

November 30, 2016

VIA HAND-DELIVERY

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**

Dear Mr. Nitschke:

Enclosed for filing in the above entitled matter, please find an original and ten (10) copies of the following documents:

- Dakota Access, LLC's Motion to Dismiss Complaint;
- Brief of Dakota Access, LLC in Support of Motion to Dismiss Complaint; and
- Certificate of Service.

Also enclosed is a CD containing the above-referenced documents in PDF format. Should you have any questions, please advise.

Sincerely,



LAWRENCE BENDER

LB/dmk
Enclosures

cc: William Leone – via e-mail
Keegan Pieper – via e-mail
John Schuh – via e-mail
Julie Prescott – via e-mail

60181471_1.docx

Attorneys & Advisors
main 701.221.8700
fax 701.221.8750
fredlaw.com

Fredrikson & Byron, P.A.
1133 College Drive, 245
Bismarck, North Dakota
58501-1215

PU-14-842 Filed 11/30/2016 Pages: 21
Motion to Dismiss Complaint, and Brief in Support of Motion
Dakota Access, LLC
Lawrence Bender, Fredrikson&Byron, P.A.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

Public Service Commission,)	Case No. PU-14-842
)	
v.)	
)	DAKOTA ACCESS, LLC'S
Dakota Access, LLC,)	MOTION TO DISMISS
)	COMPLAINT
Respondent.)	

[¶ 1] Pursuant to the Administrative Agencies Practice Act and Rule 12(b)(6) of the North Dakota Rules of Civil Procedure, Respondent, Dakota Access, LLC (“Dakota Access”), hereby moves to dismiss the Complaint filed by the North Dakota Public Service Commission (“Commission”). For the reasons set forth in the accompanying brief, the Complaint against Dakota Access fails to state a claim upon which relief can be granted by the Commission and therefore does not comply with the requirements of the Administrative Agencies Practice Act regarding sufficiency of complaints. Accordingly, the Complaint against Dakota Access should be dismissed.

[¶ 2] This Motion is based on the brief submitted herewith, and all of the pleadings and other documents previously submitted in this matter.

Dated this 30th day of November, 2016.

FREDRIKSON & BYRON, P.A.

By: 

LAWRENCE BENDER, ND Bar #03908
DANIELLE M. KRAUSE, ND Bar #06874
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com
dkrause@fredlaw.com

WILLIAM LEONE (*pro hac vice* admission
pending)
KRISTOPHER C. KLEINER, ND Bar #07949
Norton Rose Fulbright US LLP
1200 17th St., Ste. 1000
Denver, CO 80202
Telephone: 303.801.2700
william.leone@nortonrosefulbright.com
kris.kleiner@nortonrosefulbright.com

Attorneys for Respondent, Dakota Access, LLC

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

Public Service Commission,)	
)	Case No. PU-14-842
Complainant,)	
v.)	
)	BRIEF OF DAKOTA ACCESS, LLC
Dakota Access, LLC,)	IN SUPPORT OF MOTION TO
)	DISMISS COMPLAINT
Respondent.)	

INTRODUCTION

[¶ 1] Respondent, Dakota Access, LLC (“Dakota Access”) herein submits this Brief in Support of its Motion to Dismiss the Complaint filed by the North Dakota Public Service Commission (“Commission”). The Complaint against Dakota Access fails to state a claim upon which relief can be granted by the Commission and therefore does not comply with the requirements of the Administrative Agencies Practice Act regarding sufficiency of complaints. Accordingly, the Complaint against Dakota Access should be dismissed.

STATEMENT OF FACTS

A. The Dakota Access Pipeline.

[¶ 2] Dakota Access is a limited liability company organized for the purpose of constructing the Dakota Access Pipeline. See Second Supplemental Findings of Fact, Conclusions of Law and Order (hereinafter “Second Suppl. Order”) 3, Docket No. 192. The Dakota Access Pipeline (“Pipeline” or “Project”) is an approximately 1,154-mile-long, 12-, 20-, 24-, and 30-inch-diameter crude oil pipeline and associated facilities stretching from North Dakota to existing pipeline infrastructure near Patoka, Illinois. *Id.* at 3-4. In North Dakota, the Project will be located in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and Emmons

Counties. *Id.* The maximum capacity of the Project will be 100,000 barrels per day between the Stanley Tank Terminal and the Ramberg Tank Terminal, 240,000 barrels per day between the Ramberg Tank Terminal and the Epping Tank Terminal, 300,000 barrels per day between the Epping Tank Terminal and the Trenton Tank Terminal, 450,000 barrels per day between the Trenton Tank Terminal and the Watford City Tank Terminal, and 600,000 barrels per day between the Watford City Tank Terminal and the South Dakota border. *Id.* at 4-5.

[¶ 3] The Pipeline is necessary to accommodate oil production from the Bakken Petroleum System, which in the past has resulted in a five-fold increase in daily oil production in North Dakota in the last six years. *See* Combined Application for Certificate of Corridor Compatibility and Route Permit (“Application”) 7-8, Docket No. 1. Upon completion, the Pipeline will have capacity to transport more than half of the oil currently produced each day in North Dakota. *Id.* Currently, most of the oil produced in North Dakota is transported by truck or rail because of the lack of pipeline capacity and the need for access to markets on the coasts. *Id.*

[¶ 4] The Pipeline is a safer and more cost-effective method for North Dakota crude to reach markets on the East Coast and Gulf Coast. *Id.* The Pipeline will also ease overcrowding on railways, including railways in North Dakota, caused by increased crude oil shipments. *Id.* Additionally, the Pipeline will reduce the number of trucks on the road. *Id.*

B. Submission of an Application to the Commission for a Certificate of Corridor Compatibility and Route Permit for the Dakota Access Pipeline.

[¶ 5] On December 22, 2014, Dakota Access filed an Application for a Certificate of Corridor Compatibility and Route Permit with the Commission for the approximately 358 miles of Pipeline and associated facilities to be located in North Dakota. *See generally* Application, Docket No. 1. On January 20, 2016, after holding three hearings regarding the Project, the Commission entered its Findings of Fact, Conclusions of Law and Order (“Order”) issuing

Certificate of Corridor Compatibility Number 179 and Route Permit Number 191 for the Project. See Docket No. 134.

[¶ 6] On April 5, 2016, Dakota Access filed an application to amend Certificate of Corridor Compatibility No. 179 and Route Permit No. 191 for the Project (“Application to Amend”). See Docket No. 156. The Application to Amend sought Commission approval to modify portions of the previously designated corridor and route in Mountrail, Williams, McKenzie, and Dunn Counties. *Id.* On May 23, 2016, the Commission requested additional information concerning one proposed route adjustment located in Dunn County, identified in Dakota Access’s April 19, 2016 filing as “Reroute Location 50.” See Docket No. 176. On May 24, 2016, the Commission issued its Supplemental Findings of Fact, Conclusions of Law and Order (“Supplemental Order”) and issued to Dakota Access First Amended Certificate of Corridor Compatibility No. 179 and First Amended Route Permit No. 191 designating a corridor and designating a route for the Project to include the proposed route adjustments, with the exception of Reroute Location 50. See Docket No. 179.

[¶ 7] On June 17, 2016, Dakota Access filed a Memorandum from GeoEngineers in response to the information request of the Commission regarding Reroute Location 50. See Docket No. 188. On June 22, 2016, the Commission issued its Second Supplemental Findings of Fact, Conclusions of Law and Order (“Second Supplemental Order”) and issued to Dakota Access Second Amended Certificate of Corridor Compatibility No. 179 and Second Amended Route Permit No. 191 designating a corridor and designating a route for the Project to include all proposed route adjustments. See Docket No. 192. Attached to and made part of the Orders¹ was the May 20, 2015, Certification Relating to Order Provisions – Transmission Facility Siting and

¹ The January 20, 2016 Order, the May 24, 2016 Supplemental Order, and the June 22, 2016 Second Supplemental Order are hereinafter collectively referred to as the “Orders.”

accompanying Tree and Shrub Mitigation Specifications (“Certification”) signed by Dakota Access. *Id.* at 16-26.

C. Events Leading to the Filing of the Formal Complaint by the Commission.

[¶ 8] On October 25, 2016, Keitu Engineers & Consultants, Inc. (“Keitu”) filed a construction inspection report (“Report”) for the Project. *See* Docket No. 225; *see also* Compl. ¶ III, Docket No. 230. Keitu reported that during an October 21, 2016 construction inspection of the Project, Keitu noted an area had been flagged and construction of a route adjustment was in progress. *Id.* The Report further indicated Keitu inspectors were informed the route adjustment occurred as a result of an unanticipated discovery on or around October 15, 2016. *Id.*

[¶ 9] On October 25, 2016, Commission staff requested information from Dakota Access concerning any unanticipated discovery and route adjustment. *See* Compl. ¶ IV. On October 27, 2016, Dakota Access provided a response to the Commission. *See* Compl. ¶ V; *see also* Docket No. 227. The October 27, 2016 filing of Dakota Access provided notification to the Commission of the unanticipated discovery, and included a report of a professional examination regarding the unanticipated discovery of potential cultural materials, an explanation of events surrounding the discovery, and a letter from the North Dakota State Historic Preservation Office (“SHPO”) dated October 18, 2016, concurring with the approach taken by Dakota Access to avoid the site. *See* Docket No. 227.

[¶ 10] The materials submitted by Dakota Access regarding the unanticipated discovery were in accordance with Certification Provision number 12, which states:

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.

See Second Suppl. Order 17, Docket No. 192. Dakota Access also submitted all necessary documentation for the route adjustment pursuant to North Dakota Century Code Section 49-22-16.3(1). See Docket No. 227.

[¶ 11] On November 2, 2016, the Commission held a regularly scheduled Commission meeting. During the administrative portion of the Commission meeting, the Commission discussed the Dakota Access unanticipated discovery issue. See Commission Admin. Meeting (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. At the meeting, Commissioner Fedorchak instructed Commission staff to proceed with drafting and filing a complaint against Dakota Access for alleged violations of the Commission Orders. *Id.* On November 7, 2016, PSC staff filed a formal complaint against Dakota Access alleging two violations of the Commission Orders pursuant to North Dakota Century Code Chapter 49-22. See generally Compl., Docket No. 230.

[¶ 12] The Complaint alleges Dakota Access violated the Commission Orders issuing a certificate of corridor compatibility and route permit for the Project “by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.” See Compl. ¶ XI. The Complaint also alleges a violation of the Commission Orders “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.” See Compl. ¶ XI.

[¶ 13] North Dakota Century Code Section 49-22-16.3(1) states:

Before or during construction, a utility, without any action by the commission, may adjust the route of a gas or liquid transmission line within the designated corridor if, before conducting any construction activities associated with the adjustment, the utility files with the commission certification and supporting documentation that:

- a. The construction activities will be within the designated corridor;
- b. The construction activities will not affect any known exclusion or avoidance areas within the designated corridor; and
- c. The utility will comply with the commission's order, laws, and rules designating the corridor and designating the route.

In addition to the requirements set forth in North Dakota Century Code Section 49-22-16.3(1), Certification Provision 38 clarifies the following documents must be filed with the Commission for a route adjustment within the designated corridor:

- 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;
- c. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

See Second Suppl. Order 20-21, Docket No. 192.

[¶ 14] As a penalty for the violations set forth in the Complaint, Commission staff has recommended “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.” *See* Compl. at 6-7.

ARGUMENT

I. Applicable Law.

[¶ 15] The Commission is an administrative agency subject to the Administrative Agencies Practice Act. *See* N.D.C.C. ch. 28-32. The Administrative Agencies Practice Act, as adopted in North Dakota, contains certain requirements designed to ensure adjudicative proceedings comport with basic due process principles. Thus, in adjudicative proceedings against a specific-named respondent, “a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of the proceeding.” N.D.C.C. § 28-32-21(a). “The complaint shall contain a concise statement of the claims or charges upon which the complainant relies, including reference to the statute or rule alleged to be violated, and the relief sought.” *Id.*

[¶ 16] “The North Dakota Rules of Civil Procedure, although specifically designed to govern proceedings in courts of law, are applicable to administrative agencies with respect to their administrative proceedings.” N.D. Att’y Gen. Op. No. 85-24 (June 12, 1985). In reviewing Rule 81(a) of the North Dakota Rules of Civil Procedure, the North Dakota Supreme Court has discussed the applicability of the rules of civil procedure to administrative proceedings:

The statutory proceedings listed in Table A are excepted from [the North Dakota Rules of Civil Procedure] insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules. An examination of Table A discloses that Chapter 28-32, N.D.C.C., the Administrative Agencies Practice Act, is not listed among the statutes, which implies that Chapter 28-32 is not exempt from the Rules of Civil Procedure.

Reliance Ins. Co. v. Pub. Serv. Comm’n, 250 N.W.2d 918, 920 (N.D. 1977); *see also* *Evanson v. Wigen*, 221 N.W.2d 648 (N.D. 1974). Accordingly, administrative proceedings initiated pursuant to Chapter 28-32 involving the Commission must comply with the North Dakota Rules of Civil Procedure.

[¶ 17] As is done in other administrative proceedings and in proceedings before North Dakota district courts, a complaint should be dismissed if there are insufficient facts to warrant the relief sought. *See* N.D.R.Civ.P. 12(b)(6) (failure to state a claim upon which relief can be granted is a valid defense to a claim for relief, and a complaint can be dismissed on these grounds); *Vandall v. Trinity Hosps.*, 2004 ND 47, ¶ 25, 676 N.W.2d 88 (finding if a formal complaint served upon a physician and with the Board of Medical Examiners for disposition under Chapter 28-32 of the North Dakota Century Code does not contain sufficient facts to warrant further action, the complaint must be dismissed). The Complaint of the Commission must contain sufficient factual allegations to satisfy Chapter 28-32 or the Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

II. The Complaint Filed By the Commission Should Be Dismissed.

A. The Commission Only Has Authority to Impose the Penalty Sought in the Complaint Under Chapter 49-22 if Willful Conduct is Present.

[¶ 18] Administrative agencies are creatures of legislative action and only have the power which has been granted to them or necessarily implied from the grant. *Heier v. N.D. Dept. of Corr. & Rehab.*, 2012 ND 171, ¶ 18, 820 N.W.2d 394; *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984). The North Dakota Supreme Court has specifically indicated the Commission's "authority to regulate is limited to that given it by the Legislature." *Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148-49 (N.D. 1983) (internal citations omitted).

[¶ 19] For violations of the Energy Conversion and Transmission Facility Siting Act ("Siting Act"), which is the basis for the allegations here, the Commission can impose a penalty on a company that engages in the following conduct:

- a. Begins construction of an energy conversion facility or a transmission facility without having been issued a certificate or permit pursuant to this chapter.
- 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.
- c. Violates any provision of this chapter or any rule adopted by the commission pursuant to this chapter.
- d. Falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained pursuant to a certificate or permit issued pursuant to this chapter.

N.D.C.C. § 49-22-21(3). The penalty cannot “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.” *Id.* However, the Commission can only impose penalties for conduct engaged in *willfully*. *See id.*

[¶ 20] For violations of the Siting Act, the North Dakota Legislature has only granted the Commission power to impose penalties under Chapter 49-22 for the conduct noted above which is engaged in willfully by an entity. During the 2015 Legislative Session, the Commission sought to broaden its authority to impose civil penalties under Chapter 49-07, which allows for wider enforcement of penalties in other areas regulated by the Commission. *See* S.B. 2122, 64th N.D. Leg. Assemb. (2015). The testimony from the Commission with respect to Senate Bill 2122 specifically discussed the limited authority of the Commission to impose penalties under Chapter 49-22:

The Public Service Commission implements the state’s Energy Conversion and Transmission Facility Siting Act (Siting Act), North Dakota Century Code Chapter 49-22. Chapter 49-22 includes civil penalties of up to \$10,000 per violation, per day, for willful violations. ***Chapter 49-22 does not allow the Commission any discretion to enforce violations for culpability that is other than willful***, and willful is not defined in Chapter 49-22.

The Public Service Commission's general penalty authority, applicable to most of the Commission's jurisdiction, is found in North Dakota Century Code Chapter 49-07. Chapter 49-07 allows wide enforcement discretion to the Commission for varying degrees of culpability, and includes a substantially smaller maximum civil penalty. However, *Chapter 49-07 currently is not applicable to siting law violations, and consequently, the only siting law violations for which a penalty can be imposed are willful violations.*

Hearing on S.B. 2122 Before the Senate Energy and Natural Resources Comm., 64th N.D. Leg. Assemb. (Jan. 15, 2015) (testimony of Illona Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission) (emphasis added).

[¶ 21] The attempt to broaden the powers of the Commission for violations of the Siting Act in Senate Bill 2122 ultimately failed during the 2015 Legislative Session. Accordingly, the North Dakota Legislature has only granted the Commission the power to impose penalties or fines for willful violations of the Siting Act and orders of the Commission under Chapter 49-22. As discussed in detail below, the Complaint is completely devoid of any allegations of willful conduct by Dakota Access to violate the Commission Orders. Accordingly, the Commission does not have the authority to impose the penalties sought under Chapter 49-22.

B. The Complaint Fails to Establish Any Willful Conduct By Dakota Access Which Would Violate the Commission Orders or Rules.

[¶ 22] As established by the Administrative Agency Practices Act, the Commission bears the burden of establishing facts for a claim. *See* N.D.C.C. § 28-32-21(a) (“The complaint shall contain a concise statement of the claims or charges upon which the complainant relies . . .”). For violations of the Siting Act, the Commission cannot establish facts for a claim by merely pleading legal conclusions based on allegations that do not establish willful behavior. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Instead, there must be facts

showing grounds for a plausible claim for relief, not merely labels and conclusions and a formulaic recitation of the law. *Id.* at 679; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1) Willful Conduct Defined.

[¶ 23] One issue with determining culpability under the Siting Act is that Chapter 49-22 of the North Dakota Century Code does not define “willful” behavior. *See generally* N.D.C.C. ch. 49-22. The lack of definition in the statute was raised during the 2015 legislative session, but the issue was not resolved. *Hearing on S.B. 2122, supra* (testimony of Illona Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission). Guidance as to the definition of willful conduct can be sought from case law, various legal sources, and the common meaning of the word.

[¶ 24] Generally, willful is defined as “[v]oluntary and intentional, but not necessarily malicious.” *See Willful*, Black’s Law Dictionary (8th ed. 2004). Willfulness is further defined as the “fact or quality of acting purposely or by design.” *See Willfulness*, Black’s Law Dictionary. For use in defining the term to juries in civil proceedings, North Dakota has determined “[w]illful misconduct’ means intentionally doing that which should not be done or intentionally failing to do that which should be done, knowing that injury to a person will probably result or recklessly disregarding the possibility that injury to a person may result.” N.D. Pattern Jury Instrs., Civil, No. C – 2.12 (2015) (citing *Rokusek v. Bertsch*, 50 N.W.2d 657 (N.D. 1951); *Stokka v. Cass Cty. Elec. Coop., Inc.*, 373 N.W.2d 911, 915 (N.D. 1985)).

[¶ 25] The meaning of the legal term “willful” varies among courts and subject matters. In federal tax cases, “willfulness” requires proof that the defendant knew of a legal duty and voluntarily and intentionally violated the duty. *See Cheek v. United States*, 498 U.S. 192, 200-01 (1991). A North Dakota federal bankruptcy court in reviewing willful acts with respect

to dischargeability of debts determined “‘willful’ requires intentional and deliberate action.” *Matter of Langer*, 12 B.R. 957, 959 (D.N.D. 1981). The common element among all of these definitions of “willful” is the requirement of a party to intentionally engage in an action.

2) Dakota Access Did Not Willfully Violate the Siting Act or Commission Orders.

[¶ 26] Critically absent from the Complaint of the Commission are any claims or facts establishing Dakota Access acted *willfully* to violate the Orders or rules of the Commission under Chapter 49-22. While the Commission may take issue with the timing of certain notifications provided in this matter, the Commission does not have carte blanche to impose penalties or fines for actions the Commission merely finds “disappointing.” *See* Commission Admin. Meeting at 6:55 (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3> (statement by Commissioner Fedorchak that she “was really extremely disappointed” with the delay of Dakota Access in providing notification to the Commission). The actions of a company must be willful violations of the law or Commission order to impose a penalty under the Siting Act. *See* N.D.C.C. § 49-22-21. The factual basis set forth in the Complaint does not include any actions of Dakota Access that could even remotely be construed as willful violations of the Commission’s Orders or rules.

[¶ 27] Absent the intent to violate an order of the Commission, there can be no willful conduct which would allow the imposition of a penalty under North Dakota Century Code Section 49-22-21. Commissioner Fedorchak conceded there is no set timeframe in the Orders for notification of an unanticipated discovery. Commission Admin. Meeting at 16:24 (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. While the Commission noted the implied intent is for immediate notification of unanticipated

discoveries, a timeframe is not set forth in the Orders or the Siting Act. A company cannot “willfully” violate a timeframe that does not exist in law or by order.

[¶ 28] Further, Commission Fedorchak stated the delay in providing notification to the Commission “could have been a miscommunication within the company There are a lot of moving parts in this process and it could have been that the people on the ground did not fully appreciate or know the process that was required.” Commission Admin. Meeting at 9:48 (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. A miscommunication hardly rises to the level of willful, intentional, conduct to violate the Commission Orders warranting a penalty under North Dakota Century Code Section 49-22-21.

[¶ 29] During the various discussions regarding the sufficiency of the allegations to bring a Complaint, Commissioner Fedorchak addressed the actions of Dakota Access during the siting process with respect to this incident and generally. Specifically, in response to a media question regarding whether Dakota Access has not been acting in good faith, Commissioner Fedorchak stated she does not “have any reason to believe that . . . [and] no evidence whatsoever to suspect that.” Commission Special Meeting at 20:07 (Nov. 8, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611081415-special-1.mp3>.

[¶ 30] Critically important to the notification requirement found in Certification Provision 12 regarding unanticipated discoveries is providing notification to the SHPO. Commissioner Fedorchak went so far as to commend Dakota Access for involving the SHPO, and stated:

[Dakota Access] did the right thing in notifying the SHPO. That was the most important thing, quite honestly, that the SHPO be notified and that construction be stopped, SHPO be notified, and expertise be brought in to effectively delineate where the site is and to develop a re-route around it and ensure that it is not impacted, so that’s a good thing.

Commission Admin. Meeting at 7:03 (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. These comments of the Commission further support the clear absence of any willful intent of Dakota Access to violate the Orders.

C. The Complaint Does Not Contain Sufficient Claims to Comply with the Requirements of the Administrative Agencies Practice Act.

[¶ 31] In addition to the Complaint being completely devoid of allegations regarding any willful behavior of Dakota Access, the Complaint does not “contain a concise statement of the claims or charges upon which the complainant relies, including reference to the statute or rule alleged to be violated, and the relief sought.” *See* N.D.C.C. § 28-32-21(1)(a). The lack of clarity regarding the allegations and violations further warrants dismissal of the Complaint.

[¶ 32] In the prayer for relief, staff requests the Commission find Dakota Access “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.” *See* Compl. at 6. However, given the route adjustment was within the previously designated corridor, and did not impact any exclusion or avoidance area, no clearance to proceed with the route adjustment was required. *See* N.D.C.C. § 49-22-16.3(1) (“Before or during construction, a utility, *without any action by the commission*, may adjust the route of a gas or liquid transmission line within the designated corridor”) (emphasis added). It is likely this allegation is intended to reference clearance to proceed under Certification Provision 12, but such specificity is absent from the Complaint. The route adjustment itself did not require Commission approval to proceed, so there can be no violation for failure to obtain approval for the route adjustment.

[¶ 33] As written, the Complaint lacks the clarity required to advance the allegations in this proceeding. Even if the Complaint is found to contain sufficient allegations regarding the violations, the Complaint of the Commission wholly fails to allege any conduct that could rise to the level of a “willful” violation under Chapter 49-22. There is nothing in the record indicating Dakota Access willfully violated the Orders of the Commission. As Commissioner Fedorchak herself noted, the delay in notification of the unanticipated discovery and the route adjustment simply could have been a miscommunication, and there is nothing to suggest Dakota Access has not been acting in good faith. A delay in providing these notifications does not rise to the level of willful conduct by Dakota Access in violation of the Commission Orders or any law.

CONCLUSION

[¶ 34] The Complaint filed by the Commission does not set forth with specificity any willful conduct by Dakota Access which would allow for the imposition of a penalty under Chapter 49-22. Additionally, the Complaint does not comply with the North Dakota Administrative Agencies Practice Act or North Dakota Law given the threadbare assertions contained therein. The Complaint against Dakota Access should therefore be dismissed.

Dated this 30th day of November, 2016.

FREDRIKSON & BYRON, P.A.

By: 

LAWRENCE BENDER, ND Bar #03908
DANIELLE M. KRAUSE, ND Bar #06874
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
Telephone: 701.221.8700
lbender@fredlaw.com
dkrause@fredlaw.com

WILLIAM LEONE (*pro hac vice* admission pending)

KRISTOPHER C. KLEINER, ND Bar #07949

Norton Rose Fulbright US LLP

1200 17th St., Ste. 1000

Denver, CO 80202

Telephone: 303.801.2700

william.leone@nortonrosefulbright.com

kris.kleiner@nortonrosefulbright.com

Attorneys for Respondent, Dakota Access, LLC

60074771_3.docx

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

**Dakota Access, LLC
Dakota Access Pipeline Project
Siting Application**

CASE NO. PU-14-842

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that true and correct copies of the following documents:

- Dakota Access, LLC's Motion to Dismiss Complaint; and
- Brief of Dakota Access, LLC in Support of Motion to Dismiss Complaint

were on the 30th day of November, 2016 served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

Zachary E. Pelham
Pearce & Durick
314 E. Thayer Ave.
P.O. Box 400
Bismarck, ND 58502-0400

Derrick Braaten
Baumstark Braaten Law Partners
109 North Fourth Street, Suite 100
Bismarck, ND 58501-4003

Matt J. Kelly
Tarlow and Stonecipher, PLLC
1705 West College Street
Bozeman, MT 59715

Bryan Van Grinsven
McGee, Hankla & Backes
2400 E. Burdick Expy., Ste. 100
Minot, ND 58702-0998

Bryan L. Giese
Attorney at Law
107 First Ave. NW
Mandan, ND 58554-3150

Brian Bjella
Blaine Johnson
Crowley Fleck, PLLP
100 West Broadway, Suite 250
Bismarck, ND 58501

Tim Dawson, Director
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, ND 58503

The original and ten (10) copies of the foregoing documents were also hand delivered to the North Dakota Public Service Commission on said date.

By: 

LAWRENCE BENDER, ND Bar #03908
DANIELLE M. KRAUSE, ND Bar #06874
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
Facsimile: (701) 221-8750
lbender@fredlaw.com
dkrause@fredlaw.com

WILLIAM LEONE (*pro hac vice* admission
pending)
KRISTOPHER C. KLEINER, ND Bar #07949
Norton Rose Fulbright US LLP
1200 17th St., Ste. 1000
Denver, CO 80202
Telephone: 303.801.2700
william.leone@nortonrosefulbright.com
kris.kleiner@nortonrosefulbright.com

Attorneys for Respondent, Dakota Access, LLC