

February 14, 2020

**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**

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 Combined Response to Motion for Leave to File Informational Brief and Motion for Issuance of a Subpoena of Intervenor Standing Rock Sioux Tribe; 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

LB/sr  
Enclosures  
69377466.1

Attorneys & Advisors / Fredrikson & Byron, P.A.  
main 701.221.8700 / 1133 College Drive, Suite 1000  
fax 701.221.8750 / Bismarck, North Dakota

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Response to Motion for Leave to File Informational Brief and Motion for Issuance of Subpoena of Intervenor  
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**

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**DAKOTA ACCESS, LLC’S COMBINED RESPONSE TO  
MOTION FOR LEAVE TO FILE INFORMATIONAL BRIEF AND  
MOTION FOR ISSUANCE OF A SUBPOENA  
OF INTERVENOR STANDING ROCK SIOUX TRIBE**

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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”) its Combined Response to the Motion for Leave to File Informational Brief and Motion for Issuance of a Subpoena (“Response”) of Intervenor Standing Rock Sioux Tribe (“Standing Rock”), and states as follows:

**INTRODUCTION**

On February 6, 2020, Standing Rock filed a Motion for Leave to File Informational Brief, requesting the Commission grant Standing Rock leave to inform the Commission of its authority to request documents from Dakota Access related to the proposed Emmons County Pump Station, and also filed a Motion for Issuance of a Subpoena, requesting a subpoena be issued to Dakota Access for the “production of documents, electronically stored information, or tangible things,” described in the proposed subpoena submitted therewith. *See* Docket Nos. 100-102. While Dakota Access does not dispute the Commission’s general authority to request relevant information and/or documents to assist it in deciding an application for certificate of corridor and/or permit, the Commission should deny both motions. First, the Motion for Leave to File Informational Brief should be denied because the Commission is already aware of its authority to

request relevant documents and correctly refused to request the documents Standing Rock now seeks, which are not relevant to its pending determination. Second, the Motion for Issuance of a Subpoena should be denied because the proposed subpoena is untimely and seeks irrelevant and unduly burdensome discovery.

### **RELEVANT BACKGROUND**

On June 20, 2019, Dakota Access filed its Combined Application for Amended Certificate of Corridor Compatibility and Amended Route Permit (“Application”) for the construction of the new pump station to be located in Emmons County, North Dakota (the “Emmons County Pump Station”). *See* Docket No. 1. After the Commission issued a Notice of Opportunity for Hearing, Standing Rock requested a hearing on Dakota Access’s Application and filed a Petition to Intervene. *See* Docket Nos. 8, 17 and 29. On September 12, 2019, the Commission issued an order permitting Standing Rock to appear as an intervenor in the above-captioned matter. *See* Docket No. 30. The Commission held a formal hearing on Dakota Access’s Application on November 13, 2019 (the “November Hearing”).

Prior to the November Hearing, both Dakota Access and Standing Rock participated in a prehearing conference, submitted pre-filed witness lists, pre-filed testimony, and pre-hearing briefs. *See* Docket Nos. 31, 34, 36, 39-42, 43-47, 49, and 51. At no point prior to the pending Motion for Issuance of Subpoena has Standing Rock filed and/or served any formal discovery requests on Dakota Access. Despite this, Standing Rock, at the November Hearing and now, has sought to expand the breadth of the Commission’s inquiry well beyond the scope of its statutory purview.

The Commission has retained attorney Zachary Pelham (“Attorney Pelham”) to provide legal services that assist the Commission in processing Dakota Access’s Application. *See*

Docket No. 20. Attorney Pelham has been involved in all proceedings related to this matter, from the time he was retained on or about August 6, 2019 through the present, including being present at the Commission's January 23, 2020 work session ("Work Session") which seemingly brought about Standing Rock's desire to file an informational brief. *See* Docket Nos. 99 and 101.

### ARGUMENT

#### **I. Standing Rock's Motion for Leave to File Informational Brief Should be Denied as Unnecessary.**

Standing Rock has filed a Motion for Leave to File Informational Brief and has attached its proposed Informational Brief as Exhibit A to its Motion. *See* Docket No. 101. Standing Rock asserts that it is necessary to file the proposed informational brief due to a question raised by Chairman Kroshus at the Commission's Work Session regarding the Commission's authority to require Dakota Access to produce certain documents requested by Standing Rock at the November Hearing, and Attorney Pelham's purported response that requiring Dakota Access to produce such documents "could invite legal challenge, or otherwise represent a legally problematic deviation beyond the Commission's regulatory 'lane.'" *See* Docket No. 101.

Dakota Access does not dispute that N.D.C.C. §§ 49-22.1-06 and 49-22.1-07 provide the Commission with the general authority to require "[a]ny other information" in support of an application for a certificate of corridor or permit, subject to relevance and other practical restrictions on discovery set forth in Rule 26(b) of the North Dakota Rules of Civil Procedure. *See* N.D.R.Civ.P. 26(b); N.D.C.C. §§ 49-22.1-06(i); 49-22.1-07(g); 28-32-33(2) ("[A] hearing officer may issue subpoenas, discovery orders, and protective orders *in accordance with the North Dakota Rules of Civil Procedure.*" (emphasis added)). Thus, the Commission is entitled to request that Dakota Access provide it with relevant information and/or documentation. Dakota

Access intends to comply with any such requests for relevant information. If for some reason Dakota Access fails to comply with any requests from the Commission for relevant information, the Commission could issue a subpoena under N.D.C.C. § 28-32-33. But Standing Rock mischaracterizes the discussion between Chairman Kroshus and Attorney Pelham at the Work Session.

During the Work Session, Chairman Kroshus asked Attorney Pelham an “overarching question” that applied to every type of documentation requested by Standing Rock. *See* Docket No. 98 at 4:10. Specifically, Chairman Kroshus stated:

It’s important that we stay in our own lane from a regulatory standpoint because, I think the impression that may be given at times [is] that we’re just not looking at these things. We’re making sure they are being looked at by the appropriate agencies and that that analysis is thorough because they have the experts in each respective area. So at what point do we weave that into the order for example, and make that a part of the order. . . when ultimately we may not have statutory authority. . . in some of these areas?

*Id.* at 4:46. Attorney Pelham responded:

If we were to require the company to provide the documentation...there’s potential for a challenge to that requirement...so that’s one aspect to your question, I think. As to your point though as to other agencies that are tasked specifically with evaluating these various topics that we are talking about – surge analysis, facility response plan, hydraulic profiling – we’ve received testimony on that from company officials, from company experts, we’ve received testimony from the intervenor...that differs. Ultimately, a decision based on the information provided to you has to be made. You can make a decision that what has been provided to the Commission is adequate and meets the requirements that are issued in our notice. [To] paraphrase, there’s... three requirements, and... one of the primary components of that notice is... is there a minimal adverse impact on ...the welfare of the citizens of the state and the operations of the facility.... Ultimately, you as commissioners have to make a decision as to whether or not the evidence that’s provided to you in the course of these proceedings satisfies those requirements. And... from a legal prospective...if we require the company to do something that is outside of our lane, as you say, that could be legally problematic.

*Id.* at 6:09.

To summarize, Chairman Kroshus discussed other agencies' findings and asked how those findings should be included in the Commission's final order, when those findings fall outside the purview of the Commission's statutory authority. *See* Docket No. 98. Attorney Pelham responded by affirming the Commission's authority to make a decision based on relevant evidence submitted; he did not state or suggest that a request for relevant documents would be legally problematic. *Id.* He did caution, however, that legal challenges could arise if the Commission was to seek documents from Dakota Access related to "something that is outside of [the Commission's] lane;" in other words, information not relevant to the Commission's determination, although arguably relevant to decisions falling within the jurisdiction of other agencies, such as PHMSA. *Id.*

Consistent with this unremarkable proposition, during the Work Session when discussing surge analysis, Commissioner Fedorchak observed that when reviewing items that are enforced by other agencies, the Commission's standard is satisfied when the Commission ensures the company has completed what is needed, testifies under oath that it has, and certifies that it will follow the other agencies' requirements or recommendations. *See* Docket No. 98 at 2:34. In light of this observation and the thoroughness of the record as it already stood, Commissioner Fedorchak opined that she did not believe it was necessary for the Commission to see the surge analysis. *See id.* at 2:22.

It is clear from these discussions that the Commission knows it has, through its controlling statutes and regulations, the authority to request *relevant* information. Yet the Commission also knows, and correctly recognized during the Work Session, that it need not request information from Dakota Access that is not relevant to its analysis under N.D.C.C. § 49-22.1-09. All of the documentation Standing Rock now seeks relates to the safety of the proposed

facility, not to the various factors related to the “location, construction, and operation of the proposed facility” as set forth in N.D.C.C. § 49-22.1-09 and cited by Standing Rock. Such information is the dominion of PHMSA, and any attempts by the Commission to regulate the safety of the facility would exceed its authority and encroach upon the dominion of the federal government, as North Dakota readily acknowledges. *See generally*, N.D. Legislative Council, *Pipeline Safety Regulation* (Feb. 2014), <https://www.legis.nd.gov/files/resource/committee-memorandum/15.9191.0100.pdf> (explaining the Commission’s statutory authority to regulate “the *siting* of energy conversion and transmission facilities” and observing that “the federal government is primarily responsible for developing, issuing, and enforcing pipeline safety regulations” (emphasis added)).

There is simply no need to file an informational brief informing the Commission of its statutory authority when it is well aware of that authority and properly exercised it in this matter by declining to seek the irrelevant information Standing Rock now seeks. Accordingly, Standing Rock’s Motion for Leave to File Information Brief should be denied.

## **II. Standing Rock’s Motion for Issuance of a Subpoena Should be Denied.**

Standing Rock has requested the Commission grant a Motion for Issuance of Subpoena pursuant to N.D.C.C. § 28-32-33 which provides, in part, that “upon the request or motion of any party to [a] proceeding or upon the hearing officer’s own motion on behalf of the agency, a hearing officer may issue subpoenas . . . in accordance with the North Dakota Rules of Civil Procedure. Moreover, any discovery obtained must be “obtained in accordance with the North Dakota Rules of Civil Procedure.” N.D.C.C. § 28-32-33(1).

Rule 26(b) of the North Dakota Rules of Civil Procedure places various limitations on the frequency or extent of discovery. Most importantly, a party may obtain only information “that is

relevant to any party's claim or defense." N.D.R.Civ.P. 26(b)(1)(A). Moreover, the court (or administrative agency acting pursuant to its authority under N.D.C.C. § 28-32-33) must limit the frequency or extent of discovery when:

- discovery sought is unreasonably cumulative or duplicative, or it can be obtained from some other sources that is more convenient, less burdensome, or less expensive;
- the party seeking discovery has ample opportunity to obtain the information by discovery in the action; or
- the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

N.D.R.Civ.P. 26(b)(1)(B)(i).

The Commission should limit discovery by denying Standing Rock's Motion for Issuance of Subpoena because first, the request is untimely; second, the sought-after information and/or documents are not relevant; and third, the burden of the proposed discovery outweighs its benefit.

**A. Standing Rock had ample opportunity to request information and/or documents prior to the November Hearing.**

Standing Rock's request for a subpoena is untimely. On September 20, 2019, the Commission issued a Notice of Prehearing Conference to Dakota Access and Standing Rock. *See* Docket No. 31. The Notice provided that "[t]he purpose of this prehearing conference is for counsel to discuss with the ALJ matters involved in this administrative action, *including discovery*, issues, witnesses, *documentary evidence*, anticipated motions, and other preliminary matters." *Id.* (emphases added). Standing Rock should have made discovery requests at or prior to the prehearing conference, so such requests could be discussed during the prehearing conference. Standing Rock did no such thing. In fact, up until this present motion – approximately three (3) months after the November Hearing – Standing Rock has made *no*

formal discovery requests to Dakota Access. Standing Rock has had ample time to make such requests, and as such, the Commission should limit the extent of discovery.

**B. The information and/or documents Standing Rock seeks are not relevant.**

The documents Standing Rock wishes to subpoena from Dakota Access, include, among others, a transient surge analysis, hydraulic profiles, and spill models. All of these documents relate to the safety of the proposed facility, not its routing. The efficacy and content of these documents are not only enforced by federal agencies, and not by the Commission, but regarding the spill models, are protected by a protective order entered in ongoing federal litigation. *See Standing Rock Sioux Tribe et al. v. U.S. Army Corps of Eng'rs*, Case No. 1:16-cv-1534, D.E. 391 (D.D.C. Dec. 26, 2018). Commissioner Fedorchak has already, and correctly, stated that when a company states under oath and certifies that it has complied with the requirements of other agencies by providing certain documents relevant to those agencies' regulatory and enforcement responsibilities, there is no need for the Commission to review the content of those documents. *See* Docket No. 98. This is because interstate pipeline-safety regulation is outside the Commission's purview and thus not relevant to its corridor and routing determinations. *See supra* pp. 5-6.

Standing Rock's request is simply another part of its continued attempt to expand the Commission's inquiry beyond its statutory purview into the federal realm of pipeline safety. This is a claim Standing Rock is currently litigating in federal court – where it should be litigated. *See* SRST Summ. J. Motion. ECF No. 433-2 at 30-32 (arguing DAPL does not meet the industry's best practices); SRST Summ. J. Reply ECF No. 465 at 22-24 (same). Standing Rock should not be allowed to use this proceeding as a means to obtain information to further its

legal position in the federal lawsuit against the U.S. Army Corps of Engineers. The Commission should not be drawn into such litigation tactics.

Dakota Access has filed an Application that complies with all requirements and provides all information required by North Dakota law. That should mark the end of discovery. The Commission should not allow Standing Rock to usurp its resources in pursuit of an improper result.

**C. The burden of the discovery request by Standing Rock outweighs any potential benefit.**

In light of the irrelevance of the information and/or documents Standing Rock seeks, the burden of producing them would far outweigh any *legitimate* benefit Standing Rock could obtain from them. Moreover, if the Commission had a need to review any additional, *relevant*, information, it certainly has the authority to request it. Accordingly, the Commission should deny Standing Rock's Motion for Issuance of Subpoena.

**CONCLUSION**

The Commission is fully aware of its authority regarding whether it can request relevant information and/or documents and is aware that a request for the same is different than evaluating documents relevant only to the requirements of a federal agency. Moreover, Standing Rock had ample opportunity to make discovery requests prior to the November Hearing and failed to do so, and the discovery it now requests is not relevant and overly burdensome. Accordingly, Dakota Access respectfully requests the Commission deny Standing Rock's Motion for Leave to File Informational Brief and Motion for Issuance of Subpoena.

DATED this 14th day of February, 2020.

FREDRIKSON & BYRON P.A.

A large, stylized handwritten signature in blue ink, appearing to read 'Y. Bender', is written over the printed name of Lawrence Bender.

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

Lawrence Bender, ND Bar #03908  
1133 College Drive, Suite 1000  
Bismarck, ND 58501-1215  
701.221.8700  
lbender@fredlaw.com

Bret Dublinske (*Admitted Pro Hac Vice*)  
Brant Leonard (*Admitted Pro Hac Vice*)  
505 E. Grand Avenue, Suite 200  
Des Moines, IA 50309  
515.242.8900  
bdublinske@fredlaw.com  
bleonard@fredlaw.com

*Counsel for Dakota Access, LLC*

69341630.1

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**CERTIFICATE OF SERVICE**

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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 Dakota Access, LLC's Combined Response to Motion for Leave to File Informational Brief and Motion for Issuance of a Subpoena of Intervenor Standing Rock Sioux Tribe for filing was, on February 14th, 2020, served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

Timothy J. Dawson  
ND Office of Administrative Hearings  
2911 N 14th Street  
Bismarck, ND 58503

Zachary E. Pelham  
Pearce Durick PLLC  
P.O. Box 400  
Bismarck, ND 58502-0400

Timothy Q. Purdon  
Robins Kaplan LLP  
1207 West Divide Ave, Suite 200  
Bismarck, ND 58503

DATED this 14th day of February, 2020.

FREDRIKSON & BYRON P.A.

By: 

Lawrence Bender, ND Bar #03908  
1133 College Drive, Suite 1000  
Bismarck, ND 58501-1215  
701.221.8700  
lbender@fredlaw.com

Bret Dublinske (*Admitted Pro Hac Vice*)  
Brant Leonard (*Admitted Pro Hac Vice*)  
505 E. Grand Avenue, Suite 200  
Des Moines, IA 50309  
515.242.8900  
bdublinske@fredlaw.com  
bleonard@fredlaw.com

*Counsel for Dakota Access, LLC*

69377696.1