

November 8, 2019

**HAND DELIVERED**

Mr. Steve Kahl  
Interim Executive Director  
North Dakota Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

**Re: Dakota Access, LLC  
Emmons County Pump Station  
Case No. PU-19-204  
OAH File No. 2019-0280**

Dear Mr. Kahl:

Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and ten copies of the following:

1. Dakota Access, LLC's Motion to Strike Testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle Sr.; and
2. Certificate of Service.

Please also find enclosed a disk containing the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,

  
LAWRENCE BENDER

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Enclosures  
68630838 v1

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PU-19-204 Filed 11/08/2019 Pages: 22  
Motion to Strike Testimony  
Dakota Access, LLC  
Lawrence Bender, Fredrikson&Byron, P.A.

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

**Dakota Access, LLC  
Dakota Access Pipeline Pump Station – Emmons County  
Siting Application**

**Case No. PU-19-204  
OAH File No. 2019-0280**

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**DAKOTA ACCESS, LLC’S MOTION TO STRIKE TESTIMONY OF  
DONALD HOLMSTROM, RICHARD KUPREWICZ, AND JON EAGLE SR.**

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Dakota Access, LLC (“Dakota Access”), by and through its undersigned counsel, hereby submits to the North Dakota Public Service Commission (the “Commission”) this motion to strike on relevance grounds the November 1, 2019 testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle Sr., submitted by Intervenor Standing Rock Sioux Tribe (the “Holmstrom Testimony,” “Kuprewicz Testimony” and “Eagle Testimony,” respectively) (Docket Nos. 40-42). *See* N.D. R. Civ. Proc. 12(f); N.D. R. Evid. 401.

Rather than address the question before the Commission—whether to authorize a new pump station in Emmons County—the testimony seeks to expand the scope of this hearing to issues that are not properly before the Commission. Not only does the testimony of all three witnesses go to issues beyond the scope of this hearing or go outside of the Commission’s jurisdiction, the testimony also goes to issues that have been raised (and decided) by other tribunals. Even if such testimony were relevant, it should be excluded on other grounds because any probative value is substantially outweighed by a danger of confusing the issues. *See* N.D. R. Evid. 403(b).

If the Commission does not strike the Holmstrom Testimony in full on relevance grounds, Dakota Access moves to strike the portions of this testimony that violate a Protective Order in ongoing federal litigation (*Standing Rock Sioux Tribe et al. v. U.S. Army Corps of*

*Eng'rs*, Case No. 1:16-cv-1534, D.E. 390 (D.D.C. Dec. 26, 2018)). In the alternative, Dakota Access moves to seal those portions of the Holmstrom Testimony that implicate topics covered by the Protective Order.

For all of these reasons, Dakota Access also moves to exclude any oral testimony from Mr. Holmstrom, Mr. Kuprewicz, and Mr. Eagle concerning any stricken or sealed aspect of their November 1, 2019 written testimony.

### **BACKGROUND**

On December 22, 2014, Dakota Access made application to the Commission for a corridor certificate and route permit for the Dakota Access Pipeline (“DAPL”). *See* Case No. PU-14-842, Docket No. 1. On January 20, 2016, the Commission entered Findings of Fact, Conclusions of Law and Order granting DAPL the Certificate of Corridor Compatibility No. 179 and Route Permit No. 191. *See id.* at Docket No. 134. The Commission subsequently modified that decision on May 24, 2016 in its Supplemental Findings of Fact, Conclusions of Law, and again on June 22, 2016 in its Second Supplemental Findings of Fact, Conclusions of Law and Order. *See id.* at Docket Nos. 178 and 192.

Contemporaneous with the Commission’s issuance of Certificate of Corridor Compatibility No. 179 and Route Permit No. 191, on July 25, 2016, the United States Army Corps of Engineers (“Corps”) granted approval for Dakota Access to install the DAPL across federal jurisdictional areas, including deep below Lake Oahe. *See id.* at Docket No. 200. The Standing Rock Sioux Tribe (“Standing Rock”), among others, has challenged those approvals in the United States District Court for the District of Columbia. *See Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Eng'rs*, Case No. 1:16-cv-1534 (the “*Federal Litigation*”).

On June 14, 2017 in the *Federal Litigation*, the District Court granted summary judgment to the Corps in part and denied it in part. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 127-29 (D.D.C. 2017) (“*SRST II*”). “Although the [District] Court found that the agency had ‘substantially complied’ with [NEPA],” it “identified three discrete

deficiencies in the Corps' analysis" and remanded back to the Corps. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 94 (D.D.C. 2017) ("SRST III"). "Aside from the discrete issues that" were "the subject of [the] remand, the [District] Court conclude[d] that the Corps complied with its statutory responsibilities." *SRST II*, 255 F. Supp. 3d at 160.

The Federal Litigation documents are governed by a Protective Order providing, in part, that:

All Protected Information in the Litigation may be used only by parties to the Litigation to: a) evaluate, prosecute or defend a claim **in this Litigation**; and/or b); prepare comments to the Corps falling within the scope of **the court-ordered remand**, and **for no other purpose**.

*Federal Litigation* D.E. 390 at P 2 (emphases added). A copy of the Protective Order is attached hereto as Exhibit 1. The Protective Order is "binding upon the Parties" to the Federal Litigation, including Standing Rock, as well as "their respective attorneys, agents, representatives, officers, members and employees." *See* Exhibit 1, ¶ 1. Any documents that "rely on or incorporate the Protected Information in whole or in part" are to be "maintained as Protected Information" in accordance with the Protective Order. *Id.* at ¶ 6.

The Corps completed its remand on August 31, 2018 and reaffirmed its July 25, 2016 approvals. *Federal Litigation* D.E. 362, 362-1. On February 4, 2019 the Corps lodged the administrative record for its August 31, 2018 Remand Decision. *Federal Litigation* D.E. 398. The Federal Litigation Parties, including Standing Rock, "agreed that certain documents . . . will be treated as protected pursuant to the Protective Order." *Id.* at 1-2. The Protected Information included the revised 2018 Spill Model Report and a Down Stream Receptor Report, which was incorporated in part of the Spill Model Report. *Id.* at 26 (RAR008743-008964); 8 (RAR002739-02944).

The Federal Litigation is on-going.

Recently, as a result of increased demand for transportation of crude oil in North Dakota, on June 20, 2019, Dakota Access made application to the Commission for an amendment to

Certificate of Corridor Compatibility No. 179 and Route Permit No. 191, requesting the addition of a pump station to DAPL in Emmons County, North Dakota. *See* Case No. PU-19-204, Docket No. 1.

On July 10, 2019, the Commission issued a Notice of Opportunity for Hearing that set forth the “issues to be considered.” *Id.* at Docket No. 8. On July 30, 2019, the Tribe filed a Request for Hearing setting forth numerous additional issues that it thought should be addressed at any hearing, including whether the application complies with “recognized and generally accepted . . . industry standards” and applicable regulations for an increase in pipeline flow rate, the risk of over pressurization, prior incidents around the U.S. involving out-of-state affiliates of Dakota Access, and whether the increase in flow rate significantly increases the likelihood of a theoretical spill. *Id.* at Docket No. 17. Dakota Access responded to that Request on August 19, 2019, explaining, *inter alia* that the issues “concern pipeline safety” and are thus “under the jurisdiction of the federal Pipeline Hazardous Materials Safety Administration (“PHMSA”) and are already addressed by federal pipeline safety law, with which Dakota Access complies.” *Id.* at Docket No. 22, p.1. Dakota Access went on to explain that “[t]he Commission has not been vested with the regulatory authority over these concerns, and, consequently, should not be used by Standing Rock as a means to obtain information from Dakota Access for third party litigation or to promote an anti-fossil fuel agenda.” *Id.*

On August 21, 2019, the Commission issued a Notice of Hearing for November 13, 2019 that set forth the same “issues to be considered” as did the July 10, 2019 Notice of Opportunity for Hearing. *Id.* at Docket No. 24. The Notice for Hearing did *not* add any of the extra-jurisdictional issues raised in the Standing Rock Request for Hearing to the list of “issues to be considered “at the November 13 Hearing. *Id.* Instead, the Commission set forth three issues to be considered in Dakota Access’s applications. *Id.* These concern whether “the location and

operation of the proposed facilities [will] produce minimal adverse effects on the environment; whether the “proposed facilities [are] compatible with the environmental preservation and the efficient use of resources; and whether the “proposed facility locations minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion.” *Id.*

On November 1, 2019, Standing Rock filed the written expert testimony of Donald Holmstrom and Richard Kuprewicz. *See id.* at Docket Nos. 41-42. Standing Rock also filed the testimony of Jon Eagle Jr. *See id.* at Docket No. 40. The Holmstrom Testimony makes repeated reference to, and appears to rely on, Protected Information from the Federal Litigation, including “the latest 2018 spill model.” *See id.* at Docket No. 41. In addition, neither the Holmstrom Testimony nor the Eagle Testimony mention, even once, the proposed pump station in Emmons County—the only facility that is the subject of November 13 Hearing. *See id.* at Docket Nos. 40-41. Similarly, the Holmstrom and Kuprewicz Testimony address almost exclusively the issues raised by Standing Rock in its Request for Hearing—that the Commission declined to add to the Notice of Hearing—issues that are within PHMSA’s jurisdiction, not the Commission’s. *See id.* at Docket Nos. 41-42.

### ARGUMENT

The Commission should exclude the Holmstrom Testimony, Kuprewicz Testimony and Eagle Testimony. First, none of the testimony is relevant to the narrow issues that the Commission seeks to resolve at the hearing, and even if the testimony was relevant, it is sure to confuse the issues with those not properly before the Commission. Second, if the Commission finds the Holmstrom Testimony to be relevant and its probative value to outweigh the danger of confusing the issues, the Commission should still strike it from the hearing—it makes repeated reference to, and appears to rely on, Protected Information from the Federal Litigation in violation of that litigation’s Protective Order.

**I. The Commission Should Exclude The Holmstrom, Kuprewicz, and Eagle Testimony Because They Are Not Relevant And Confuse The Issues Before The Commission.**

Under Rule 401 of the North Dakota Rules of Evidence, relevant evidence means evidence that “has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” N.D. R. Evid. 401. Even if evidence is deemed relevant, it may be excluded if “its probative value is substantially outweighed by a danger of” “confusing the issues.” N.D. R. Evid. 403. Here, the Holmstrom Testimony, Kuprewicz Testimony, and Eagle Testimony are not relevant to the narrow questions before the Commission for at least two reasons, and even if they were relevant, all three statements would confuse the issues that are teed up for resolution.

*First*, neither Holmstrom, Kuprewicz, nor Eagle address facts that are “of consequence in determining the action,” and instead, the statements attempt to circumvent the Commission’s decision to narrow the issues presented for consideration and expand the scope of this hearing to include matters that are outside the Commission’s jurisdiction or that have been, or will be, decided by other tribunals. *See* Docket No. 24. For example, neither the Holmstrom nor Eagle Testimony mention the location and operation of the proposed facilities whatsoever—the precise concern before the Commission. Instead, Holmstrom opines about the “potential consequences” of the Optimization in light of “existing oil spill response planning efforts,” the “safety record” of Dakota Access and its corporate parent, and Dakota Access’s “risk management approach.” *See* Holmstrom Testimony, Docket No. 41 at 2:38-3:59. These concerns, which are entirely directed at the mainline pipeline as a whole, are the same concerns that Standing Rock unsuccessfully sought to include when the Tribe requested a hearing. *Compare* Docket No. 17 at 4 (expressing concern of “current estimate of the worst case discharge,” (“WCD”)); *id.* (criticizing Dakota Access’s Facility Response Plan for relying “upon immediate detection and 9-minute shutdown time”); *id.* at 6 (stating that Dakota Access should comply with American

Petroleum Institute (“API”) practices); and *id.* at 7-8 (raising prior incidents around the U.S. involving out of state affiliates of Dakota Access ), *with* Holmstrom Testimony, Docket No. 41 at 5:93-10:214 (addressing WCD); *id.* at 12:265-14:307 (discussing “concerns regarding the safety record,” including prior incidents of Dakota Access and its corporate parent); and *id.* at 16:359-19:422 (stating concerns regarding “risk management approach” and criticizing Dakota Access for not using complying with API practices). The Commission declined to consider these issues, and should do so again—they concern the mainline pipeline itself and are thus not relevant to the scope of activity before the Commission, which is the installation of a new pump station in Emmons County. *See* Docket No. 22 at 3.

Similarly, the Eagle Testimony raises Standing Rock’s long-standing treaty claims in the context of the overall siting of the pipeline. *See* Eagle Testimony, Docket No. 40. While treaty issues are important, they are not germane to *this* proceeding regarding new facilities in Emmons County that are several miles from Standing Rock’s reservation; the Commission has already considered and approved of the overall siting of the pipeline. *See, e.g.,* Case No. PU-14-842, Docket No. 134 (granting Certificate of Corridor Compatibility No. 179 and Route Permit No. 191); Docket No. 178; Docket No. 192. Like the Holmstrom Testimony, the Eagle Testimony does not even mention the proposed pump station. *See* Docket No. 40.

The Kuprewicz Testimony fares no better. To be sure, Kuprewicz mentions the “pump station and pumping equipment near Linton, North Dakota” but in the context of “the existing 30-inch” mainline pipeline. *See* Kuprewicz Testimony, Docket No. 42, at 5:95-97. Like the Holmstrom Testimony, the Kuprewicz Testimony also seeks to advance issues that the Commission declined to include in the list of issues to be resolved at the hearing. *Compare id.* at 7:129-139 (stating concerns of “surge overpressure”), *with* Docket No. 17 (“A hearing is needed to address the potential for pressure surges from an increased flow rate.”).

*Second*, both the Holmstrom Testimony and Kuprewicz Testimony raise issues that the Commission cannot consider because Federal law for pipeline safety preempts state and local law. The federal Pipeline Safety Act (“PSA”) establishes a comprehensive program for pipeline safety, addressing design, construction, operation and maintenance, and Congress expressly reserves exclusive jurisdiction over pipeline safety to the Federal program, as administered by PHMSA, and most especially for interstate pipelines. *See* 49 U.S.C. § 60104(c) (“A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.”); *see also* *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993) (“Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines.”).

Both Holmstrom and Kuprewicz address concerns outside the Commission’s purview. Holmstrom’s concerns about the WCD, for example, explicitly fall within the ambit of PHMSA regulations. *See* Holmstrom Testimony, Docket No. 41, 8:162-164 (contending that Dakota Access is not compliant with “PHMSA WCD regulation”). And Kuprewicz opines on how the Optimization “will result in actual liquid velocities in excess of 15 ft/sec,” and will utilize the Drag Reducing Agent (“DRA”), which “can also increase the risk of surge.” *See* Kuprewicz Testimony, Docket No. 42, at *id.* at 9:180-85, 10:194. But PHMSA regulations do not address or establish limits on flow rate, nor do any federal regulations limit use of DRA. Instead, PHMSA establishes minimum performance based standards regarding the safety design, construction, operation, and maintenance of pipelines, which involves the regulation of the pressure of pipelines and extends to the calculation, substantiation and monitoring of maximum operating pressure (MOP) and product flow. 49 C.F.R. pt. 195. Dakota Access’s compliance with the Federal regulations is not before the Commission.

Even if the Testimony had been relevant to the narrow issues before the Commission, it would still need to be excluded because both statements confuse the issues before the Commission. *See* N.D. R. Evid. 403. The narrow issues to be considered by the Commission are those pertaining to the location and operation of the proposed pump station and whether the proposed facilities produce minimal adverse effects on the environment while ensuring energy needs are met. *See* Docket No. 24. Standing Rock, by submitting the Holmstrom, Kuprewicz, and Eagle Testimony, seeks—for a second time—to expand the issues before the Commission to include the siting, safety, design, and operation of the mainline pipeline. This is decidedly not before the Commission, as the Commission has already acknowledged, and thus should not be included to ensure that the Commission focuses on the narrow issues before it.

**II. The Commission Should Strike The Portions Of The Holmstrom Testimony That Reference Or Rely On Information Subject To The Protective Order In The Federal Litigation.**

If the Commission does not strike the Holmstrom Testimony on relevance grounds, the Commission should still strike from the hearing the portions that reference, and appear to rely on, Protected Information from the Federal Litigation, information about and derived from a 2018 Spill Model, in violation of the Protective Order in that case. In the alternative, the Commission should seal those portions of the testimony from the public record on terms similar to those in the Protective Order.

When the Corps lodged the administrative record for its remand decision in the Federal Litigation, the parties, including Standing Rock, “agreed that certain documents . . . will be treated as protected pursuant to the Protective Order.” *Federal Litigation* D.E. 398 at 1-2. That Protected Information included a document referenced in the Holmstrom Testimony as “the latest 2018 spill model.” Holmstrom Testimony, Docket No. 41 at 10:224-225; *Federal Litigation* D.E. 398 at 26 (RAR008743-008964).

The Protective Order limits the “use” of Protected Information to pursuing claims in the Federal Litigation or preparing comments to the Corps “falling within the scope of the court-ordered remand” and “for no other purpose.” *Federal Litigation* D.E. 390 at P 2 (emphasis added). By reviewing and referencing the Protected Information for testimony in *this* proceeding, Mr. Holmstrom and Standing Rock have “used” the 2018 Spill Model Report for purposes other than the two permitted uses in the Protective Order.

Taking the Holmstrom Testimony at face value, it is clear that Mr. Holmstrom reviewed the 2018 Spill Model Report in preparing his testimony. Mr. Holmstrom explains what “the latest 2018 spill model . . . stated,” and what “the latest DAPL spill model indicates.” *See* Holmstrom Testimony, Docket No. 41 at 10:224-11:226, 14:311-313 (emphasis added). Mr. Holmstrom could not know what the spill model stated or indicated without reviewing it, and his statements expressly reveal the contents of a document Standing Rock has committed to keep non-public. Mr. Holmstrom also concludes that Dakota Access “failed to develop a valid spill model,” and asks the Commission to order “[a] revised spill model.” *See id.* at 4:70-71, 21:456-457. He necessarily reviewed the document to reach that conclusion and support that demand.

In addition, Mr. Holmstrom urges the Commission to “review the 2016 DAPL source documents that relate to its spill model calculation.” *Id.* at 10:208-209. Not only did Mr. Holmstrom improperly “use” Protected Information in this proceeding in his testimony, but he also invites the Commission to take a deeper dive. This request highlights Standing Rock’s disregard for the Protective Order in the Federal Litigation.

In light of Standing Rock’s violation of the federal court Protective Order, the Commission should take no comfort in Mr. Kuprewicz’s suggestion that *new* protections might

suffice. Kuprewicz Testimony, Docet No. 42 at 19:392-399 (stating “I suspect that Applicant will assert that some or all of this information is ‘highly sensitive’ in an attempt to avoid disclosure” and offering the option of a “protocol” to protect it from disclosure). Standing Rock has shown its willingness to disregard protective orders based on its own view of whether they are needed.<sup>1</sup>

The Commission should exclude from this proceeding all portions of the Holmstrom Testimony that reference or rely on the 2018 Spill Model Report because it is in violation of the Protective Order. In addition, the Court should bar Mr. Holmstrom from providing any oral testimony on topics related to the Protected Information, for the reasons discussed above and because an expert “may be required to disclose” the facts underlying his opinion “on cross-examination.” N.D. R. Evid. 705. The Commission should not force Dakota Access to choose between a full opportunity to confront a witness and compliance with a Protective Order.

Alternatively, if the Commission does not exclude Mr. Holmstrom’s written and oral testimony that is based on Protected Information, the Commission should seal it from the public record on terms similar to those in the Protective Order. *See* N.D. Admin. R. 41 § 6(a)(1). This measure would still violate the Protective Order, as it would allow the “use” of Protected Information outside of the Federal Litigation. In making this motion to seal in the alternative, Dakota Access does not concede that any Protected Information may be used in this proceeding, or waive any other arguments, claims, or defenses with respect to Standing Rock’s actions.

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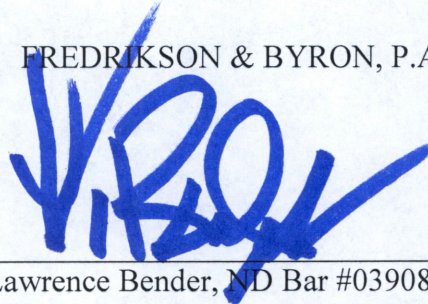
<sup>1</sup> Standing Rock’s Litigation counsel in federal court has admitted that Mr. Holmstrom signed an acknowledgement of the limitations imposed by the Protective Order. Recent correspondence with such counsel reveals that the Tribe will instead defend by claiming that *redacted* versions of the protected documents may be made public and used by persons who also had access to the unredacted versions. There is no agreement or order in the federal Litigation that gave Standing Rock the power to convert any protected documents to public documents by assuming that Dakota Access or the Court would agree with certain redactions.

**CONCLUSION**

For the foregoing reasons, the Commission should grant Dakota Access's Motion to Strike the November 1, 2019 testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle Sr. submitted by Intervenor Standing Rock Sioux Tribe.

**DATED** this 8th day of November, 2019.

FREDRIKSON & BYRON, P.A.



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

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**BEFORE THE PUBLIC SERVICE COMMISSION**

**STATE OF NORTH DAKOTA**

**Dakota Access, LLC  
Dakota Access Pipeline Pump Station – Emmons County  
Siting Application**

**Case No. PU-19-204  
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**CERTIFICATE OF SERVICE**

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[¶1] I, the undersigned, hereby certify that a true and correct copy of the Letter to Mr. Steve Kahl at the North Dakota Public Service Commission forwarding the following document for filing:

1. Dakota Access, LLC's Motion to Strike Testimony of Donald Holmstrom, Richard Kuprewicz, and Jon Eagle Sr.

was, on November 8th, 2019, served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

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**DATED** this 8th day of November, 2019.

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