

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Access, LLC
Dakota Access Pipeline Project
Siting Application

Case No. PU-14-842

AFFIDAVIT OF SERVICE BY REGULAR AND ELECTRONIC MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **2nd day of February, 2017**, she deposited in the United States Mail, Bismarck, North Dakota, **14** envelopes by first class mail, fully prepaid and **61** addressees electronically mailed a copy of:

- **Order on Motion to Dismiss Complaint**


The envelopes and electronic mails respectively were addressed as follows:

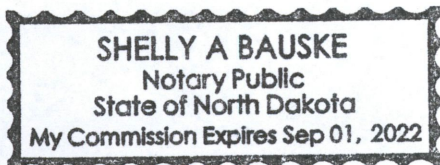
See attached list.

Each post office address shown is the respective addressee's last reasonably ascertainable post office address and each email address is the respective addressee's last reasonably ascertainable electronic mailing address.

Subscribed and sworn to before me
this **2nd day of February, 2017**.




Notary Public



SEAL

Pu-14-842

County Auditor
Dunn County
205 Owens Street
Manning ND 58642-0105

County Commission
Dunn County
205 Owens Street
Manning ND 58642-0105

Emmons County Auditor
100 4th Street NW
Linton ND 58552

Emmons County Commission
100 4th Street NW
Linton ND 58552

McKenzie County Auditor
201 5th Street NW
Watford City ND 58854

McKenzie County Commission
201 5th Street NW
Watford City ND 58854

County Auditor
Mercer County
PO Box 39
Stanton ND 58571

Chairman
Mercer County Commissioners
P O Box 39
Stanton ND 58571

COUNTY AUDITOR
MORTON COUNTY
210 2ND AVE NW
MANDAN ND 58554

CHAIR COUNTY COMMISSION
MORTON COUNTY
210 2ND AVE NW
MANDAN ND 58554

County Auditor
Mountrail County
PO Box 69
Stanley ND 58784-0069

Chairman County Commission
Mountrail County
PO Box 69
Stanley ND 58784-0069

County Auditor
Williams County
PO Box 2047
Williston ND 58802-2047

County Commissioner
Williams County Commission
PO Box 2047
Williston ND 58802-2047

ndaero@nd.gov
Melinda Weninger
Aeronautics Commission
PO Box 5020
Bismarck ND 58502-5020

masagsve@nd.gov
Matt Sagsveen
Attorney General's Office

jmittleider@nd.gov
John Mittleider
Department of Commerce
600 East Blvd
Bismarck ND 58505

cte@nd.gov

Dept of Career and Technical Education
State Capitol
Bismarck ND 58505

governor@nd.gov
Doug Burgum
Governor's Office
State Capitol
Bismarck ND 58505

ppicha@nd.gov
Paul Picha
Historical Society

samuele.warren.1@us.af.mil
Sam Warren
Minot Air Force Base

lweispfenning@nd.gov
Linda Weispfenning
N D Water Commission
900 E Boulevard
Bismarck ND 58505

ndascd@lincolnoakes.com

ND Assoc of Soil Conservation Dist
3310 University Drive
Bismarck ND 58504-7564

mdockter@nd.gov
Monte Dockter
ND Department of Transportation
State Highway Building
Bismarck ND 58505

goehring@nd.gov
Doug Goehring
Agriculture Department
State Capitol
Bismarck ND 58505

todd.j.lindquist@usace.army.mil
Todd Lindquist
Corp of Engineers
PO Box 527
Riverdale ND 58565-0527

dhseo@nd.gov

Department of Human Services

energyimpact@nd.gov

Energy Infrastructure and Impact Office

squinnell@nd.gov
Susan Quinnell
Historical Society

sjdavis@nd.gov
Scott Davis
Indian Affairs Commission
State Capitol - 1st Floor J Wing INSIDE
Bismarck ND 58505

gheiser@nd.gov
Gerald Heiser
N D Water Commission
900 E Boulevard
Bismarck ND 58505

jay.fuhrer@nd.usda.gov
Jay Fuhrer
NATURAL RESOURCE CONSERVATION SVC
PO BOX 1458
BISMARCK ND 58502-1458

ksonsalla@nd.gov
Kevin Sonsalla
ND Department of Commerce

jgisinger@nd.gov
Jennifer Gisinger
ND Dept. of Commerce

Larry.kotchman@ndsu.edu
MR LARRY KOTCHMAN
ND FOREST SERVICE
MOLBERG CENTER 307 1ST STREET EAST
BOTTINEAU ND 58318

caboyd@nd.gov
Clint Boyd
ND Geological Survey

cgiesen@nd.gov
Cheri Giesen
ND Job Service
P.O. Box 5507 INSIDE MAIL
Bismarck ND 58506-5507

mhaupt@nd.gov
Mike Haupt
ND Land Department

ndicin@nd.gov
North Dakota Industrial Commission

bbekkedahl@nd.gov
Brad Bekkedahl
Senator
418 12th Ave West
Williston ND 58801-4730

tsando@nd.gov
Todd Sande
State Engineer
ND Water Commission

krockema@nd.gov
Karl Rockeman
State Health Department

jmagr@nd.gov
Jeffrey Magrum
State Representative
PO Box 467
Hazelton ND 58544-0467

kkempenich@nd.gov
Keith Kempenich
State Representative
9005 151st Ave. SW
Bowman ND 58623-8857

tsteinwa@nd.gov
Terry Steinwand
ND GAME & FISH DEPT
INSIDE MAIL

emurphy@nd.gov
MR ED MURPHY
ND GEOLOGICAL SURVEY

labor@nd.gov
Tony Weiler
ND Labor Dept
600 E Blvd Ave
Bismarck ND 58505

jjkringstad@ndpipelines.com
ND Pipeline Authority

andreastomberg@lignite.com
Andrea Stomberg
North Dakota Transmission Authority

drust@nd.gov
David S. Rust
Senator
PO Box 1198
Tioga ND 58852-1198

pwax@nd.gov
Peter Wax
State Health Department

dglatt@nd.gov
Dave Glatt
State Health Department

boliver@nd.gov
Bill Oliver
State Representative
PO Box 1264
New Town ND 58763-1264

tbjones@nd.gov
Terry B. Jones
State Representative
PO Box 1964
New Town ND 58763-1964

dlongmuir@nd.gov
Donald Longmuir
State Representative
PO Box 519
Stanley ND 58784-0519

bertanderson@nd.gov
Bert Anderson
State Representative
P O Box 604
Crosby ND 58730

phattlestad@nd.gov
Patrick Hatlestad
State Representative
PO Box 1342
Williston ND 58802-1342

lsimons@nd.gov
Luke Simons
State Representative
11509 27th Street SW
Dickinson ND

mbrandenburg@nd.gov
MIKE BRANDENBURG
STATE REPRESENTATIVE
8044 COUNTY ROAD 34
EDGELEY ND 58433-9761

jkannianen@nd.gov
Jordan Kannianen
State Senator
8011 51st Street NW
Stanley ND 58784-9562

karmstrong@nd.gov
Kelly Armstrong
State Senator
513 Elks Drive
Dickinson ND 58601-2947

jkunruh@nd.gov
Jessica Unruh
STATE SENATOR DIST 33
213 10th Street NE
Beulah ND 58523

wendy_ross@nps.gov
Wendy Ross
Theodore Roosevelt Nat'l Park
PO Box 7
Medora ND 58645

gjwiche@usgs.gov
District Chief
U S Geological Survey
821 E Interstate Ave
Bismarck ND 58501

gsukut@nd.gov
Gary Sukut
State Representative
1603 Fourth Avenue East
Williston ND 58801-4324

dzubke@nd.gov
Denton Zubke
State Representative
PO Box 927
Watford City ND 58854-0927

jayseibel@nd.gov
Jay Seibel
State Representative
5801 Lakeshore Estates Lot 27
Beulah ND 58523-9124

mischatz@nd.gov
MIKE SCHATZ
STATE REPRESENTATIVE
400 9TH ST E
NEW ENGLAND ND 58647-7528

gkreidt@nd.gov
GARY KREIDT
STATE REPRESENTATIVE DIST 33
3892 COUNTY RD 86
NEW SALEM ND 58563-9406

bbowman@nd.gov
Bill Bowman
State Senator
408 First St. SW
Bowman ND 58623-9753

rerbele@nd.gov
ROBERT S ERBELE
STATE SENATOR
6512 51ST AVE SE
LEHR ND 58460-9149

bill_whitworth@nps.gov
Chief of Resource Management
Theodore Roosevelt National Park
P O Box 7
Medora ND 58645-0007

sschwenke@fs.fed.us
Sherri Schwenke
U S Forest Service
240 W Century Ave
Bismarck ND 58501-1494

cenwo-de@usace.army.mil
District Engineer
US Army Engineer District Omaha
1616 Capitol Ave
Omaha NE 68102

managementauthority@fws.gov

US Fish & Wildlife Service
3425 Miriam Ave
Bismarck ND 58501

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-14-842

ORDER ON MOTION TO DISMISS COMPLAINT

January 31, 2017

Preliminary Statement

On November 7, 2016, Commission Advocacy Staff filed a formal Complaint alleging that Dakota Access, LLC (Dakota Access) violated the Commission's January 20, 2016; May 24, 2016; and June 22, 2016 Orders by failing to obtain, from the Commission, clearance to proceed prior to beginning construction of a route adjustment (Complaint).

On November 8, 2016, the Commission deemed the Complaint states a *prima facie* case and directed that the Complaint be served on Dakota Access.

On November 30, 2016, Dakota Access filed a Motion to Dismiss Complaint with a supporting brief.

On December 16, 2016, Advocacy Staff filed a Memorandum in Opposition to Respondent's Motion to Dismiss Complaint.

On January 5, 2017, Dakota Access filed a Reply Brief in Support of Motion to Dismiss Complaint.

Factual Background

The Commission is familiar with the general background and history concerning Case Number PU-14-842. A more detailed discussion of the background on this case can be found in Commission's Findings of Fact, Conclusions of Law and Order. Docket No. 134. An abbreviated background, that is relevant to the pending motion to dismiss, follows.

Dakota Access, LLC ("Dakota Access") filed applications for a certificate of corridor compatibility and a route permit concerning approximately 358 miles of 12-, 20-, 24-, and 30-inch diameter crude oil pipeline and associated facilities in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and Emmons Counties, North Dakota, and

terminals near Stanley in Mountrail County, near Tioga in Williams County, near Epping in Williams County, near Trenton in Williams County, near Watford City in McKenzie County, and near Johnsons Corner in McKenzie County ("Project"). The Commission held three hearings on the Project and issued a corridor certificate and route permit to Dakota Access on January 20, 2016 ("Order"). Docket No. 134. As part of the hearing process, Dakota Access executed the Certification Relating to Order Provisions; the Order incorporated the Certification. Docket Nos. 61, 134.

The Commission retained Keitu Engineers & Consultants, Inc. ("Keitu") as independent construction inspectors for the Project. Docket No. 135. On October 25, 2016, Keitu filed a site inspection trip report with the Commission that stated Dakota Access had informed Keitu of an unanticipated discovery and that a route adjustment had occurred. Docket No. 225. Dakota Access formally provided the Commission with information concerning the unanticipated discovery and route adjustment on October 27, 2016. Docket No. 227.

The Commission held a meeting on November 2, 2016, and discussed the unanticipated discovery and route adjustment that was reported to the Commission by Keitu. At the meeting, Commissioner Fedorchak instructed staff to draft a formal Complaint against Dakota Access for possible violations of the Order. A formal Complaint was prepared by Commission advocacy staff and was served on Dakota Access. Docket No. 230. The Complaint speaks for itself, but generally alleges that Dakota Access violated the Commission's Order by failing to report the unanticipated discovery and route adjustment to the Commission.

Dakota Access did not Answer and instead filed a Motion to Dismiss on November 30, 2016. Docket No. 245. Dakota Access argues, generally, that the Complaint fails to state a claim because the allegations are insufficient as a matter of law. Commission advocacy staff filed a Response in Opposition to the Motion to Dismiss on December 16, 2016, arguing, generally, that the Complaint does state a valid claim and sufficiently states the claim. Docket No. 254. Dakota Access filed a Reply Brief in Support of its Motion to Dismiss on January 5, 2017. Docket No. 256.

The motion is ripe for review by the Commission. None of the parties requested a hearing on the Motion to Dismiss.

Law and Analysis

The purpose of a motion to dismiss under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure is to test the legal sufficiency of a Complaint. The merits of the Complaint are not weighed at this stage. In reviewing a motion to dismiss, the allegations of the Complaint are taken as true and all reasonable inferences that can be drawn from the Complaint are drawn in favor of the plaintiff. *Sweierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n. 1, (2007). A Complaint should not be dismissed if "it may be

supported by showing any set of facts consistent with the allegations in the complaint.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

Rule 8(a)(1) of the North Dakota Rules of Civil Procedure provides that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief....” Rule 12(b)(6) of the North Dakota Rules of Civil Procedure requires dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. The standard for dismissal under Rule 12(b)(6) is well-established:

A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(vi) tests the legal sufficiency of the claim presented in the complaint.... [W]e construe the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint. Under N.D.Civ.P 12(b)(vi), a complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.

Nandan, LLP v. City of Fargo, 2015 ND 37, ¶ 11, 858 N.W.2d 892. It is also accepted that determinations on the merits are generally preferred to dismissal of the pleadings. *Kouba v. Febco, Inc.*, 543 N.W.2d 245, 247 (N.D. 1996). A claim should only be dismissed if the court cannot “discern a potential for proof to support it.” *Town v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762. Detailed factual allegations are not necessary under the Rule 8 pleading standard, rather a plaintiff must set forth grounds of its entitlement to relief which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action....” *Bell Atlantic*, 550 U.S. at 555. A tribunal must also consider whether the allegations set forth in the Complaint “plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The Complaint satisfies the requirements of N.D.R.Civ.P. Rule 8, as well as N.D. Admin. Code § 69-02-02-02(2). Allegations are made that Dakota Access failed to comply with the Commission’s Order. This alone satisfies the legal requirements for setting forth a claim under North Dakota law. Further, the Commission determined the Complaint stated a prima facie case pursuant to N.D. Admin. Code § 69-02-02-02(4). Docket No. 232.

Dakota Access argues that the Complaint does not contain allegations of a “willful” violation. But Dakota Access ignores the fact that the Complaint, at paragraph II, quotes N.D.C.C. § 49-22-21, which requires a “willful” violation. A Complaint is required to put forth a short and plain statement detailing how the pleader is entitled to relief. It is clear that the Complaint alleges a “willful” violation occurred. The Complaint acknowledges the standard that must be reached to prove a violation and sets forth the allegations. Whether these allegations can be proven, after a hearing, remains to be seen. To be absolutely clear, the Commission is not deciding the issue of whether the alleged violation was “willful” or not. Rather, it is determining that the pleading sufficiently states a claim allowing the matter to proceed to a hearing on the merits.

There remains a question of fact as to whether the failure of Dakota Access to notify the Commission, as it agreed it would do, was "willful." Because there remains a question of fact on whether a "willful" violation occurred, a determination of the legal meaning of "willful" will be determined after factual evidence is received. While legislative history may be interesting, it is only relevant if a statute is ambiguous. *Sorenson v. Felton*, 2011 ND 33, ¶ 16, 793 N.W.2d 799. There has been no allegation that N.D.C.C. § 49-22-21 is ambiguous. Because the statute is not ambiguous, and the only question is as to the meaning of the word "willfully," the Commission is more than able to apply standard statutory construction to determine the meaning of "willfully" at the appropriate time.

Dakota Access attempts to rely on statements made by Commissioner Fedorchak at two public meetings to support its motion to dismiss. The Commission acts as a body. It is made up of three duly elected Commissioners. Commissioner Fedorchak has the ability to speak for herself, but only the Commission can speak for the Commission. N.D.C.C. §§ 49-01-01(1-2), 49-01-02, 49-01-06. Using the logic of Dakota Access, statements by one Commissioner would bind the other two Commissioners to those statements. This argument is contrary to established law and is rejected.

Further, even if the statements of Commissioner Fedorchak were binding on the Commission, which they are not, the statements presented in the briefings of Dakota Access are either taken out of context or are simply wrong. As to Commissioner Fedorchak's statement concerning whether Dakota Access has proceeded in good faith, the question from a member of the media and her response were as follows:

Question: Do you think because they didn't disclose this information to you is there any reason to think they have not been acting in good faith throughout this whole process?

Response: That's ... a hypothetical question and I just don't think that's appropriate. We've had inspectors out the entire time and we haven't received this kind of information in the past, so I don't have any reason to believe that. I have no evidence whatsoever to suspect that.

See November 8, 2016, Special Meeting Audio, available at: <http://www.psc.nd.gov/public/meetings/audio/2016/201611081415-special-1.mp3>. Commissioner Fedorchak did not state whether or not she believed Dakota Access had proceeded in good faith as to reporting the unanticipated discovery in this particular case. Her answer was that the hypothetical question was not appropriate and that she had received no other reports from inspectors, at that time, of other instances of Dakota Access failing to comply with the Order. That Commissioner Fedorchak stated at the November 2, 2016, meeting that their "could have been a miscommunication" by Dakota Access does not equate to a statement on whether the failure to communicate the

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unanticipated discovery and re-route was willful. See November 2, 2016, Admin Meeting Audio, available at <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. The Commission will decide whether a violation has occurred after a presentation of the evidence at the hearing.

Conclusion

This matter will proceed to a hearing on the merits of the allegations. Dakota Access will be provided with the opportunity to present its defenses at the hearing. Commission advocacy staff will be entitled to present its case.

Having considered this matter, the Commission issues the following:


Order

The Commission Orders the Motion to Dismiss Complaint filed by Dakota Access, LLC is DENIED.

PUBLIC SERVICE COMMISSION



Brian P. Kalk
Commissioner



Randy Christmann
Chairman



Julie Fedorchak
Commissioner