

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE)	HP14-002
APPLICATION OF DAKOTA)	
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO)	POST-HEARING BRIEF
CONSTRUCT THE DAKOTA)	(Sioux Falls)
ACCESS PIPELINE)	

Comes now City of Sioux Falls (“City”) and files its Post-Hearing Brief.

City’s The Application for Party Status states as follows:

Although the pipeline is not proposed to be constructed within the Sioux Falls City limits or the projected 2035 growth area for the City, Sioux Falls holds an interest because the proposed pipeline is near the City landfill west of Sioux Falls and would also cross a city owned pipeline. The proposal would also cross the Lewis and Clark Rural Water System pipeline. The City is a member of Lewis and Clark and receives water from it.

Applicant’s proposed pipeline route is parallel to the west boundary of the Sioux Falls Regional Sanitary Landfill (Landfill). (Sioux Falls Exh. A). The Landfill is approximately 5 miles west of Sioux Falls and is outside the City’s 2035 growth area. (Sioux Falls Exh. A). The City owned pipeline referenced in the Application for Party Status is a landfill gas pipeline that lies near the west boundary of the Landfill. The City does not object to the route along the Landfill, but the features and fixtures at the Landfill need to be protected throughout the life of the Applicant’s project.

Joint Motion Re Stipulated Findings of Fact, Conditions and Exhibits.

City and the Applicant presented a Joint Motion at hearing, asking the Commission to accept and rely on stipulated Findings of Fact and Conditions

relating to the Sioux Falls concerns.¹ The Commission took the matter under advisement.

The stipulated Findings of Fact are specific to the City. They provide: (a) the legal description of the City's Landfill, (b) a brief description of the features and fixtures owned by the City at its Landfill, including a groundwater monitoring well, a shelterbelt, a fence, and the Landfill gas pipeline, (c) pertinent conditions on the permit issued by the Department of Environment and Natural Resources (DENR) to the City for its Landfill, and (d) City's position that it does not object to the pipeline.

The Joint Motion also includes stipulated Conditions that would apply in addition to general or "standard conditions." The Commission has not published a set of "standard conditions," but the stipulated Conditions assume the Commission would impose a statewide set of general conditions like it did in *Matter of Transcanada Keystone Pipeline, LP (HP09-001)*, subject to the evidence presented at hearing. As referenced in the Joint Motion, the Applicant has already agreed to such conditions in the rebuttal testimony of Joey Mahmoud.

The stipulated Conditions add conditions *specific to the City*. These Conditions require the Applicant to: (a) install the pipeline safely at appropriate depths and locations relative to *City owned* landfill features and fixtures, (b) bar Applicant's workers from obstructing access to the *City's*

¹ The Joint Motion also asked the Commission to consider two City of Sioux Falls exhibits. By the time the Motion was made, however, Exhibit A had already been admitted into evidence without objection. The City asks that Exhibit B (map of City Landfill in relation to Applicant's proposed pipeline) be admitted based on the stipulation.

Landfill, (c) avoid or protect a *City owned* monitoring well and *City owned* Landfill gas pipeline during construction, including contacting One-Call and maintaining barricades around the monitoring well, (d) *reimburse City* for damage to the City monitoring well if any damage occurs, (e) restore vegetation on *City owned property*, (f) prevent or minimize disturbance of the *City's Landfill gas pipeline*, (g) maintain appropriate distances between the *City's Landfill gas pipeline* and the proposed pipeline and (i) replace a *City fence*.

The Motion was presented at hearing. The other intervenors were given an opportunity to present evidence and have their objection heard regarding the stipulation. The stipulation was presented the morning of October 7; the hearing continued for another 2½ days. The Joint Motion did not foreclose other intervenors from presenting any evidence. The stipulated Conditions do not purport to create rights or impose any obligation on other intervenors. The obligations under the stipulated Conditions would be imposed solely on the Applicant. The benefits arising from the stipulated Conditions would pertain to City owned property, City employees, and use of the use of the City landfill.

Moreover, consent of all intervenors or parties is not required for the stipulated Conditions to be approved: “while an intervenor is entitled to present evidence and have its objection heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent.” *Steiner v. Marshall County* 1997 SD 109, 568 N.W.2d 627 (citing *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986)). The stipulated Findings of Fact, Conditions, and Exhibit should be approved.

Lewis and Clark Rural Water System. The Applicant's project will cross the Lewis and Clark pipeline. City obtains a significant amount of water from Lewis and Clark. (Sioux Falls Exh. E). Applicant had not yet entered into a crossing agreement with Lewis and Clark, but Lewis and Clark Executive Director Troy Larson testified the parties were actively engaged in working on one. The City defers to Lewis and Clark as to any arguments on that issue.

Insurance. The City made an oral motion at hearing asking that the Applicant be required to submit liability insurance policies.

Several items have either been filed or must be filed by law. First, Applicant's witness Joey Mahmoud agreed to file information on the insurance held by Applicant's Contractor for the project. The Applicant fulfilled that commitment on November 3, 2015 by making a post-hearing filing under ARSD 20:10:01:24.03.

Second, the Applicant is required by law to submit a certificate of insurance in compliance with SDCL 49-16A-100.3 and SDCL 49-16A-100.6. Although it appears this certificate of insurance is to be filed with the South Dakota Department of Transportation ("DOT"), Applicant should also file the certificate with the Commission. Third, if a permit is granted the Applicant must submit an indemnity bond to the Commission under SDCL 49-41B-38 to address potential damage to roads, bridges, or other related facilities.

Although the City would be interested in obtaining copies of any additional liability insurance policies over and above the items listed, the City is now independently engaged in easement negotiations with the Applicant and

is seeking protections for its Landfill features and fixtures in that process, including insurance as necessary. Further, while the public might want to review such policies, they may not have the opportunity to review them anyway in light of ARSD 20:10:01:39, the Commission's rule pertaining to proprietary information. Consequently, the City is not going to engage in protracted debate to force the Applicant to file liability insurance policies (other than the items already required to be filed).

Moreover, regardless of any insurance coverage the Applicant holds or provides to the Commission, the Applicant is responsible for its operations and must pay for all damages it causes, not just its coverage limits. Based on conditions the Commission has imposed in other cases, it is clear the Commission recognizes the heavy responsibility pipelines hold in terms of liability. *Matter of Transcanada Keystone Pipeline, LP (HP09-001)* (conditions 45-50). In fact, the Applicant agreed to such conditions in the Mahmoud Pre-filed Rebuttal Testimony.

Outside the permit process, the Applicant would be required to disclose the extent of any additional insurance coverage if a lawsuit were filed claiming damages from the Applicant. Under the Federal Rules of Civil Procedure, Rule 26(a)(1)(A)(iv), a defendant must produce, at the very beginning of litigation, a copy of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment."

The City does not waive its right to seek additional liability protection as it engages in easement negotiations with the Applicant relating to City property or to discover the extent of the Applicant's coverage in the event the City ever pursues damage claims against the Applicant, both of which are independent of this proceeding.

Dated this 6th day of November, 2015.

CITY OF SIOUX FALLS

A handwritten signature in cursive script that reads "Diane Best". The signature is written in black ink and is positioned above a horizontal line.

Diane Best
Assistant City Attorney
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