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	* * * * * * *	**STAFF'S POST-HEARING REPLY BRIEF** **HP14-002**

COMES NOW Commission Staff ("Staff") and hereby files this brief in reply to post-hearing briefs submitted by other parties. For the purpose of this reply, all references shall remain the same as initially provided in Staff's Post-Hearing Brief filed on November 6, 2015. References to post-hearing briefs will be denoted by the party name or abbreviation as referenced in Staff's Post-Hearing Brief, followed by the appropriate page number.

I. Argument

a. Burden of Proof

Staff agrees with several of the parties that Dakota Access bears the burden of proof under ARSD 20:10:01:15.01. Dakota Access is the petitioner in this matter. Therefore, Dakota Access "has the burden of going forward with presentation of evidence…" ARSD 20:10:01:15.01. However, Staff disagrees with some of the other parties as to what standard is applicable. As described in Staff's Post-Hearing Brief, the standard to be applied is preponderance of the evidence, not substantial evidence, as some have argued.

The Court has held that "[t]he general burden of proof for administrative hearings is preponderance of the evidence." *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605. The substantial evidence burden is applied to an agency's decision on appeal. *Helms v. Lynn's, Inc.*, 1996 SD 8, ¶10, 542 NW2d 764, 766. Meaning, an appellate court will determine whether there

was substantial evidence to show that the Applicant met its burden of preponderance of the evidence.

Staff relies on its Post-Hearing Brief for a more detailed discussion on its position regarding the burden of proof.

b. Completeness of the Application

In RST's and YST's post hearing briefs, both parties identified sections of the PUC's Energy Facility Siting rules (ARSD 20:10:22) and statutes (SDCL 49-41B) that they found the Applicant failed to properly address. The following sections provide Staff's analysis as to whether or not the Applicant properly followed the Energy Facility Siting rules and statutes. It should be mentioned that ARSD 20:10:22:04(5) identifies that "[e]ach application shall be considered to be a continuing application…" Any supplemental information provided by DAPL through discovery, docket filings, and testimony is considered part of the "continuing application" if such information is placed in the docket or admitted into evidence. ARSD 20:10:22:04(5).

i. Should DAPL have updated its Application to address the new Clean Water Act Rule per ARSD 20:10:22:04(5)?

In its post hearing brief, RST argues that the Commission should deny the Application because the Applicant failed to update the Application to identify new rules redefining "waters of the United States" were issued under the Clean Water Act (CWA) by the EPA and ACOE. The brief also identifies that 6th Circuit Court of Appeals stayed enforcement of the rule nationwide.

ARSD 20:10:22:04(5) states "[e]ach application shall be considered to be a continuing application, and the applicant must immediately notify the commission of any changes of facts or applicable law materially affecting the application." Based on the South Dakota rule in question,

because the rule was stayed and "the Environmental Protection Agency and the Army Corps of Engineers has resumed the use of nationwide permits using the 'waters of the United States' definition that existed under the agencies regulations in place prior to the issuance of the new CWA rule" (RST at 12), then the new CWA rule does not materially affect the Application. Even if the new CWA rule was not stayed, because the Applicant has testified that they applied for a nationwide permit from the ACOE (DAPL Exhibit 33, page 11), the new CWA rule would have been applied, and the Applicant would have had to comply with the rule, in that process.

ii. Did the Application contain maps that include "prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities" as required by ARSD 20:10:22:11?

In its post hearing brief, RST argues that none of the maps provided in the application include "prominent features such as cities, lakes, and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities…" RST at 13. During Staff's review of the Application, Staff found that cities, lakes, and rivers were included in the topographic maps of the pipeline route. DAPL Exhibit 2, pages 1-57. With regard to cemeteries, places of historical significance, transportation facilities, or other public facilities, Staff asked DAPL to provide this information in its data request number 7 submitted on March 18, 2015. Staff Exhibit 1, Exhibit A, page 10. In response to this data request, DAPL stated the following:

> Revised maps with the requested information are included within Appendix A. Publicly available datasets were added to the topographic map set including cemeteries, transportation facilities (roads and airports), hospitals, and schools. Based on publically available datasets and field reconnaissance along the route, no hospitals, schools, or recorded places of historical significance are

within or adjacent to the Project footprint, therefore these datasets are not included within the map legend.

Based on DAPL's response, cemeteries and transportation facilities were added to the topographic maps (which are now labeled as DAPL Exhibit 2, pages 1-57) and the remaining prominent features were left off the map because they were not found within or adjacent to the Project footprint. Staff attempted to elicit the information required by ARSD 20:10:22:11 from DAPL and DAPL provided the response above. It is Staff's position that DAPL properly addressed ARSD 20:10:22:11; however Staff also acknowledges that ultimately the Commission must determine if the spirit of the rule was met by DAPL in the information it provided.

iii. Does the Application contain "reasons for the selection of the proposed locations" pursuant to SDCL 49-41B-11(6)?

RST argues that Section 11.0 of the Application "does not contain a statement of the 'reasons for the selection of the proposed location' as required by SDCL 49-41B-11(6)." RST at 21. To the contrary, DAPL met the requirement of SDCL 49-41B-11(6) with the information provided in Section 12.0 of the Application and information provided during discovery. Section 12.0 of the Application provided a discussion on alternative sites, the route selection process, route evaluation, and the proposed route. Moreover, DAPL provided supplemental information on the reasoning for the proposed route in response to Staff Data requests. Staff Exhibit 1, Exhibit A, pages 11-20. Additional information provided in response to Staff's data request included a more descriptive explanation of the GIS route selection/optimization program and alternative routes considered during the routing process.

iv. Does the Application address the requirements of ARSD 20:10:22:12 as it relates to alternative route evaluation and a

discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site?

In its post hearing brief, RST argues that DAPL did not provide an evaluation of alternative routes in its Application. RST at 25, 31-33. Further, RST identified that that DAPL did not include in the Application a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site. RST at 22. Similar to RST, Staff identified that DAPL's discussion on the evaluation of alternative routes within the Application could be more robust and also identified that a discussion on the reliance of eminent domain was needed. As such, Staff submitted data requests to DAPL requesting this information. Staff Exhibit 1, Exhibit A, pages 11-20. Through its response to Staff's data request, DAPL provided information that the company felt adequately addressed the requirements of ARSD 20:10:22:12.

v. Does ARSD 20:10:22:11 require maps that show existing power lines?

During the evidentiary hearing the colocation of the proposed pipeline route along a power line south of Harrisburg was discussed. DAPL witness Mr. Mahmoud testified that "they [(City of Harrisburg)] picked a route that parallels a power line that's existing today." ET 1947. In its brief, RST argues that this power line should have been provided on maps pursuant to ARSD 20:10:22:11. RST at 26-29. ARSD 20:10:22:11 does not require power lines to be shown on maps as argued by RST. The rule reads as follows:

> The application shall contain a general site description of the proposed facility including a description of the specific site and its location with respect to state, county, and other political subdivisions; a map showing prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities adjacent to or abutting the plant or transmission site.

ARSD 20:10:22:11.

Staff notes that the rule does not specifically identify that power lines need to be shown on maps. Further, DAPL identified that colocation of the pipeline route along power line corridors as being "preferred" during its siting analysis. Staff Exhibit 1, Exhibit A, page 12. It is Staff's position that power lines do not need to be displayed on maps and, therefore, maps provided by DAPL did conform to ARSD 20:10:22:11.

vi. Did DAPL identify the "project manager of the proposed facility" and "person managing the proposed facility" as required by ARSD 20:10:22:07 and SDCL 49-41B-11(7)?

In its brief, RST argues that DAPL did not provide the information required by SDCL 49-41B-11(7) and ARSD 20:10:22:07 in its Application. Specifically, RST identifies that Sunoco Logistics was not properly identified as the operator in DAPL's Application. RST at 30-31. ARSD 20:10:22:07, which implements the requirements of SDCL 49-41B-11(7), states in relevant part: "the application shall … contain the name of the project manager of the proposed facility."

In section 7.0 of the Application, DAPL identifies that the project will be owned by Dakota Access, LLC, operated by DAPL-ETCO Operations Management, LLC and that the project director is Mr. Mahmoud. DAPL Exhibit 1, page 4. In compliance with ARSD 20:10:22:07, the "project manager" is the individual responsible for developing the project, which in this case is Mr. Mahmoud of Dakota Access, LLC. This information was provided in the Application.

Staff notes that there is a discrepancy between ARSD 20:10:22:07 and SDCL 49-41B-11(7), where the rule states that the "project manager of the proposed facility" shall be identified

and the statute states that the "person managing the proposed facility" shall be identified. If the intent of SDCL 49-41B-11(7) is to identify the operator facility, as RST argues, Staff still finds that DAPL met this requirement. Specifically, the company met this requirement through Mr. Mahmoud's prefiled direct testimony in which he explains the corporate organization of Dakota Access and that the day-to-day operator of the pipeline will be Sunoco Logistics. DAPL Exhibit 30, lines 59-92.

vii. Did DAPL's Application identify all persons participating in the proposed facility as required by ARSD 20:10:22:06?

In its brief, YST argues that the Application failed to identify all persons participating in the proposed facility. YST at 7. It should be noted that DAPL's witness Mr. Mahmoud did identify Dakota Access and its affiliates in his pre-filed direct testimony. DAPL Exhibit 30, lines 59-81. Therefore, DAPL adequately identified all persons participating in the proposed facility as required by ARSD 20:10:22:06.

viii. Did DAPL's Application meet the estimated consumer demand requirements of ARSD 20:10:22:10 and SDCL 49-41B-11(9)?

Both RST and YST argue in their post hearing briefs that the Application did not properly address the estimated consumer demand as required by ARSD 20:10:22:10 and SDCL 49-41B-11(9). Further, the two intervening parties argue that the consumer demand requirements should be applied specifically to South Dakota consumers. Staff argued in its post hearing brief that requiring an interstate project to show that the project will meet demand for South Dakota consumers would violate the Commerce Clause. Staff at 7-8. With this in mind, Staff then determined what it thought a reasonable person would consider as being an adequate demonstration of consumer demand for the project during Staff's review of the Application.

DAPL witness Mr. Mahmoud testified that "Dakota Access has secured binding long-term transportation and deficiency contracts from multiple committed shippers to support development of the Dakota Access Pipeline with a crude oil transportation capacity of approximately 450,000 bpd…" DAPL Exhibit 30, lines 122-124. DAPL further provided supplemental information on demand for the project in response to a Staff Data request. Staff Exhibit 1, Exhibit A, pages 4-7. The Applicant provided the information required by ARSD 20:10:22:10 and SDCL 49-41B-11(7) by identifying the project has secured binding long-term shipping contracts that allow DAPL to pursue the development of the pipeline. Should the Commission determine that consumers are in fact retail consumers that use refined oil products, Staff notes that, from a market perspective, the binding long-term shipper contracts are reflective of future Bakken oil production and that future Bakken oil production is reflective of future consumer demand for refined products. In this sense, Staff believes a reasonable person would determine the binding long-term shipper contracts adequately address the estimated consumer demand for the facility.

c. Applicant's compliance with all applicable laws and rules

As discussed in Staff Post-Hearing Brief, the Applicant has met its burden to show that it will comply with all laws and rules. In its discussion of the Applicant's ability to comply with all laws and rules, YST states that "the Commission must therefore restrict permits for such facilities to those that will meet the energy requirements of the people of South Dakota… [A] permit can only be granted for a facility that will help fulfill the energy needs of the people of the State." YST at 11. Staff discussed the Court's prohibition of this type of economic protectionism in Staff's Post-Hearing Brief. Staff at 7. YST attributes its argument to language in SDCL 49-41B-1, which provides in relevant part, "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." This particular language was added in 1977, at the same time as SDCL 49-41B-22(5), which was ultimately struck down as a violation of the Commerce Clause. *See*, *In re Nebraska Power District*, 354 NW2d 713 (SD 1984). SDCL 49-41B-22(5), as it read prior to being struck down, provided

> 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 of states in which such area or areas are located.

Id. at 717. The statute that was struck down required what YST requests. The statute that remains does not. The portion cited by YST speaks not to demand, but to efficiency. It places a burden on the Commission to see to this efficiency. It does not place a burden on commerce. However, if it were interpreted as YST argues, it would be struck down with SDCL 49-41B-22(5). Therefore, as Staff detailed in Staff's Post Hearing Brief, the Commission must be cognizant of the restrictions placed upon the states by the Commerce Clause.

Additionally, Intervenors argue that the Applicant's use or attempted use of the state's condemnation laws. Intervenors at 2. The Commission has no authority over condemnation or eminent domain. SDCL 21-35-1 mandates that those issues be brought before the circuit court. Several landowners testified that the Applicant proceeded in that manner. The Commission lacks the jurisdiction to determine whether the Applicant has complied with SDCL Ch. 21-35. It was testified that that issue is before the South Dakota Supreme Court, and Staff expects the Applicant to comply with the Court's ruling, thus complying with the SDCL Ch. 21-35 through the Court's interpretation. It could be argued that the Applicant's use of the court system, rather than trespass is an indicator of its intent to follow the law.

For these reasons and those set forth in Staff's Post-Hearing Brief, the Applicant has shown by a preponderance of the evidence that it will comply with all applicable laws. However, Staff nonetheless recommends that if the Commission issues a permit, that the permit include a condition relating to compliance with applicable laws and regulations. Should this condition be included any alleged violations of laws will be reviewable by the Commission under SDCL 49-41B-34.

d. Missouri River

The proposed route would cross the Missouri River twice in North Dakota, with the closest crossing the South Dakota being approximately twenty miles upstream of the South Dakota border. ET 217:10-13, 630:8-9. IEN/DRA argues in its brief that this Commission has jurisdiction to impose rules upon a river crossing upstream in North Dakota. IEN/DRA at 12. This is only true to the extent that the Applicant must comply with North Dakota and federal law regarding that crossing, should a condition requiring compliance all laws be imposed by the Commission. However, the Commission does not have the authority to deny a permit based upon routing in another state. IEN/DRA cites to *Arkansas v. Oklahoma*, 503 US 91 (1992), as providing authority for the South Dakota Commission to impose standards on a North Dakota water crossing. That case is distinguishable in a large way, because the agency whose authority was questioned was the Environmental Protection Agency (EPA), a federal agency. *Id*. Moreover, the EPA operated with specific authority granted by Congress which allowed it to require "that the Fayetteville discharge comply with Oklahoma's water quality standards." *Id*. at 92. The Court stated that "the Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Id*.

There is no such grant of discretion to this Commission from Congress. The Commission, as a creation of the legislature has only the authority conferred upon it by the same. The Commission does not have the legal ability or procedures to enforce regulations outside its statutory jurisdiction. Just as the Iowa Utilities Board must defer to South Dakota to rule on the Project within its borders, South Dakota must defer to North Dakota. This is why many intervenors in Docket No. HP14-001 came from Nebraska to intervene in the South Dakota proceeding. The argument must be made where the jurisdiction lies.

e. Need for an EIS

In its brief, YST argues that without an EIS, DAPL cannot adequately address environmental concerns. Staff disagrees. While Staff obviously agrees that DAPL must ultimately meet the requirements of SDCL 49-41B-22 and that an EIS would be useful in making this determination, an EIS is certainly not a requirement.

Under YST's logic, no facility sited by the Commission without an EIS would meet its burden of proof. Pointing out that the EIS described under SDCL 34A-9 is not the same as the EIS required under the federal NEPA process, one could even extend this argument to say that no facility sited by the Commission without a *state* EIS would meet its burden of proof. Current Staff assigned to this docket have been assigned to 16 siting dockets since 2007. Of those 16, one application included a state EIS, which was completed voluntarily. None of the 16 projects were required to complete a state EIS and only two were required by federal agencies to complete a federal EIS. Applying YST's arguments to that experience, the Commission erred in its decision to grant siting permits to at least 13 of those projects.

Did the Commission fail to consider the environmental impacts of all of those projects? Of course not. Staff is not aware of this Commission ever requiring the completion of a state

EIS when issuing a siting permit. The obvious reason they have not is that the information and process required under SDCL 49-41B and ARSD 20:10:22 ultimately results in the same consideration of the environmental impact of potential projects. If the Legislature thought the Commission's siting of energy facilities required the completion of an EIS in addition to the requirements under SDCL 49-41B, one could logically conclude they would have required it under that same chapter, or at least not made it optional under SDCL 34A-9. Staff continues to argue that requiring a state EIS under SDCL 34A-9 would be wasteful and duplicative because the environmental impacts are already considered under the Commission's process, as laid out in SDCL 49-41B and accompanying rules.

f. Employment Estimates

In its brief, IEN/DRA argues that "DAPL failed to produce clear, competent economic information clarifying employment and induced economic benefit to South Dakota", and therefore the application "must be denied" because "[it] violates SDCL 49-41B-22(2) and ARSD 20:10:22:24." IEN/DRA at 11. Thus, IEN/DRA argues that DAPL did not provide proper employment estimates, and so, they cannot prove that the project "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." Staff disagrees.

While Staff's witness, Dr. Michael Shelly, found an "inconsistency" between DAPL's employment estimate and its economic analysis with respect to the treatment of permanent jobs, he did not find any "major flaws" with the economic analysis. Staff Exhibit 10. Additionally, while employment estimates were unable to provide much certainty on whether workers would be coming from in or out of state, Staff believes DAPL has met the requirements of 20:10:22:24. Estimates were provided in the Application and supplemented in response to Staff Data

Requests. Staff Exhibit 1. While imperfect, they were reasonable in their scope and effort. In addition, the Commission was able to explore the validity and accuracy of the employment estimates in sitting through the extensive cross-examination of both DAPL and Staff's witnesses on this topic.

Finally, if the Commission were to rule the Applicant has not provided the necessary information under 20:10:22:24, Staff fails to see how a lack of employment estimates poses a threat of serious injury to the social and economic condition of inhabitants or expected inhabitants in the siting area. In fact, Dr. Shelly concluded the project "will not pose a threat of serious injury to the social and economic condition of inhabitants or expected inhabitants in the siting area." Staff Exhibit 10.

g. Drain Tile

In their brief, Intervenors argue that DAPL's damage to drain tile system will result in the economic condition of landowners being seriously injured. Staff disagrees. Any damage to drain tile as a result of the project can be remedied by a condition requiring DAPL to repair such drain tile and compensate affected landowners for any economic loss resulting from such damage. The Commission commonly includes a condition that requires the Applicant to pay for whatever they break, essentially.

h. High Consequence Areas

High Consequence Areas (HCAs) were discussed in detail during the evidentiary hearing and in post hearing briefs. For example, DRA/IEN discusses HCAs in its post hearing brief (IEN/DRA at 11-13) and the individual intervenors post hearing brief. Intervenors at 6. Two of Staff's witness, Dr. McFadden and Mr. Flo, testified that there could be HCAs in South Dakota based on the definition of Unusually Sensitive Areas (USAs). ET 1559, 1745-1746. Mr. Flo

further clarified his position that the project could cross USAs by stating "we believe it (defining USAs) is a determination of a regulatory authority, a governmental agency, whether an area that is crossed by the pipeline is, in fact, unusually sensitive." ET 1745. It should be noted that Staff's witnesses formulated their opinions with regard to the project potentially crossing unusually sensitive areas based on the language with 49 CFR §195.6 and their opinions were not based on review of PHMSA's GIS data sets for USAs and HCAs.

During the hearing, DAPL testified that the project does not cross HCAs in South Dakota and that this determination was based on PHMSA's GIS data sets for HCAs and USAs. ET 186-187, 2205 -2206. Staff did review PHMSA's HCA and USA GIS data sets and agrees with DAPL's conclusion that the route does not cross any USAs and HCAs in South Dakota as identified in PHMSA's GIS data sets. However, Staff also understands that PHMSA concludes there may be limitations to its data and, therefore, also agrees with Mr. Flo's testimony that if a regulatory authority, such as the US Fish and Wild Service, determines an area to be unusually sensitive then DAPL would need to designate those areas as HCAs. Should this situation occur, where the US Fish and Wildlife Service, SD Game Fish and Parks, or the SD DENR determines an area should be designated as an USA, DAPL testified that they would treat such areas as HCAs. ET 2206. This alleviates Staff's concerns regarding HCAs.

i. Staff Witness Testimony

In its post hearing brief, Dakota Access made the following statement with regards to Mr. Ledin's testimony:

> 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.

DAPL at 22.

Staff notes that the above statement is an incorrect understanding the testimony of Staff Witness Daniel Flo, who adopted the testimony of Mr. Ledin. While Mr. Flo did agree that a separate wetland and waterbody crossing table is not necessary, this opinion was based on the fact that DAPL testified that all delineated wetlands and waterbodies will be shown on the project's construction alignment sheets. ET 1730:9-15, DAPL Exhibit 38, Page 3. In Mr. Flo's opinion, displaying delineated wetlands and waterbodies on construction alignment sheets is a suitable substitute for the crossing table. ET 1730:15.

II. Conclusion

For the above reasons and those stated in its Post-Hearing Brief, the Applicant has met its burden under SDCL 49-41B-22, provided any permit issued contains those conditions stipulated to by the Applicant and Staff, as well as those stipulated to by the Applicant and the City of Sioux Falls.

Respectfully submitted this 20th day of November, 2015.

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