

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

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

**Case No. PU-14-842**

**SETTLEMENT AGREEMENT**

**August 14, 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, 2016, Dakota Access filed a reply.

On January 31, 2016, the Commission issued an Order denying the Motion to Dismiss.

On February 17, 2016, Dakota Access filed its Answer to the Complaint.

On May 31, 2017, the Commission issued an Order to Show Cause and Order Dismissing Complaint Without Prejudice and issued a Notice of Hearing on the Order to Show Cause.

On June 21, 2017, a pre-hearing conference on the Order to Show Cause hearing was held.

On July 27, 2017, the Commission adopted a Motion continuing the Order to Show Cause hearing.

### **Factual Background**

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.

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" by North Dakota State Historic Preservation Office ("SHPO"). Dakota Access has indicated the unanticipated discovery occurred on October 17, 2016. 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 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, was more efficient and appropriate than proceeding under the formal complaint process. After the Commission issued its Order to Show Cause on May 31, 2017, and dismissed without prejudice the Complaint, a pre-hearing conference for the Order to Show Cause hearing was held on June 21, 2017. Commission advisory counsel, Commission advocacy staff, counsel for Dakota Access, and the Administrative Law Judge were present at the pre-hearing conference. The Commission learned at the pre-hearing conference that Dakota Access objected to the procedure in which the Commission was proceeding. Specifically, Dakota Access indicated it objected to the dismissal without prejudice of the Complaint that resulted in the Order to Show Cause being issued by the Commission. Dakota Access also indicated it objected to the burden of proof being placed on it, rather than the Commission, in the Order to Show Cause proceeding. The Administrative Law Judge issued a Summary of Prehearing Conference on June 23, 2017, that set forth a briefing schedule for the procedural issues to which Dakota Access objected. On July 26, 2017, the Commission adopted a motion to continue the Order to Show Cause hearing that had been scheduled for August 16, 2017, and to continue the briefing schedule that the Administrative Law Judge issued on June 23, 2017.

### **Agreement**

The Commission and Dakota Access hereby agree to settle this administrative action on the following terms:

1. Dakota Access admits that it is subject to the North Dakota Century Code ch. 49-22.1 (formerly ch. 49-22) and North Dakota Administrative Code Title 69, and that the Commission has jurisdiction over this matter.
2. The Commission has the authority to enter into this Settlement Agreement (“Agreement”) under N.D.C.C. § 28-32-22.
3. Dakota Access is a Texas limited liability that owns and operates a pipeline that was permitted by the Commission in this case.
4. Dakota Access signed the Certification, subsequently attached to and made a part of the January 20, 2016, Order authorizing construction, which provided in part:

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.

5. On or about October 17, 2016, an unanticipated discovery occurred. Dakota Access immediately notified the Environmental Inspector for the Project and a Project Archaeologist was dispatched. The area was flagged off from construction traffic and Dakota Access consulted with SHPO. A re-route of the site was formulated in conjunction with SHPO and SHPO approved the re-route on October 18, 2016. Dakota Access did not provide information to the Commission about the re-route or the unanticipated discovery until after the re-route occurred.
6. The Commission and Dakota Access acknowledge a disputed question exists as to whether Dakota Access violated state law by not notifying the Commission pursuant to the Certification.

7. The parties to this Agreement have determined that settlement and compromise of the dispute is in the interests of their respective stakeholders and agree to resolve this matter without any fault or admissions being made by either party to the allegations made.
8. Dakota Access agrees that it will make a one-time contribution of fifteen thousand dollars (\$15,000.00) to SHPO or a mutually agreeable entity within seven days of execution of this Agreement by both parties.
9. Within ten days of confirmation of payment to SHPO, or mutually agreeable entity, and execution of the Agreement by both parties, the Commission will dismiss, with prejudice, all claims it has pending against Dakota Access, its agents and representatives, related to the October 17, 2016, unanticipated discovery.
10. It is understood and agreed that this Agreement is the compromise of a disputed claim, and that the payment made is not to be construed as an admission of liability on any party, and that all parties deny liability and intend merely to avoid litigation.
11. Dakota Access acknowledges that, with regard to the October 17, 2016, unanticipated discovery matter, it is waiving the rights and procedures that would otherwise protect it and that it would have in any formal administrative adjudicatory proceeding or any civil action in a court of law, including the right to present evidence and witnesses, cross-examine Commission witnesses, administrative and judicial review, and to appeal any potentially adverse decision of the Commission.

12. Dakota Access agrees that the Commission may issue an order incorporating the terms of this Agreement, and agrees that such an order may be enforced by a court of competent jurisdiction.

13. The Agreement is effective upon signature by both parties.

14. The parties to this Agreement agree that if any portion of this Agreement is determined to be void or unenforceable, such determination shall not affect the validity nor enforceability of the remaining portion.

15. The parties to this Agreement agree that it shall be interpreted under the laws of North Dakota and that any dispute arising out of the Agreement shall be brought in state or federal court in Burleigh County, North Dakota.

Signed this \_\_\_\_\_ day of August, 2017.

**PUBLIC SERVICE COMMISSION**

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**Brian Kroshus  
Commissioner**

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**Randy Christmann  
Chairman**

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**Julie Fedorchak  
Commissioner**

Signed this \_\_\_\_\_ day of August, 2017.

**Dakota Access, LLC**

By: \_\_\_\_\_

Its: \_\_\_\_\_