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## **SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

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January 11, 2008

RE: TransCanada Keystone Pipeline, LP

Attached each of you will find a copy of Commission Staff Brief with reference to the above captioned matter. This is intended as service upon you either by mail or electronically.

Very truly yours,

Kara Semmler  
Staff Attorney

Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION BY )	<b>COMMISSION STAFF BRIEF</b>
TRANSCANADA KEYSTONE PIPELINE, LP )	
FOR A PERMIT UNDER THE SOUTH )	
DAKOTA ENERGY CONVERSION AND )	
TRANSMISSION FACILITIES ACT TO )	
CONSTRUCT THE KEYSTONE PIPELINE )	
PROJECT )	

HP07-001

An evidentiary hearing was held beginning on December 3, 2007, and concluded on December 11, 2007, in the above-captioned matter. At the conclusion of the hearing, the Commission ordered that all initial briefs be filed on or before January 11, 2008, and that all reply briefs be filed on or before January 31, 2008. Commission Staff submits this brief in accordance with such Order. References to the hearing transcript will be "TR" followed by the appropriate page number. Exhibit references correspond to exhibits admitted in the above-captioned hearing.

**STATEMENT OF THE CASE**

On April 27, 2007, TransCanada Keystone Pipeline (Applicant) submitted to the South Dakota Public Utilities Commission (Commission) an application for a permit for the Keystone Pipeline under the Energy Conversion and Transmission Facility Act. The purpose of the proposed pipeline is to transport incremental crude oil production from the Western Canadian Sedimentary Basin to meet growing demand by refineries and markets in the United States. TC Exhibit 1, page 1. The Applicant proposed to construct and operate a crude oil pipeline and related facilities from Hardisty Alberta, Canada to Patoka, Illinois. The pipeline will enter South Dakota at the North Dakota/South Dakota border in Marshall County, and extend in a southerly direction, exiting the state at the South Dakota/Nebraska border in Yankton County. The length of the pipeline in South Dakota will be approximately 220 miles and it will cross through the

following counties: Marshall, Day, Clark, Beadle, Kingsbury, Miner, Hanson, McCook, Hutchinson and Yankton.

On May 24, 2007, the Commission issued its Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status in this docket. The notice provided that pursuant to SDCL 49-41B-17 and ARSD 20:10:22:40, each municipality, county, and governmental agency in the area where the facility is proposed to be sited; any non-profit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the area in which the facility is to be sited; or any interested person, may be granted party status in this proceeding by making written application to the Commission. Originally, the final date for party application was set for June 26, 2007.

The Commission then held four public input hearings along the pipeline route. The hearings were held as follows: June 25 in Yankton, June 25 in Alexandria, June 26 in Clark and June 27 in Britton. The public hearings resulted in over twenty hours of public comment and questions. As a result of public comment and concern the Commission, at Commission Staff's Motion, extended the party application final date to July 10, 2007. On July 11, 2007, at a regularly scheduled meeting, the Commission considered the Applications for Party Status and further granted all applications made through the July 10, 2007, deadline.

On September 14, 2007, the Commissioners signed a Scheduling and Procedural Order for prefiled direct testimony, rebuttal and surrebuttal submissions. The filing deadline for Commission Staff and Intervenor direct testimony was October 31, 2007, however, Intervenor WEB Water filed a request for an extension on November 2, 2007. Although WEB Water did not demonstrate good faith attempts to meet the original deadline, the extension was granted in an attempt to have as inclusive a hearing as possible.

## ISSUE

The issue to be decided in this matter is whether pursuant to SDCL 49-41B and ARSD 20:10:22, the Keystone pipeline permit requested by the Applicant should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Commission Staff believes the Keystone pipeline permit requested by the Applicant should be granted with the conditions that Commission Staff recommends below in this brief. Commission Staff believes Applicant met its burden of proof, and along with Commission Staff's recommended conditions, the proposed facility will not pose unreasonable harm or threat to our state. No evidence to the contrary was introduced into the record at the evidentiary hearing. Facilities such as the proposed pipeline may clearly be built in the state of South Dakota when all applicable laws are followed and the subject pipeline will not pose risks above and beyond an acceptable level. Commission Staff argues by following all pipeline safety regulations along with all other laws and rules, the burden of proof contained in the applicable South Dakota statute is met.

## ARGUMENT AND AUTHORITIES

The general standard of proof for administrative hearings is by preponderance, that is, the greater weight, of the evidence, and it is error to require a showing by clear, cogent, and convincing evidence. Dillinghan v. North Carolina Dept. of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999). Each element must be established by reliable, probative, and substantial evidence of such sufficient quality and quantity that a reasonable administrative law judge could conclude that the existence of facts supporting the claim are more probable than their nonexistence. U.S. Steel Min. Co., Inc. v. Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor, 187 F. 3d 384 (4<sup>th</sup> Cir. 1999).

Commission Staff's role is to evaluate this matter to ensure that the public interest is protected, that is, that the interests of the inhabitants in the proposed pipeline vicinity, generally the citizens of South Dakota, the industry, and the environment are all considered before a

recommendation is rendered. Commission Staff's evaluation of this matter found that the Applicant has met its burden of proof as required in SDCL 49-41B-22 and ARSD 20:10:22 and with incorporation of Commission Staff's recommendations, all interest groups are adequately protected.

The Applicant's burden of proof involves proving four specific elements. They are, in order: (i) The proposed facility will comply with all applicable laws and rules; (ii) the facility will not pose a threat of serious injury to the environment nor to the social and economic conditions of the inhabitants or expected inhabitants in the siting area; (iii) the facility will not substantially impair the health, safety or welfare of the inhabitants; and (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. Each particular element will be addressed separately below. See SDCL 49-41B-22. Elements two and three of the burden of proof are very similar and difficult to separate. The environment is inseparable from the health, welfare and condition of the inhabitants and vice versa. To avoid redundancy the two elements are combined in argument below.

**I. COMPLIANCE WITH ALL APPLICABLE LAWS AND RULES**

The Applicant repeatedly stated the proposed Keystone Pipeline will comply with all applicable laws and rules. TR 44. None of the parties to this matter offered any evidence contrary to Applicant's position regarding its intent to follow all applicable laws and rules. Although various parties asked the Commission to impose regulations beyond what is established in rule or law, no evidence, beyond the desire to create undue burdens, was offered to support such "conditions." No evidence was offered to support sentiments that current laws do not sufficiently protect all interested parties.

II. **THE FACILITY WILL NOT POSE AN UNDUE THREAT OF SERIOUS INJURY TO THE ENVIRONMENT NOR TO THE HEALTH, SAFETY, WELFARE OR SOCIAL AND ECONOMIC CONDITIONS OF THE INHABITANTS**

Commission Staff appreciates it may be impossible to completely eliminate all risks associated with the proposed facility. The statute does not require, however, that all risks be eliminated. As with any business, total elimination of risks is impossible and unreasonable. Further, Chapter 49 allows a facility (SDCL 49-41B-2) to be sited and built in South Dakota. Finally, the Commission heard no evidence to prove the mere presence of the facility will cause either environmental or inhabitant damage or injury.

Just as in any industry, the pipeline industry has building, construction and operation standards developed to protect landowners, consumers, the environment and the industry. Specifically, CFR 49 part 195 contains the applicable pipeline standards studied in this siting docket. The cited code section contains the “accumulated knowledge of liquid pipeline transport based upon engineering principles, experience, analysis and testing.” Commission Staff Exhibit 10. The accumulated knowledge protects and preserves the varying interests naturally present in facility construction. In addition, Part 195 is a dynamic document changing over time with the needs of the industry, along with changes in technology. Commission Staff Exhibit 10. Pipeline operator and owner obligations consequently change along with the code. Commission Staff Exhibit 10. Part 195 was the basis of Commission Staff review of the pipeline plans as it relates to health, safety and welfare of both the environment and the inhabitants. Commission Staff believes the Applicant complied and intends to comply with 49 CFR 195. Commission Staff Exhibits 8, 9, 10, 16, 17 and 18. TR 1439, 1465 and 1479. No evidence was entered into the record to show pipeline safety rules are not evolving appropriately or do not adequately protect the environment and consequently the inhabitants.

One such rule intended to facilitate construction of a hydrocarbon pipeline allows the operator to apply for a special permit or a waiver. The Pipeline Safety Act allows a pipeline

operator to apply for a special permit to the Code of Federal Regulations. The Applicant made such a filing. TR 274. After extensive examination, the Pipeline and Hazardous Material Safety Administration (PHMSA) granted the waiver and attached an additional fifty one conditions to the permit. TC Exhibit 11. PHMSA did not find the permit or the waiver to be less safe or against public safety. TC Exhibit 11. The waiver does not remove any of Applicant's responsibilities regarding safety, testing, cleanup or rehabilitation. TR 275. In fact, PHMSA found, and Commission Staff agreed, that adherence to the conditions of the special permit will indeed, provide a level of safety equal to or greater than that which will be provided if the pipeline were operated under existing regulations. TR 1420.

Detrimental environmental and health results were presented and argued to occur as a result of a spill. No evidence was entered to prove the mere presence of the pipe will cause detrimental health or environmental damage. Although some landowners believe the existence of the pipe will decrease the overall value of the land, no evidence was entered to prove such belief. In fact, the only evidence entered into the record actually shows no effect to land value by the mere existence of the pipe. TR 1637-1638. Specifically, a 2001 study of four communities around the United States provided evidence suggesting that fears about pipeline safety and encumbrances from easements had no significant impact on the sale price or demand for properties located along the pipeline right-of ways. Commission Staff Exhibit 6. Therefore, the statistical challenges regarding the possibility of a spill in South Dakota must first be overcome before most arguments of injury to the environment or inhabitants are applicable. In addition, another layer of statistical improbability is added when arguments were made that a crude oil leak will pollute rural water systems. According to Intervenor WEB Water, the Applicant's pipe must not only leak, but crude oil must surround a plastic or PVC rural water pipeline. Then, the crude oil must remain in contact with the pipe, un-remediated, for a length of time. The fear involves an idea that hydrocarbon products will penetrate the walls of a plastic or PVC pipe, enter the water system and pose a health or financial risk for the water line

consumers. TR 1358 – 1359. An American Water Works article remains the only evidence entered in the record regarding the topic. TC Exhibit 7R1. The article does not address crude oil specifically, rather, it discusses the effect of gasoline, a hydrocarbon product, on PVC pipe. Gasoline contains a higher level of the harmful penetrating chemical, BTEX, than crude oil. The study shows PVC was resistant to the contamination levels in gasoline, which then stands to reason such fear regarding crude oil is unfounded if all circumstantial and statistical realities are overcome and a standing pool of crude oil is released directly surrounding a PVC water pipeline. TC Exhibit 7R1, TR 311-313.

Nonetheless, due to the potential known negative effects of a spill, the Applicant is required, according to the Federal Pipeline Safety Standards, to plan for a worst case scenario of a major spill. TR 508. Response time, equipment, spill amounts and manpower are all planning elements requiring approval from the Pipeline Safety Administration prior to operation. TR 494. The federal pipeline safety standards regarding both response and construction are, again, an evolving code. Due to such an evolving standard, pipeline leaks have decreased over the last five year period. Specifically, there is a 57% reduction in the number of spills on crude oil pipelines. Further, spill volumes decreased over the same period by over half. TR 387.

The Applicant plans to use the most modern, state of the art equipment, and monitoring devices available to accomplish code compliance. TR 1437. For example, the steel used in facility construction will comply with an American Petroleum Institute Standard and the Applicant's own standard. TR 269-270. The standard, just as any building code, provides a criterion believed by experts to be the best, safest, and most reasonable requirement. The steel standards incorporate the latest knowledge and research regarding best practices and necessary safety precautions. TR 269-270. In addition, the Applicant intends to use Fusion Bond Epoxy coating on the steel pipe. TR 272-273. This coating incorporates the best technology and practices with a successful track record. TR 273. The list of best practices continues with the Applicant's intention to use state of the art surge analysis, and to properly

place its valves in relation to drain down volumes to best protect not only its investment but also all residents and the environment in South Dakota. TR 1438, 1436. Due, in part to the strength of the steel, but also because of the depth of cover, the pipe will withstand weight from normal agricultural traffic. TR 1416, 1434. All testimony shows, aside from unpredictable circumstances, the Applicant plans to build the safest pipeline with the most modern technology available to not only protect our state resources, but also to prevent any restrictions on normal activity above or around the pipeline route. (TR starting at 1410 through completion.)

Not only will the Applicant use state of the art preventative measures to avoid a leak, but in the event a leak does occur, the Applicant is responsible for the cleanup and any resulting damage. TR 85. Beyond criminal behavior or pure negligence, there are no circumstances that require landowners be responsible for damages or leaks that occur on the pipe. TR 85, 108. Landowners know their land better than anyone else. The Applicant, therefore, learns more about the land both above and beneath the chosen route as landowner relations progress. Buster Gray testified that, even at this point, the Applicant hesitates to say the ultimate and final route is selected. It is possible, as Buster Gray explained, that additional landowner issues will become relevant and known as the process proceeds. See generally testimony of LA Gray. The Applicant makes attempts to protect the inhabitants and takes affirmative action when fact-based landowner issues are discovered. TR 200 - 203. In addition Mr. Gray expressed the Applicant's willingness to work with individual utility companies from whom inhabitants in the area receive services. It is in the Applicant's best interest to prevent any interruption of service, or as little interruption as possible.

As part of its efforts to adequately protect the inhabitants, and to understand the physical, geological characteristics along with permitting requirements, the Applicant met with a variety of South Dakota agencies beginning over two years ago. TR 1049 and generally state agency representative testimony. By all state agency accounts, the Applicant was responsible and diligent throughout the process to propose a pipeline with the least possible affect to the

environment and the inhabitants. TR 1049. Additional testimony was entered regarding the Department of Environment and Natural Resources experience in hydrocarbon product clean up and the remediation that follows. Specifically, Mr. Bill Markley testified at great length regarding a hydrocarbon product spill in the Sioux Falls area that was cleaned up with great success and did not destroy the subject property for future use. Further, the leak did not negatively affect inhabitants aside from some immediate inconvenience. The responsible company completely paid for the remediation. Under the existing laws, his department can efficiently and safely remediate a hydrocarbon spill. Currently, Mr. Markley and other employees of the Department of Environment and Natural Resources believe their department has enough legislation, jurisdiction and capability to assure that if a leak occurs, it will be remediated, and further, he does not believe the proposed pipeline will place any burden on the department. As a last resort, the regulated substance response funds can be used if the guilty company is not financially able to completely clean a spill. See generally Bill Markley testimony beginning on TR 1109.

The Department of Environment and Natural Resources has jurisdiction first for some potential permits for which the Applicant intends to apply, and second if a spill occurs. TR 1219. If a spill does occur in South Dakota, the department does not require the landowner take physical responsibility for the remediation. TR 1166. In addition, it is not the property owner's responsibility to determine when, where or how the property is cleaned up and when it is sufficiently cleaned up. TR 1166. A property owner is invited to participate in the process. There is not, however, a burden regarding remediation placed on the landowner. TR 1166. Rather, the Department of Environment and Natural Resources works with the guilty company and the landowner to determine the best remediation method. TR 1166.

The Department of Environment and Natural Resources receives hundreds of spill reports per year. TR 1148. The Department cleans spills in a variety of ways. In Kim McIntosh's experience, pipeline companies react very quickly; they want to determine what the

cause is and get it fixed and cleaned up. TR 1152. Kim McIntosh works as the Department of Environment and Natural Resources Spill Coordinator. In Ms. McIntosh's experience, the pipeline companies are in the business of transportation. TR 1152. It does the company no good if it cannot conduct business. Ms. McIntosh has been part of many remediation efforts in South Dakota. In Ms. McIntosh's experience, no permanent natural resource damage occurred as a result of a spill. TR 1159. In her experience, time and money can clean up any type of leak of any hydrocarbon product. TR 1159. As part of the remediation efforts, the Department of Environment and Natural Resources may require a company provide residents with a new or different water source. TR 1156-1157. For example, in the event a private well is negatively affected, the Department of Environment and Natural Resources requires the company provide an alternate drinking source. TR 1156. An alternate drinking source may include a new well or other source of water including the possibility of connection to rural water. In other words, private landowner issues are considered and addressed along with all potential remediation efforts. TR 1156 – 1157 and 1166.

Applicant's emergency response planning is an essential part of the process and can determine what kind of remediation and the success rate of remediation. TR 1521 - 1522. The Emergency Response Plan and Integrity Management Plan, although not finished at this time, are completely appropriate for the project stage. TR 1522. The Applicant is in compliance with federal law regarding such requirements. The emergency response plan as regulated in 49 CFR requires identification of a variety of structures and environmental issues throughout its planning, ultimately protecting the environment and inhabitants. All such planning work is being done according to code. The final product is not required at this time. TR 1516. The process is designed so as not to create wasted time or product. It makes no sense to develop an emergency response plan if the pipeline facility is not approved. TR 1531. Although the Office of Pipeline Safety (PHMSA) requires the emergency and integrity management plans be filed in its office and not with the Commission, Commission Staff believes there is value in monitoring

the process. Commission Staff's recommendation regarding monitoring is included in the Recommendations below.

Despite the nearly 160 intervenors, only one Intervenor, WEB Water, utilized expert witnesses. WEB Water's geological experts admitted no experience in the pipeline industry and further admitted no investigation into all other environmental concerns relating to pipeline siting. TR 1056-1058 and 1080-1081. As a result, no evidence was entered to show the most modern pipeline safety standards are insufficient or lacking in any way to protect the environment or inhabitants. In fact, the experts did not support the route argued by the intervenor they represented. The inconsistency and lack of complete analysis made the offered WEB expert testimony wholly incomplete, unreliable and devoid of any material usefulness to show that compliance with all pipeline safety rules will not adequately protect the South Dakota environment and inhabitants from construction through operation of the proposed facility.

In contrast, numerous Applicant representatives testified regarding the analyses that culminated in the chosen route and required pipeline safety planning documents. Initial routing and subsequent modifications require a balance of a variety of interests associated with natural resources, personal property, private landowner desires, safety and reliability. The route selection incorporates and balances them all without emphasis on one to the detriment of others. TR starting at 120. Environmental protection was one such element weighed and incorporated into planning. Intervenor cross examination of Mr. Ellis, also an Applicant representative, effectively demonstrated the varying environmental interests from drainage to soil types that were studied in the proposed pipeline placement and will be important in operation and emergency planning to protect and preserve the environment. TR 153 - 158. Not only did the Applicant show it followed all best industry practices to protect the environment in route selection, it testified regarding its commitment to monitor the environmental condition during and after the pipeline is built as well. Buster Gray testified the Applicant will have two or three environmental inspectors solely responsible for the environmental requests, conditions

and requirements throughout the building process. TR 223 – 224. In addition, the Applicant will have an individual specifically familiar with agricultural issues to work closely with the inspectors. TR 223 – 224.

An important element in properly protecting the environment and consequently the people along the pipeline route is identification of the various environmentally sensitive areas. Some such areas were identified by the federal government as high consequence areas (HCA). Although this topic evoked argument regarding the proper definition of a high consequence area, it is federally designated and defined. TR 394 – 406. Specifically, HCA's are determined by the Department of Transportation under the Pipeline and Hazardous Material and Safety Administration. TR 219 – 220. The Applicant obtained data regarding HCA areas directly from PHMSA. TR 219 - 220. The Commission is not the proper venue to change either the HCA designation process or the HCA definition itself. Although the Commission cannot redefine or dictate where an HCA may or may not exist, all areas that meet the definition of an HCA, regardless of whether designated and mapped by the Department of Transportation, must receive the same protection as the known areas. The Applicant is aware of, and intends to observe all pipeline safety rules related to High Consequence Areas. TR 1526, 1528, 1477.

Brenda Winkler, one of the Commission Staff witnesses, determined a majority of the route passes through silt and clay soils that are predominately impermeable. TR 784 – 785, 818. Her opinion was supported by the geologist expert, Derric Iles, and the Applicant. TR 1108, 369. Ms. Winkler testified that drinking water may be obtained from some water bearing lenses or buried channels within the silt and clay. Those water bearing lenses are, however, surrounded by the same impermeable till and silt. The lenses are, consequently, protected by the impermeable layers of ground. The silts and clays inhibit movement of anything and would act the same with the unlikely event of an oil spill in South Dakota directly over water bearing lenses. Ms. Winkler further testified a shallow water table does not equal potable water and does not make it more likely that an aquifer is contaminated in the event of a release. TR 820.

Ms. Winkler did study, however, an area where sand deposits are present at the ground surface, particularly in Marshall County. A sand deposit could be hydraulically connected to the Middle James Aquifer. TR 812. The connection makes contamination more likely in the event of a release. TR 812. Regardless, the movement of oil takes considerable time. Remediation efforts can stop the continued movement and clean up any existing contamination. TR 815. Nonetheless, additional protection may be in order.

The potential social and economic impact to the residents of the area was studied specifically by Commission Staff Witness Muehlhausen. No evidence was entered into the record by intervenors to either support or refute Muehlhausen's testimony and written report. Muehlhausen found that although there will be some temporary impacts to the affected area, the specific areas along the pipeline route and related to pipeline construction is not long term. Commission Staff Exhibit 6. Pipeline construction typically proceeds with a number of crews working in an assembly line fashion, with one or more construction spreads, with a separate construction crew working on each spread. The construction population is, therefore, spread throughout the project and continually moving. Commission Staff Exhibit 6. Naturally, some impact on local retail, hospital and other resources will be felt. Communities along the route will, however, be capable of managing the influx and will experience some positive increase in economic activity. Commission Staff Exhibit 6. Muehlhausen did conduct an economic input/output multiplier for the counties affected by construction and determined for every \$1.00 spent by the Applicant in the project areas for construction, an additional \$.70 of indirect and induced output would be expected from other industries. Commission Staff Exhibit 6. Further during operation of the pipeline, for every \$1.00 spent by the Applicant in the project area, an additional \$.33 of indirect and induced output would be expected from other industries. Commission Staff Exhibit 6. "In general, additional economic output is considered a beneficial impact because it results in additional jobs and wages." Commission Staff Exhibit 6.

Aside from the Department of Environment and Natural Resources' testimony regarding remediation, the Commission heard testimony from other outside agencies. State agencies get involved with the project throughout its life depending upon jurisdiction and project stage. Although the Commission has sole jurisdiction at this time, Intervenor WEB Water subpoenaed several other state agency representatives that may or may not have jurisdiction on other topics throughout the life of the proposed project. John Kirk, for example, testified for the South Dakota Department of Game, Fish and Parks where he is the program head for the Environmental Review Department. TR 1016-1017. Early on Game, Fish and Parks began a review process with the Applicant. TR 1017. Game, Fish and Parks reviewed the Environmental Impact Statement produced by the Department of State, agreed with the analysis and, in addition had some suggestions. TR 1020. The Environmental Impact Statement fulfills the obligations of SDCL 49-41B-12 and was released in its final form in early January 2008. Mr. Kirk further believes the Applicant has been prudent in its review and attempted to follow all recommendations by his and any other organization. He has no complaints or concerns at this time regarding the Applicant's siting behavior. TR 1016 – 1025.

Considering the testimony and related evidence detailed above, along with the recommended conditions briefed later, Commission Staff does not believe the proposed facility poses an undue threat to the environment or the inhabitants of South Dakota. Compliance with all laws and rules requires adherence to the Pipeline Safety Rules and Regulations. Commission Staff believes the Pipeline Safety Rules and Regulations consider acceptable safety and risk associated standards. As a result, the proposed pipeline met its burden of proof and a siting permit, with conditions, should be granted.

### **III. NO UNDUE INTERFERENCE WITH DEVELOPMENT OF THE REGION**

The Applicant's proposed pipeline will not unduly interfere with the orderly development of the region. Staff Witness Muehlhausen did extensive research to provide a socioeconomic impact analysis of the proposed construction and operation of the proposed facility. One such

task was to determine the affect, if any, the project will have on future development and use of the region. "The proposed project does not cross commercially or industrially developed land in South Dakota." Commission Staff Exhibit 6. Construction of the proposed project will restrict certain structures and uses in the permanent pipeline right-of-way. However, the restrictions will not necessarily restrict future development of a particular parcel of land. Rather, the right-of-way restrictions may affect the physical layout of how the particular parcel is developed and in which manner it is developed. Commission Staff Exhibit 6. Certainly, every potential purchaser has different criteria and different capabilities when purchasing or developing land. An industrial developer may, however, find the pipeline and the easement preferable, thus not inhibiting industrial growth. A residential or agricultural developer on the other hand may find it unworkable. Commission Staff Exhibit 6. Nonetheless, nothing indicates future development will be inhibited by the proposed facility.

## **RECOMMENDATIONS**

Generally the application is adequate and generally complies with pipeline industry standards. Commission Staff recommends the Applicant follow such plan along with some additional recommendations. The Applicant objected to a very limited number of Commission Staff's recommendations. Based on the above argument, and all other testimony and evidence, Commission Staff makes the following recommendations.

### **I. OTHER LAWS**

Commission Staff recommends the Commission grant the siting permit on the condition that the proposed facility complies with all applicable laws and rules.

### **II. ENVIRONMENTAL INSPECTION**

Although the Applicant's Construction Mitigation and Reclamation Plan did not stipulate to the use of an environmental inspector, Buster Gray testified regarding the Applicant's practice of the use of environmental inspectors. Commission Staff recommends the Commission require the Applicant to incorporate environmental inspectors into the Construction Mitigation and

Reclamation Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with the Commission Order and all other applicable laws and rules.

### **III. NOISE CONTROL**

Mr. Ellis testified for the Applicant regarding the noise standard applicable for pipeline operation. He testified regarding the Applicant's intention to follow such standard. Commission Staff recommends the Applicant perform a noise assessment survey during operation to confirm the level of noise at each listed noise-sensitive area. In the event the noise level exceeds 55 dBA Ldn, the noise standard recommended by Staff Witness Tom Janssen, the Commission Staff recommends the Commission require Applicant to implement noise mitigation measures to ensure that regulation levels are not exceeded.

### **IV. WEED CONTROL**

In an attempt to avoid noxious weed problems, yet at the same time trying to respect individual landowner concerns and rights, Staff Witness Tom Janssen made an initial recommendation in his prefiled testimony and then altered it somewhat at the hearing. TR 1670 and 1671. Although it would be best to get landowner consent every time spraying is necessary, it may be unrealistic, and time sensitive weed control may make it impossible to obtain such consent. Commission Staff therefore recommends the Applicant allow landowners to choose either blanket approval for the Applicant to use its discretion and professional knowledge to spray using the method it finds best considering the circumstances or require landowner consent for such application. Such option allows the landowner to opt out and to be notified upon each proposed herbicide application. Staff recommends the Applicant consider the landowner to have given blanket consent upon failure to receive response from the landowner within a number of days acceptable to the Commission, as weed control can be very time sensitive.

## **V. DUST CONTROL**

The Applicant agrees to cover open-bodied trucks while on paved roads.

## **VI. TRENCHING METHOD, TOPSOIL REMOVAL AND STORAGE, TEMPORARY EROSION AND SEDIMENT CONTROL, BACKFILL AND CLEANUP**

During the course of the hearing, the Applicant submitted TC 28, a Construction Agreement it executes with all affected landowners. The Construction Agreement includes a landowner option regarding trenching and topsoil removal methods. Commission Staff recommends landowners receive an explanation regarding options and then require the Applicant to follow landowner preference as documented on the Construction Agreement. At a minimum, however, the Applicant shall separate topsoil from subsoil. In addition, Commission Staff recommends required slope breakers to be used to prevent erosion at a 2 to 4 percent gradient rather than the Applicant's proposed 2 to 8 percent gradient. Finally, cleanup efforts shall commence immediately following backfill operations. Commission Staff further recommends final grading and topsoil replacement and installation of permanent erosion control structures within 20 days after backfilling the trench and within 10 days in residential areas. In the event seasonal or other weather conditions prevent compliance with the time frames, temporary erosion controls shall be maintained until conditions allow completion of cleanup.

## **VII. RECLAMATION AND REVEGETATION**

- a) The Commission shall be notified and obtain a winterization plan in the event the winter season delays successful completion of de-compaction, topsoil replacement or seeding until the following spring.
- b) Rock excavation from the trench may be used to backfill the trench only to the top of the existing bedrock profile. All other rock shall be considered construction debris.
- c) Mulch shall be applied on all slopes concurrent with or immediately after seeding, where necessary to stabilize the soil surface and to reduce wind

and water erosion. Additional recommendations regarding liquid mulch binders and specifications for mulch use is found in Commission Staff Exhibit 7.

- d) Erosion control matting fabric shall be installed on water body banks at the time of final bank re-contouring, unless riprap or other bank stabilization methods are employed in accordance with federal, state and local permits and approvals.

#### **VIII. FORESTED LAND**

If trees are to be removed that have commercial or other value to affected landowners, the Applicant shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. The environmental inspection in Recommendation II shall include forested lands.

#### **IX. DRAIN TILE SYSTEM CONCERNS**

Commission Staff recommends the Applicant track drain tile system information throughout construction. Location information shall be collected using a sub-meter accuracy global position system or at a minimum by accurately documenting the pipeline station numbers of each exposed drain tile. The Applicant shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where applicable.

#### **X. EASEMENT AND WORKSPACE IN WETLAND CROSSINGS**

- a) Commission Staff recommends that unless a wetland is actively cultivated or rotated cropland, the width of the construction right-of-way shall be limited to 75 feet or less in standard wetlands unless non-cohesive soil conditions require utilization of greater width.
- b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries.

- c) Vegetation clearing shall be limited between extra work areas and the edge of the wetland to the construction right-of way.
- d) Wetland boundaries and buffers shall be clearly marked in the field with signs and/or highly visible flagging until construction-related ground disturbing activities are complete.

**XI. OPERATION AND MAINTENANCE IN WETLAND CROSSINGS**

- a) To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state.
- b) Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

**XII. EASEMENT AND WORKSPACE IN WATERBODIES AND RIPARIAN LAND**

- a) Extra work areas shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land. Limit clearing of vegetation between extra work space and areas and the edge of the wetland to the construction right-of-way.
- b) Work area boundaries and buffers shall be clearly marked in the field with signs and or highly visible flagging until construction-related ground disturbing activities are complete.
- c) Spoil from minor and intermediate water body crossings and upland spoil from major waterway crossings shall be placed in the construction right of way at least 10 feet from the water's edge or in additional extra work areas.

### **XIII. OPERATION AND MAINTENANCE IN WATERBODIES AND RIPARIAN LANDS**

- a) Limit vegetation maintenance adjacent to water bodies to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.
- b) To facilitate periodic pipeline leak surveys, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state
- c) Trees that are located within 15 feet of the pipeline that are greater than 15 feet high may be cut and removed from the permanent right of way
- d) Herbicides or pesticides shall not be used in or within 100 feet of a water body except as allowed by the landowner and appropriate land management or state agency.

### **XIV. CONTINUED HCA IDENTIFICATION AND RECOGNITION OF ADDITIONAL SENSITIVE AREAS**

Commission Staff recommends the Commission grant the siting permit on the condition that Applicant performs ongoing study and ongoing assessment regarding high consequence areas. Additionally, upon discovery, Commission Staff recommends a mandatory inclusion (whether currently marked on federal government maps or not) in the Emergency Response Plan and in the Integrity Management Plan.

The proposed pipeline route should be continually evaluated, and prior to the Applicant commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 should be identified and added to an Integrity Management Plan that may exist. Finally, Commission Staff recommends the Applicant identify the Middle James Aquifer area as a hydraulically sensitive area in its Integrity Management and Emergency Management Plans.

## **XV. POST CONSTRUCTION CROP ANALYSIS**

Commission Staff is concerned with the passive nature of the Applicant's planned post construction assessment of crop development and production and recommends a more proactive approach whereby the Applicant sends written notice to landowners regarding the option to have agriculture monitors. The landowner must then affirmatively request such monitoring; failure to respond shall be considered rejection and no monitoring activity is required. Landowner testimony indicates some prefer to be the sole judge regarding post construction crop analysis. With Commission Staff's recommendation, the landowner must take affirmative action and make the request if he or she finds it necessary. Further, when affirmatively requested by landowners, Commission Staff recommends such agricultural monitoring of the property beyond construction and after the first and second growing season.

## **XVI. EMERGENCY PLANNING**

Commission Staff experts did not find shortcomings regarding Applicant's progress and current compliance with Federal Safety Regulations. Nonetheless, Commission Staff recommends a mandatory filing of all emergency response and integrity management documents with the Commission in addition to the Federal Government. Although the Commission has no jurisdiction and cannot dictate the contents of the documents, filing the information for informational purposes allows easy access for all.

## **XVII. ROAD PROTECTION AND BONDING**

"The movement of construction equipment, material and crew members to the project area would result in additional traffic on the road in the counties crossed by the pipeline and in the adjacent counties." Commission Staff Exhibit 6. Impacts associated, however, with construction will be temporary and not expected to create significant disruptions. The Applicant voluntarily agrees to follow all of Commission Staff's recommendations regarding road protection and bonding. Such recommendations include:

- a) Commission Staff recommends the Applicant coordinate road closures with state and local emergency responders.
- b) Commission Staff recommends the Applicant implement a regular program of road maintenance and repair through active construction to keep paved and gravel roads in an acceptable condition for residents and the general public.
- c) After construction, Commission Staff recommends the Applicant repairs and restores any deterioration caused by construction traffic such that the roads are returned to their preconstruction condition.
- d) Commission Staff recommends the Applicant use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.
- e) Commission Staff recommends the Applicant obtain a bond per SDCL 49-41B-38 in the amount of \$3 million in 2008 and \$12 million in 2009 to insure that any damage beyond normal wear to public roads, highways, bridges or other related facilities would be adequately compensated.

#### **XVIII. RESIDENTIAL MITIGATION PLAN**

Due to the nature of residential property, Commission Staff believes it deserves the following additional protections when affected:

- a) Commission Staff recommends the Applicant coordinate construction work scheduled with affected residential landowners prior to the start of construction.
- b) Commission Staff recommends the Applicant maintain access to all residences, except for periods essential for pipe-laying activity as coordinated with affected residential landowners.
- c) Commission Staff recommends the Applicant install temporary safety fencing, when reasonably requested by the landowner on the Applicant's

construction contract (TC Exhibit 28), to control access and minimize hazards associated with an open trench in residential areas.

- d) Commission Staff recommends the Applicant notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.
- e) Commission Staff recommends the Applicant repair any damages to property that results from construction.
- f) Commission Staff recommends the Applicant restore all areas disturbed by construction to preconstruction condition.

#### **XIX. OTHER COORDINATION EFFORTS**

- a) The Applicant shall coordinate project activities with the South Dakota State Fair Administration to make best use of fair resources for traditional users as well as construction workers.

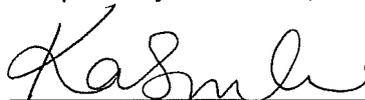
#### **CONCLUSION**

Commission Staff believes the Applicant has met the burden contained in SDCL 49-41B-22. The recommendations or conditions as recommended by Commission Staff only make the proposed facility construction and operation safer for the environment and inhabitants. Commission Staff understands inhabitant desires to keep infrastructure such as the pipeline out of his or her agricultural field or surrounding property. Commission Staff also firmly believes in the importance of due process. Commission Staff argues a plain reading of the applicable statutes allows hydrocarbon pipelines to be built in South Dakota. All parties were given an opportunity to be heard. The Commission was, in fact, very lenient regarding pro se participation and allowed nearly as much information and as much testimony as any pro se participant had to offer. In the end, oppositional testimony did not show this pipeline failed to meet its burden of proof. Rather, oppositional testimony simply argued the pipeline should be placed elsewhere, so as not to interfere with the Intervenor's own property.

Commission Staff recommends a number of conditions to the granting of the permit which include Commission Staff's condition that the siting permit be issued subject to the condition that all the other applicable permits are issued and all applicable laws and rules are followed, including recommendations in the final Environmental Impact Statement. In conclusion, Commission Staff recommends that the Commission find that the Applicant has met its burden of proof and therefore the Applicant should be granted a pipeline siting permit pursuant to SDCL 49-41B-22 and ARSD 20:10:22 and that the permit should be conditioned as stated above.

Dated this 11<sup>th</sup> day of January, 2008.

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I hereby certify that copies of Commission Staff Brief were served on the following electronically on this the 11th day of January, 2008.

See attached.



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Kara Semmler  
Staff Attorney  
South Dakota Public Utilities Commission