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Received - DIANE L. BATTIATO
Register of Deeds, Douglas County, NE
07/01/2010 10:56:01.00



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PIPELINE ACCESS EASEMENT

This PIPELINE ACCESS EASEMENT ("Easement") is made and entered into as of the 30th day of June, 2010 ("Effective Date"), by and among, Behavioral Health Support Foundation, a Nebraska nonprofit corporation ("BHSF"), The Lutheran Home Foundation, a Nebraska nonprofit corporation ("TLHF"), and Energy Systems Company, a Nebraska corporation ("ESC").

RECITALS

WHEREAS, BHSF is the owner of record of certain real property legally described as follows:

Lot 2, in LUTHERAN PLACE REPLAT 1, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska ("Lot 2"); and

16-23316 Lot 10, in LUTHERAN PLACE, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska ("Lot 10"); and

WHEREAS, TLHF is the owner of record of certain real property legally described as follows:

Lot 1, in LUTHERAN PLACE REPLAT 1, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska ("Lot 1") (Lot 1, Lot 2 and Lot 10 are collectively referred to herein as the "Parcels"); and

16-23316 Lot 1, in LUTHERAN PLACE, an Addition to the City of Omaha, as surveyed, platted and recorded, in Douglas County, Nebraska ("TLHF Lot"); and

WHEREAS, ESC is the owner of a certain underground pipeline (which is in-part direct buried, in-part situated within an underground tunnel, and in-part situated within a power plant) which consists of one twelve inch (12") steel chilled-water supply line, one twelve inch (12") steel chilled-water return line, one eight inch (8") steel steam supply line, one four inch (4") steel condensate return line, and all appurtenances thereto, including, but not limited to, two sets of service valves which are specifically

described herein, and which commences, as of the date hereof, in ESC's underground vault (denominated by ESC as its Vault B-5) located in the intersection of 24th Street & Harney Street; which then proceeds West on Harney Street until it enters and is situated in or upon Lot 10; which then proceeds until it enters and is situated in or upon Lot 2; which then proceeds until it enters and is situated in or upon Lot 1; which then proceeds until it enters into the power plant that is situated in or upon Lot 1, until it terminates within such power plant immediately after the two sets of service valves which serve the building situated on TLHF Lot and the building situated upon Lot 10 (the "Pipeline"). Exhibit 1, which is attached hereto and incorporated herein by this reference, provides a pictorial view of the Pipeline.

WHEREAS, the parties by this instrument intend to create a permanent easement for ingress and egress, to, upon, over, across, under, and within, as applicable, the Parcels for the benefit of ESC, and its successors and assigns, in order for ESC to operate and maintain the Pipeline which provides heating and cooling thermal services for its customers, which include, as of the date hereof, BHSF and TLHF. The permanent easement shall consist of the following described corridor, which follows the Pipeline, and which is pictorially shown in Exhibit 2, which is attached hereto and incorporated herein by this reference:

A corridor twenty (20) feet in width with respect to that portion of the Pipeline that is direct buried, that commences on the North line of Lot 10 from the Public-Right-Of-Way, and proceeds in a multi-turn fashion to an underground vault which is denominated by ESC as B-5A ("Vault B-5A"), which is also situated on Lot 10. The depth of such easement through this portion of the corridor shall be whatever is reasonable and necessary for Pipeline operations, maintenance, and replacement, at ESC's sole discretion.

In addition, all of the volume within Vault B-5A, and the parcel over, that is situated in Lot 10.

In addition, the underground tunnel, in full width and height, through which the Pipeline is located from Vault B-5A to the point where the Pipeline enters the power plant, that is situated in or upon Lot 1. Such underground tunnel is situated in or upon the Parcels.

In addition, the volume and floor area in the power plant, that is situated in or upon Lot 1, that is necessary for the location of the Pipeline, and necessary for safe and reasonable access to the Pipeline for operations, maintenance, and replacement thereof, in ESC's sole discretion.

NOW, THEREFORE, in accordance with the terms and conditions of that certain Formal Authorization to Proceed dated October 2, 2006, by and among BHSF, TLHF, and ESC, and in consideration of the mutual grants, covenants and promises contained herein, and the mutual benefits accruing to each of the parties hereto, their respective successors and assigns, the receipt and adequacy of which are hereby acknowledged, the parties hereto hereby declare and agree as follows:

1. **Recitals.** The foregoing recitals are hereby incorporated herein as a material part of this Easement.

2. Surface Easement. BHSF hereby grants and conveys unto ESC, and its successors and assigns, a perpetual non-exclusive access easement to and over the above-described portion of Lot 10 for purposes of ingress and egress in the operation, maintenance, and replacement of the Pipeline, including access to Vault B-5A.

3. Subsurface Pipeline Access Easement – Directly-Buried Pipeline & Vault B-5A. BHSF hereby grants and conveys unto ESC, and its successors and assigns, a perpetual non-exclusive access easement to and under the above-described portion of Lot 10 for purposes of ingress and egress in the operations, maintenance, and replacement of the subsurface directly-buried Pipeline, and the Pipeline located within Vault B-5A.

4. Pipeline Access Easement – Pipeline Located in Underground Tunnel. BHSF and TLHF hereby grant and convey unto ESC, and its successors and assigns, a perpetual non-exclusive access easement to and through the above-described underground tunnel which is situated in or upon Lot 10, Lot 2, and Lot 1, for purposes of ingress and egress in the operations, maintenance, and replacement of the Pipeline, which is located within such underground tunnel.

5. Power Plant Easement. TLHF hereby grants and conveys unto ESC, and its successors and assigns, a perpetual non-exclusive access easement to and within the power plant that is situated in or upon Lot 1, for purposes of ingress and egress in the operations, maintenance, and replacement of the Pipeline, which is located within such power plant.

6. Nature of Easements. The provisions of the easements granted hereunder are not intended and shall not be deemed to constitute a dedication for public use, and the rights and easements granted herein are private and for the benefit only of ESC, and its successors and assigns.

7. Use of Easements by ESC. All the parties hereto acknowledge that ingress and egress to, over, across, within, or upon the Parcels, and through the tunnel under the Parcels, affected by this Easement is necessary for all parties hereto. As such, in the event ESC requires access pursuant to this Easement in such a manner as may impact such ingress and egress, ESC agrees to (a) provide not less than seven (7) days notice of such event to the other parties (except in the event of an emergency threatening loss of life or property, in which case ESC may act immediately to address said threat and shall provide notice to the other parties as soon as practicable and in any event within 24 hours), (b) work with the other parties to schedule such activities so as to minimize, to the extent possible, the impact of same on the parcels and the other parties' activities, (c) use reasonable efforts to minimize the extent and duration of any interruptions in such access for the other parties.

8. Restoration by ESC. After any exercise of its rights pursuant to this Easement, ESC, its successors and assigns, shall be solely responsible for returning, as soon as practical thereafter, all portions of the Parcels, Vault B-5A, the underground tunnel under such Parcels affected by this Easement, or the power plant, which are damaged as a result of such utilization, to a condition not less than substantially the condition of the same immediately prior to such exercise. ESC shall not, however, be otherwise responsible for any maintenance, replacement, or restoration of the Parcels, Vault B-5A, the underground tunnel under such Parcels, or the power plant, which are affected by this Easement.

9. Effect of Covenants. Each party hereto, and its successors and assigns, by the acceptance of a deed of conveyance for one or more of the Parcels affected by this Easement, accepts same subject to all restrictions, conditions, covenants, reservations, options, liens and charges, and the

jurisdiction, rights and powers granted or reserved by the easements granted hereunder, or to which these easements are subject, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared and all impositions and obligations hereby imposed shall be deemed and taken to be covenants running with the land and shall be binding upon the parties hereto and upon their successors and assigns, and shall inure to the benefit thereof in like manner as though the provisions, terms and restrictions of these easements were received and stipulated at length in each and every deed of conveyance.

10. Waiver. No covenant, restriction, condition or provision of this Easement shall be deemed to have been abrogated or waived by reason of any failure by the applicable party to enforce the same at any time, irrespective of the number of violations or breaches which may occur.

11. Indemnification. Each party ("Indemnifying Party") for itself and its successors and assigns hereby agrees to defend, indemnify and hold harmless the other parties ("Indemnified Party"), its successors and assigns and their respective directors, officers, members, employees, invitees, agents, representatives and affiliates from and against any and all claims, obligations, liabilities, losses, damages (excluding punitive damages), causes of action, suits, demands, claims for indemnity or contribution, penalties, judgments, costs and expenses (including reasonable attorneys' fees and expenses) arising from and out of any liability for bodily injury (including death), property damage, automobile accident liability or environmental liability, at any time existing or asserted, to the extent such arise out of, are caused or alleged to have been caused by any action or inaction of the Indemnifying Party, its successors and assigns or their respective directors, officers, members, employees, invitees, agents, representatives and affiliates in connection with or related to the use of the portions of the Parcels, Vault B-5A, the underground tunnel under the Parcels affected by this Easement, and the power plant (collectively, "Easement Areas") pursuant to this Easement, unless such claims, obligations, liabilities, losses, damages (excluding punitive damages), causes of action, suits, demands, claims for indemnity or contribution, penalties, judgments, costs and expenses of every kind and nature whatsoever, without regard to the form of action, are hereinafter suffered or incurred by the Indemnified Party or its directors, officers, members, employees, invitees, agents, representatives and affiliates, and such arise out of, directly or indirectly, (i) the negligence or willful misconduct of the Indemnified Party, its successors and assigns or their respective directors, officers, members, employees, invitees, agents, representatives and affiliates, or (ii) the Indemnified Party's operation or use of real property located adjacent to the Easement Areas that is owned by the Indemnified Party, its successors and assigns, in which case such Indemnified Party, its successors and assigns shall indemnify, defend, save and hold harmless the Indemnifying Party and its directors, officers, members, employees, invitees, agents, representatives and affiliates.

12. Savings Clause. The invalidity of any covenant, restriction, condition, limitation or any other provision of this Easement herein contained, as the case may be, shall not render the remainder of this Easement invalid, nor any other part therein contained.

13. Amendment, Modification, Notices. This Easement may only be amended or modified by the written consent and agreement of all parties hereto, or their respective successors and assigns. Any such modification or amendment shall be effective when duly recorded in the office of the Register of Deeds of Douglas County, Nebraska.

14. Notices or Other Communication Hereunder Shall Be In Writing. Notices and other communications hereunder shall be in writing and shall be sent certified or registered mail, return receipt requested, by other national overnight courier company, or by personal delivery. Notice shall be

deemed given upon receipt or refusal to accept delivery. Each party may change from time to time their respective address for notice hereunder by like notice to the other party. The notice addresses of TLHF, BHSF and ESC are as follows:

TLHF:	Kermit A. Brashear The Lutheran Home Foundation 711 North 108th Court Omaha, Nebraska 68154
with a copy to:	Kurth A. Brashear, Esq. BRASHEAR LLP North Old Mill 711 North 108th Court Omaha, Nebraska 68154-1714
BHSF:	Behavioral Health Support Foundation Attn: Kenneth E. Stinson Peter Kiewit Sons, Inc. 1000 Kiewit Plaza 3555 Farnam Street, 10th Floor Omaha, Nebraska 68131-3374
	and
	Rhonda A. Hawks The Hawks Foundation 1044 N. 115th Street, Suite 400 Omaha, Nebraska 68154-4446
with a copy to:	Max J. Burbach, Esq. Kendra J. Ringenberg, Esq. Koley Jessen, P.C. One Pacific Place, Suite 800 1125 South 103rd Street Omaha, Nebraska 68124
ESC:	Energy Systems Company Attn: Frank J. Reida, Esq. 2152 Howard Street Omaha, Nebraska 68102 2455

15. **Insurance.** Each party to this Easement agrees that it shall, at all times during the duration of this Easement, maintain at its sole expense (a) commercial general liability insurance protecting against any and all claims for injury to persons or property, with a minimum limit of \$1,000,000 coverage per occurrence and with an aggregate limit of at least \$2,000,000, (b) automobile liability insurance with \$1,000,000 combined single limit, and (c) workers' compensation insurance as required by law.

16. Authority. Each individual signing this Easement represents and warrants that such individual has been duly authorized to sign this Easement on behalf of the party for whom such individual signs.

17. Waiver of Subrogation. Anything in this Easement to the contrary notwithstanding, each party hereby releases the other party (and their respective agents, contractors, officers, members, managers and employees) from any liability, right of recovery, claim, action or cause of action the other party may have on account of loss, cost damage or expense which arises from any peril (a) that is or would be covered by any policy of insurance required to be carried by the releasing party under this Easement (regardless of whether such insurance is actually being carried); or (b) that is covered by any other insurance actually being carried by the releasing party at the time of such accident or occurrence, regardless of the negligence of the party being released or its agents, contractors, officers or employees, and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof, including that of the insurance carriers of the other party. TLHF, BHSF and ESC shall give their respective insurance carriers written notice of the terms of the above mutual waivers and the parties' respective insurance policies shall be properly endorsed, if necessary, to prevent the invalidation of said policies by reason of such waivers.

18. Entire Agreement. This Easement, including, without limitation, any Exhibits referred to herein and attached hereto, constitutes the entire agreement between the parties with respect to the subject matter hereof. There are no agreements, representations, warranties, promises, covenants, commitments or undertakings between the parties hereto other than those expressly set forth herein. This Easement supersedes all prior agreements, representations, warranties, promises, covenants, commitments or undertaking between the parties hereto, whether written or oral, with respect to the subject matter contained in this Easement.

19. Governing Law. This Easement shall be construed and governed in accordance with the laws of the State of Nebraska.

[Signature pages follow]

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Easement as of the day and year first above written.

THE LUTHERAN HOME FOUNDATION, a Nebraska
nonprofit corporation

By: *K. Brashear*

Kermit A. Brashear, President

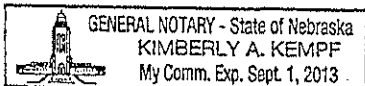
STATE OF NEBRASKA)

) ss.

COUNTY OF DOUGLAS)

Before me, a Notary Public, qualified in and for said County, personally came Kermit A. Brashear, President of The Lutheran Home Foundation, a Nebraska nonprofit corporation, known to me to be the identical person who signed the foregoing instrument, and acknowledged the execution thereof to be his voluntary act and deed, and the voluntary act and deed of said corporation.

WITNESS my hand and notarial seal on this 29th day of June, 2010.



Kimberly A. Kempf
Notary Public

BEHAVIORAL HEALTH SUPPORT FOUNDATION, a
Nebraska nonprofit corporation

By: *Rhonda A. Hawks*

Rhonda A. Hawks, Vice-President

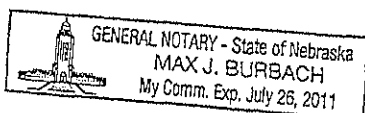
STATE OF NEBRASKA)

) ss.

COUNTY OF DOUGLAS)

Before me, a Notary Public, qualified in and for said County, personally came Rhonda A. Hawks, Vice-President of Behavioral Health Support Foundation, a Nebraska nonprofit corporation, known to me to be the identical person who signed the foregoing instrument, and acknowledged the execution thereof to be her voluntary act and deed, and the voluntary act and deed of said corporation.

WITNESS my hand and notarial seal on this 28 day of June, 2010.



Max J. Burbach
Notary Public

ENERGY SYSTEMS COMPANY, a Nebraska corporation

By: 
Frank J. Reida, V.P. & General Counsel

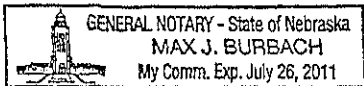
STATE OF NEBRASKA)

) ss.

COUNTY OF DOUGLAS)

Before me, a Notary Public, qualified in and for said County, personally came Frank J. Reida, Vice President and General Counsel of Energy Systems Company, a Nebraska corporation, known to me to be the identical person who signed the foregoing instrument, and acknowledged the execution thereof to be his voluntary act and deed, and the voluntary act and deed of said limited liability company.

WITNESS my hand and notarial seal on this 28 day of June, 2010.



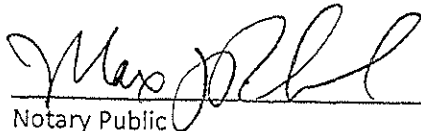
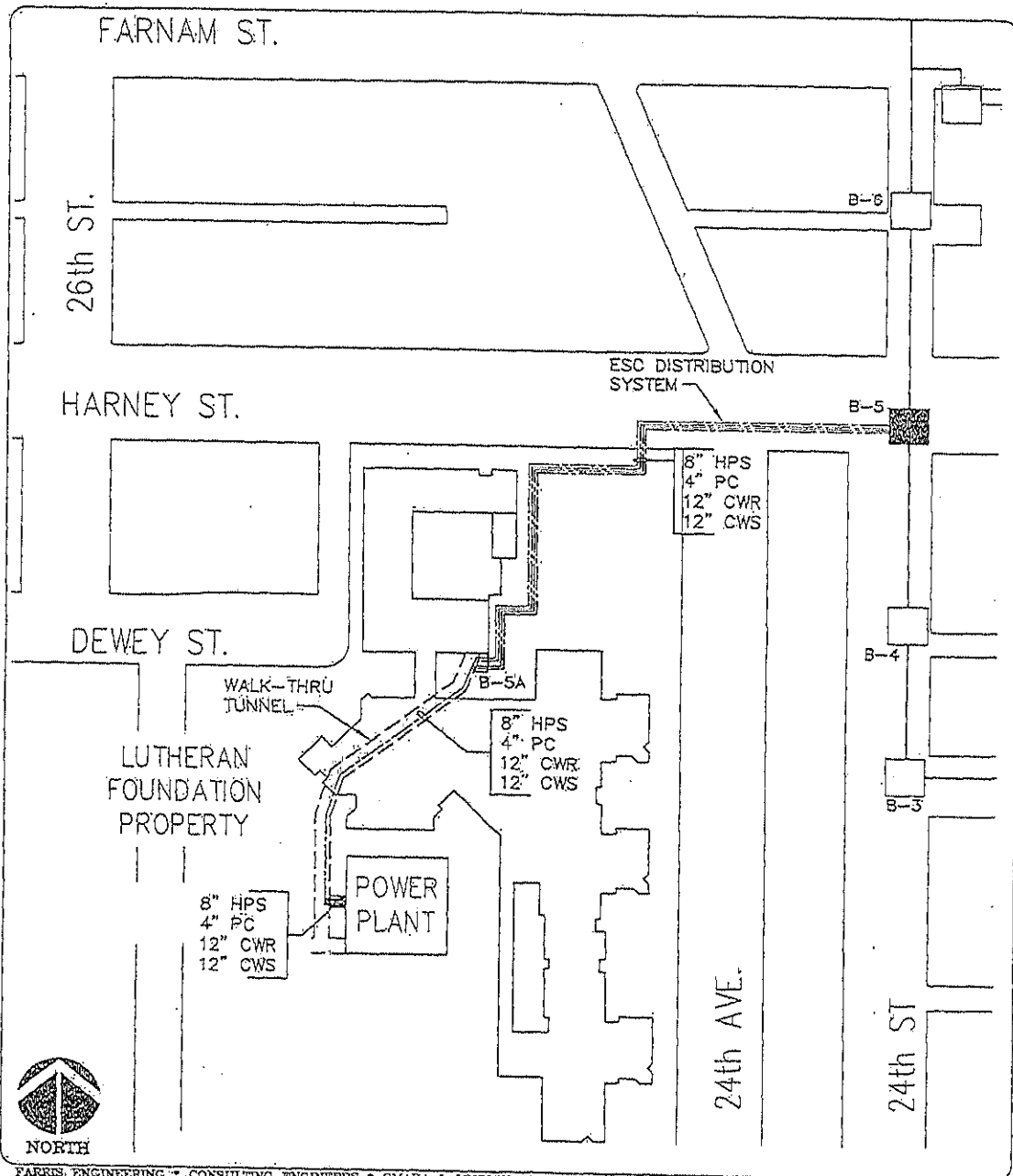

Notary Public

Exhibit 1

ILLUSTRATED DEPICTION OF PIPELINE




FARRIS ENGINEERING • CONSULTING ENGINEERS • OMAHA & LINCOLN, NEBRASKA • COLORADO SPRINGS, COLORADO • DES MOINES, IOWA					
	Project:		ENERGY SYSTEMS		
	Sheet Title:		DEWEY STREET PLANT		
	Project No:	082133	Addenda No:	-	Dwg Ref No: 2
	Date:	1-9-09	Checked By:	GTK	Addenda Mt: 2 of 2 Drawn By: CWK

Exhibit 2

ILLUSTRATED DEPICTION OF PIPELINE ACCESS EASEMENT

