

November 7, 2016

Mr. Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

RE: Dakota Access, LLC – Case No. PU-14-842
Enforcement Action

Dear Mr. Nitschke:

On October 25, 2016, Keitu Engineers & Consultants, Inc. filed a construction inspection report concerning the Dakota Access Pipeline Project. As a result of the report and subsequent investigation, Staff is filing a Formal Complaint against Dakota Access, LLC alleging two violations.

Enclosed is the Formal Complaint in Case No. PU-14-842.

Sincerely,



John M. Schuh
Staff Counsel

Encl.

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission,)	
Complainant,)	
)	
vs.)	
)	Case No. PU-14-842
)	Complaint
Dakota Access, LLC,)	
Respondent.)	

The Public Service Commission of North Dakota, by and through Advocacy Staff (Staff), for its complaint against Dakota Access, LLC (Dakota Access or the Company), alleges and shows the following:

I

Dakota Access is a registered Delaware corporation with a principal office located at 3738 Oak Lawn Avenue, Dallas, TX 75219. Dakota Access is a foreign limited liability company authorized to do business in North Dakota. Dakota Access' registered agent with the North Dakota Secretary of State is Corporation Service Company, 1709 N 19th St, Ste. 3, Bismarck, ND 58501.

II

North Dakota Century Code section 49-22-21 provides:

3. Any person who willfully engages in any of the following conduct shall be subject to a civil penalty of not to exceed ten thousand dollars for each such violation for each day that such violations persist, except that the maximum penalty may not exceed two hundred thousand dollars for any related series of violations:

....

b. Constructs, operates, or maintains an energy conversion facility or a transmission facility other than in compliance with the certificate or permit and any terms, conditions, or modifications contained therein.

....

The civil penalty provided for in this subsection may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise shall be deposited in the general fund and, if not paid, may be recovered in a civil action in the courts of the state.

4. Notwithstanding any other provision of this chapter, the commission may, by injunctive procedures, without bond or other undertaking, proceed against any person who willfully engages in any conduct described in subsection 3. No liability shall accrue to the commission or its authorized representative in proceeding against any person pursuant to this section.

North Dakota Century Code section 49-22-03(3) provides:

“Construction” includes any clearing of land, excavation, or other action that would affect the environment of the site after April 9, 1975....

The Certification to Order Provisions – Transmission Facility Siting, executed by Dakota Access on May 20, 2015, and incorporated into and made a part of the Commission’s January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access’ Dakota Access Pipeline Project, provides:

12. Company understands and agrees that if any cultural resource, paleontological site, archeological site, historical site, or grave site is discovered during construction, it must be marked, preserved and protected from further disturbances until a professional examination can be made and a report of such examination is filed with the Commission and the State Historical Society and clearance to proceed is given by the Commission.

....

38. ROUTE ADJUSTMENT WITHIN DESIGNATED CORRIDOR, NO AVOIDANCE AREA AFFECTED: Before conducting any construction activities for any adjustment to the designated route within the designated corridor under NDCC 49-22-16.3(1), the Company will file:

- a. Certification and supporting documentation affirming that construction activities will be within the designated corridor, will not affect any known exclusion or avoidance areas within the designated corridor;
- b. Certification and supporting documentation, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying the designated corridor, route and the route adjustment; and
- c. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

III

On October 25, 2016, Keitu Engineers & Consultants, Inc. (Keitu) filed a construction inspection report (Report) concerning the Dakota Access Pipeline Project (Project). Keitu reported that during an October 21, 2016 construction inspection of the Project, it was noted that an area had been flagged and construction of a route adjustment was in progress. The Report further indicated that Keitu inspectors were informed by Dakota Access' environmental inspector that the route adjustment had taken place as a result of an unanticipated discovery which occurred on or around October 15, 2016.

IV.

Staff contacted Dakota Access on October 25, 2016 to request information concerning the unanticipated discovery and the route adjustment. A deadline of October 27, 2016, was given for a response by Dakota Access to this request for information.

V.

On October 27, 2016, Dakota Access responded to the Staff's request. The response including a report of a professional examination regarding an unanticipated discovery of cultural materials, an explanation of events surrounding the discovery, a

map of the route adjustment and associated landowner information, and a letter from the North Dakota State Historic Preservation Office (SHPO), dated October 18, 2016, that concurred with the approach taken by Dakota Access to avoid the site containing the cultural materials.

The response by Dakota Access also included an affidavit by Joey Mahmoud, Vice President of Engineering for Dakota Access, which certified under North Dakota Century Code section 49-22-16.3(1) that all construction activities for the route adjustment will take place within the corridor previously established by the Commission, that the route adjustment will not impact any exclusion or avoidance areas, and that Dakota Access will comply with the Commission's orders, laws, and rules designating the corridor and route.

VI.

In a letter dated October 28, 2016, Staff acknowledged receipt of the Dakota Access's certification under North Dakota Century Code section 49-22-16.3(1) for the route adjustment.

VII.

Based on its investigation, Staff determined that an unanticipated discovery of cultural materials occurred on October 17, 2016.

VIII.

Based on its investigation, Staff determined that the Commission had not given clearance to proceed prior to Dakota Access beginning construction on the route adjustment.

IX

Based on its investigation, Staff determined that Dakota Access had not filed the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

X.

Based on its investigation, Staff determined that construction of the route adjustment commenced no later than October 21, 2018 and continued through October 25, 2016.

XI.

Based on its investigation, Staff concluded that Dakota Access violated the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for the Dakota Access Pipeline Project by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.

XII.

Based on its investigation, Staff concluded that Dakota Access violated the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for the Dakota Access Pipeline Project by failing to file with the Commission the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

XIII.

The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

Prayer for Relief

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Dakota Access, LLC in violation of the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access LLC's Dakota Access Pipeline Project by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.
2. That the Commission find Dakota Access, LLC in violation of the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders issuing a certificate of corridor compatibility and a route permit for Dakota Access LLC's Dakota Access Pipeline Project by failing to file with the Commission the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.
3. That the Commission impose an appropriate civil penalty up to \$10,000 per violation per day, but at least \$10,000 for violating the Commission's Orders in this case by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment and \$5,000 for violating the Commission's Orders in this case by failing to file with the Commission the required certifications under North

Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.

4. Such other relief that the Commission finds just and proper.

Dated this 7th day of November, 2016



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