

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Access, LLC
Dakota Access Pipeline Project
Siting Application

Case No. PU-14-842

ORDER TO SHOW CAUSE
AND
ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

May 31, 2017

Preliminary Statement

On January 20, 2016, the Public Service Commission (“Commission”) issued its Findings of Fact, Conclusion of Law and Order authorizing the construction, operation and maintenance of the Dakota Access Pipeline, approximately 358 miles of 12-, 20-, 24-, and 30-inch diameter crude oil pipeline and associated facilities in North Dakota.

On May 24, 2016, the Commission issued Supplemental Findings of Fact, Conclusion of Law and Order.

On June 22, 2016, the Commission issued Second Supplemental Findings of Fact, Conclusion of Law and Order.

On November 7, 2016, Public Service Commission Advocacy Staff (“Advocacy Staff”) filed a formal complaint against Dakota Access, LLC (“Dakota Access”) alleging that Dakota Access violated the Commission’s Orders.

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

On December 16, 2016, Advocacy Staff filed its response to the Motion to Dismiss, and on January 5, 2017, Dakota Access filed a reply.

On January 31, 2017, the Commission issued an Order denying the Motion to Dismiss.

On February 17, 2017, Dakota Access filed its Answer to the Complaint.

Discussion

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. The Commission issued Supplemental Findings of Fact, Conclusions of Law and Order and Second Supplemental Findings of Fact, Conclusions of Law and Order on May 24, 2016 and June 22, 2016, respectively. Dakota Access executed the Certification Relating to Order Provisions (“Certification”), which the January 20, 2016, May 24, 2016, and June 22, 2016 Orders incorporated. See Affidavit of Patrick Fahn (the Affidavit is incorporated into this Order by reference).

Provisions of the Certification document, made a part of the Orders, required Dakota Access to do the following upon an unanticipated discovery of a cultural resource:

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

The Commission retained Keitu Engineers & Consultants, Inc. (“Keitu”) as independent construction inspectors for the Project on January 20, 2016. On October 25, 2016, Keitu filed a site inspection trip report with the Commission. The report stated during the site inspection on October 21, 2016, Keitu found an area flagged off from construction traffic and was informed by an Environmental Inspector with Dakota Access that “an unanticipated discovery was found on or around October 15, 2016 which resulted in a ROW reroute that was approved.” Dakota Access had commenced construction of the re-route prior to notifying the Commission of the discovery of the cultural resource. Dakota Access had not, at that point in time, informed the Commission of the unanticipated discovery. Upon the request of the Commission, Dakota Access formally provided the Commission with information concerning the unanticipated discovery and route adjustment on October 27, 2016.

The Commission held a regular meeting on November 2, 2016. At the administrative matters portion of that meeting, the Commission discussed the unanticipated discovery and route adjustment that was reported to the Commission by Keitu. At the meeting, Commissioner Fedorchak instructed Commission staff to draft a formal Complaint against Dakota Access for possible violations of the Order.

A formal Complaint was prepared and filed by Advocacy Staff and was served on Dakota Access. The Complaint generally alleged that Dakota Access violated the Commission’s Order by failing to report the unanticipated discovery and route adjustment to the Commission as required by N.D.C.C. § 49-22-16.3(1), and the January 20, 2016, May 24, 2016, and June 22, 2016 Orders, subjecting Dakota Access to penalties set forth at N.D.C.C. § 49-22-21.

Dakota Access did not Answer and instead filed a Motion to Dismiss the Complaint, and a supporting brief, on November 30, 2016. Commission advocacy staff filed a Response in Opposition to the Motion to Dismiss on December 16, 2016. Dakota Access filed a Reply Brief in Support of its Motion to Dismiss on January 5, 2017. On January 31, 2017, the Commission denied the Motion to Dismiss. Dakota Access filed an Answer on February 17, 2017.

The Commission has determined that the Complaint brought against Dakota Access should be dismissed without prejudice and that an Order to Show Cause hearing, allowing Dakota Access to respond to the allegations of non-compliance with law and Commission Orders following the unanticipated discovery of a cultural resource and subsequent re-route of the Project route, is more efficient and appropriate than proceeding under the formal complaint process. The Commission is currently investigating other unrelated potential violations in this case and has determined the Order to Show Cause procedure under N.D. Admin. Code § 69-02-02-09 is the appropriate manner to proceed on the issues raised by the Complaint.

Order

The Commission orders:

1. Dakota Access LLC shall appear before the Public Service Commission at the time and place as set forth in the Notice of Hearing and show cause, if any, why Dakota Access should not be found in violation for failing to comply with North Dakota siting law and the January 20, 2016, May 24, 2016, and June 22, 2016 Orders, which incorporated the Certification provision requiring Dakota Access to do the following upon an unanticipated discovery of a cultural resource:

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.

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- 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.

2. Dakota Access shall appear by and through representatives who have sufficient knowledge and information to discuss the allegations.

3. A Notice of Hearing on the Order to Show Cause shall be served with this Order.

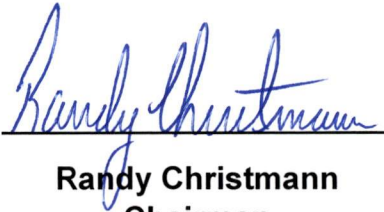
4. A copy of the Commission Motion to issue an Order to Show Cause and a Notice of Hearing shall be served with this Order.

5. Briefs on relevant issues of law may be filed with the Commission at least five business days prior to the Order to Show Cause hearing.

PUBLIC SERVICE COMMISSION



**Brian Kroshus
Commissioner**



**Randy Christmann
Chairman**



**Julie Fedorchak
Commissioner**