipelines are easily incorporated into city growth plans. Cities are able to incorporate pipeline routes into green space or other similar plans. The patterns are clear here and elsewhere across the nation. Pipelines are a part of and compatible with modern life. Cities can take advantage of the “no build” directly on top of pipelines in a way that can add to quality of life in large cities. Tr. at 399-400. Dakota Access is confident the proposed route will work with and become part of the affected community growth and development plans. The silence heard by the Commission from the affected communities is telling. For example, after satisfying its concern regarding the city landfill, the City of Sioux Falls chose not to further participate in the hearing in any way. Tr. at 1521-1522, 1528. The City of Sioux Falls did not call any witness, and did not present any testimony. The joint motion offered regarding the landfill, by its terms, resolves the issues. Tr. at 1514-1528. None of the local governments directly affected by the project take a position contrary to that of Dakota Access. None of the local governments directly affected by the project shared with the Commission a concern that the Project will unduly interfere with their orderly development.

Dakota Access consulted all local bodies of government along the pipeline route or affected by the proposed pipeline. Due to their lack of proximity to the project, Dakota Access does not consider either the Yankton Sioux Tribe or the Rosebud Sioux Tribe to be an affected local body of government. Due to the distance from the reservations, Dakota Access takes a position that neither the Yankton Sioux Tribe nor the Rosebud Sioux Tribe are directly affected. If a pipeline incident occurs, neither YST nor RST emergency response groups will not be asked to participate.

V. Additional Noticed Hearing Issues.

In addition to the statutory burden of proof, the Commission noticed two issues for consideration: (i) whether the Application was filed generally in the form and content required by SDCL Chapter 49-41B-11 and ARSD 20:10:22 and (ii) whether the Application or any accompanying statements or studies required of the Applicant contain any deliberate misstatements of a material fact?

The SD PUC Staff examined the Application for completeness. The PUC Staff finds the Application is complete and in the appropriate form. Ex. Staff-1. Dakota Access agrees.

As to the second question: neither the application nor accompanying studies contain any deliberate misstatements of material fact. However, there were two items where in Staff witness Michael Shelly misunderstood the economic study performed on behalf of Dakota Access. While not major issues they are worth clarification.

The first misunderstanding pertained to the pool of employees expected to work on the pipeline. More specifically, Section 23.1 of the application states, “It is estimated that up to 50 percent of the total construction work force could be hired locally, with the remaining portion consisting of non-local personnel.” Ex. DAPL-1. This statement was contrasted to the report titled, “An assessment of the Economic and Fiscal Impacts of the Dakota Access Pipeline in North Dakota, South Dakota, Iowa and Illinois.” Exhibit A to Ex. Staff-1. Page 22, footnote 13 of that report states, “at least 50% of the construction jobs in each state” will be filled with residents of that state. This misunderstanding appears to arise from the notion of local union halls. The local union halls for South Dakota are in some circumstances located out of state, due to our population and right to work laws. However the project traverses states where labor unions are a large social and political presence. The resulting discussions about the use of union labor

based on the expected contract language have resulted in misunderstandings as to the residence of laborers on the project. This appears to be one of those misunderstandings.

The construction contracts were awarded to Michels Corporation based in Wisconsin. The contract requires Michels to use up to 50% of the labor for the project from local union halls, which in this case are outside South Dakota but tied by their own rules to this jurisdiction. Some laborers will come along with Michels from Wisconsin, some will be from South Dakota and some from surrounding states, all based not necessarily on the residence of the laborer but instead to what local union hall he belongs.

The second misunderstanding pertained to the number of full-time jobs created by the Project. Mr. Shelley again seemed to misunderstand Dakota Access's report, and as a result testified that Dakota Access erred. Dakota Access believes it is a misunderstanding rather than error. Mr. Shelley believed page 5 of the report⁸, which indicates the Project will add 31 permanent jobs is inconsistent with Page 38 of the application⁹ which indicates 12 "permanent employees will be hired in South Dakota." However, the 31 permanent jobs indicated the economic report refers to the total number of employees across the whole project versus just those in South Dakota. The report and the application are consistent. It appears Mr. Shelly was simply comparing two different estimates which lead to his belief that there was an error or inconsistency.

VI. SDCL 49-41B-1

49-41B-1. Legislative findings--Necessity to require permit for facility. The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects 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 Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are*

⁸ Exhibit A to Staff Exhibit 1.

⁹ Ex. DAPL-1.

constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission.

In 1977, the South Dakota Legislature found that prior to constructing an energy conversion or transmission facility, a permit must be granted. The Legislature codified its intent starting with a legislative finding at SDCL 49-41B-1. In that section, the Legislature clearly expressed its findings that energy development needs to be done in an orderly manner with the interests of the citizens, environment and industry in mind. From the hearings, it appears several intervenor groups isolated and misinterpreted the following statutory language, "...that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled."

The noted statutory language does not require that facilities begin and end in the state of South Dakota to serve only South Dakota needs. In fact, if the statute were written in that way, it would be unconstitutional. While a state has the inherent and reserved right to regulate its domestic commerce, per the U.S. Constitution's Tenth Amendment, it cannot exercise that right in a manner that interferes with, or place a burden on, interstate commerce.

Furthermore, the position taken is inconsistent with how the statute is written and required to be read. SDCL 49-41B-1 (along with the rest of the chapter) does indicate that the Commission must keep the needs of South Dakota citizens in mind when considering siting applications for energy conversion and transmission projects. The Commission should certainly keep the Legislature's intent in mind when considering the Project. Currently, the U.S. produces about 10 million barrels of oil per day and then imports approximately another 7.5 to 10 million barrels per day. Tr. at 1933. Consumption ranges between 17.5-20 million barrels

per day. *Id.* Hard facts and figures regarding the petroleum needs and requirements of both South Dakotans and citizens of the United States as a whole must be considered. Oil produced in North Dakota, which will be transported to existing refineries elsewhere in the United States, will come back to this state and others, and will be used to meet domestic needs, providing products and fuel for consumers and producers, all of which are essential to the South Dakota economy. South Dakota has no refinery yet consumes oil on a per capita basis above the national average. South Dakota ranks 8th in the nation in terms of per capita consumption of oil products. South Dakota consumes approximately 60,000 barrels per day, yet only produces 5 barrels per day. Tr. at 1934. Dakota Access will transport a resource essential to the South Dakota and American way of life. The application is precisely the type the Legislature intended for the Commission to consider when issuing siting permits.

VII. Tribal Issues

The Yankton Sioux Tribe and the Rosebud Sioux Tribe intervened, along with the Indigenous Environmental Network. They were asked repeatedly by Dakota Access in discovery to engage on issues and concerns and largely declined to discuss issues. Their intervention, conduct and tactics at hearing appeared to be directed toward stopping the project. They offered no conditions under which Dakota Access could exist.

The tribal intervenors appeared focused on two legal schemes, arguing legal non-compliance. They offer that they are local units of government who were not consulted, that they have aboriginal land rights which require respect and that they have water rights which are violated by the proposed pipeline. Those arguments are flawed both in fact and in law. They 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.

The first principle argued by Tribe intervenors is their claim to the lands of South Dakota. Dakota Access traverses through no land in South Dakota recognized to be controlled by a Tribe. The Yankton Sioux Tribe has a diminished reservation, calling into question its borders and what function and control over land remains with the Tribe. The Yankton Sioux Tribe appears to be almost 100 miles away from the route. The Rosebud Sioux Tribe reservation is West River, well over 100 miles and the Missouri basin away. Neither can claim to be affected by Dakota Access. They are simply too far removed geographically from the route.

The Tribes also claimed aboriginal territory rights to large portions of South Dakota land. However they point to no statute or case law giving them rights or control of the lands they so claim. Instead, the land to which the tribes claim aboriginal rights is owned and deeded according to state law and is under the control of state and local government as we understand it in South Dakota. South Dakota, the courts, the Commission, Dakota Access, and landowners and local governments who are really affected do not recognize the Tribes as having any jurisdiction or control over the route. The Commission lacks the facts or jurisdiction to alter that system.

With respect to water rights, the Tribe intervenors argued the application of the 1908 Supreme Court Decision, *Winters v. Unites States*,¹⁰ to this siting application. The doctrine states that reservations of the land for Indian Tribes carries with them implied rights to use water.

¹⁰ 207 U.S.564 (1908).

IEN provided legal argument through a witness, Peter Capossela. However, Mr. Capossela failed to fully explain the un-adjudicated nature of the Tribe's "Winters Doctrine" rights.

Adjudication is a legal process to determine who has a valid water right, whose rights are senior and junior, how much water is subject to the rights, and thus who has priority use during shortages. Persons claiming a water right, such as the Tribe, under the Winters Doctrine, must have their rights adjudicated by a court of competent jurisdiction. That adjudication has not occurred for these tribes in this state. It is clear that the Commission has not heard evidence and lacks jurisdiction to adjudicate their claim of water rights. The Commission can only hold Dakota Access to the laws, rules and regulations adjudicated and known to it presently.

Dakota Access has minimal needs to use water. The only uses are during construction, for hydrostatic testing and for HDD mud. The hydrostatic testing water will be returned to the environment and thus not consumed. The HDD mud will be land farmed or disposed of in accord with the law. Should the tribes have adjudicated rights in the future, such adjudication is unlikely to affect Dakota Access based on these facts. There's no ongoing use of water by Dakota Access. With that said, on the chance that tribal water rights are somehow adjudicated in the future, it is clear that the remedy for water used is monetary in nature. Any such payment would have to be ordered by a Court of competent jurisdiction and would likely be very small.

There are no facts indicating that the Tribe intervenors are affected by Dakota Access. Presently there are no effects on adjudicated Tribal land or water rights that Dakota Access would violate. If future adjudications are made by courts of competent jurisdiction, Dakota Access (and the rest of South Dakota) will comply. The commission lacks facts or jurisdiction to rule on these legal theories put forth by YST, RST or IEN.

CONCLUSION

The PUC offers an open, transparent, and available process which welcomes and accommodates all interested people to testify in contested case hearings. In its efforts to do so, the PUC presided over 8 days of hearing at which it heard testimony from 43 witnesses and heard cross examination and argument from 10 lawyers. Witnesses included outside expert consultants, landowners and various state agencies with jurisdiction over the Project.

As the only party without a vested interest of any type, the PUC Staff did not express any concern that the burden of proof has not or cannot be met. Among landowners and various groups with a special interest in stopping the Project, opinions varied between a desire that the pipeline simply be placed somewhere else, to sweeping and broad requests that further development of fossil fuels be stopped. However, none of the intervenors could demonstrate that Dakota Access failed to meet its burden of proof.

While intervenors were not able to support their positions with evidence, fact and law, Dakota Access did thoroughly support its request to the Commission for a siting permit. Dakota Access proved it is committed to engage in business as a responsible corporate citizen and does plan to educate itself on and follow all applicable laws. Dakota Access proved its construction and operations utilize the best technology and science available to build and operate a safe pipeline. Dakota Access proved it is committed to proper and complete reclamation of land impacted by construction. Finally, through its consultation, conversation and discussion with local units of government, Dakota Access is aware of the regions development plans and it will not negatively impact those plans.

Dakota Access met its burden of proof and respectfully requests the Commission issue a siting permit.

Dated this 6th day of November, 2015.

MAY, ADAM, GERDES & THOMPSON LLP

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