

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Dakota Access, LLC
Dakota Access Pipeline Pump Station – Emmons Cn
Siting Application

Case No. PU-19-204

**ORDER ON INTERVENOR’S MOTION FOR ISSUANCE OF SUBPOENA AND
MOTION FOR LEAVE TO FILE INFORMATIONAL BRIEF**

February 19, 2020

Preliminary Statement

On September 20, 2019, ALJ Dawson issued a Notice of Prehearing Conference.

On September 30, 2019, a prehearing conference was held as scheduled.

On October 7, 2019, ALJ Dawson issued a Scheduling Order.

On November 13-14, 2019, a public hearing was held as scheduled.

On January 23, 2020, the Commission held a work session.

On February 6, 2020, Standing Rock Sioux Tribe (“Standing Rock”) filed a motion for leave to file an informational brief and a motion and brief in support of motion for issuance of a subpoena.

On February 14, 2020, Dakota Access, LLC (“Dakota Access”) filed a combined response brief in opposition to Standing Rock’s the motion for leave to file an informational brief and motion for issuance of a subpoena.

On February 18, 2020, Standing Rock filed a reply brief in support of its motion for leave to file an informational brief and motion for issuance of a subpoena.

Factual Background

The Public Service Commission (“Commission”) is familiar with the general background and history concerning Case Numbers PU-14-842 and PU-19-204. A more detailed discussion of the background of this case can be found in the Commission’s Findings of Facts, Conclusions of Law and Order issued in PU-14-842 and PU-19-204 (which is issued contemporaneously with this Order). An abbreviated background, that is relevant to the pending motions, follows.

On January 20, 2016, the Commission issued Certificate of Corridor Compatibility 179 and Route Permit 191 designating a transmission facility corridor and a transmission facility route to Dakota Access, LLC for the construction, operation, and maintenance of a 358-mile crude oil pipeline and associated facilities in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and Emmons Counties in North Dakota, Case No. PU-14-842.

On June 20, 2019, Dakota Access filed with the Commission a combined application (Application) to amend Certificate of Corridor Compatibility 179 and to amend Route Permit 191 for the addition of a pump station (Pump Station) to its existing Dakota Access Pipeline. The Pump Station will be located in Emmons County, North Dakota, Case No. PU-19-204.

Standing Rock intervened as a party and participated in Case No. PU-19-204. A prehearing conference was held on September 30, 2019. Included in the Notice for the prehearing conference was discussion of discovery in Case No. PU-19-204. Standing Rock did not serve any discovery in Case No. PU-19-204.

Standing Rock and Dakota Access agreed to provide pre-filed testimony of their respective witnesses in advance of the evidentiary hearing. Standing Rock and Dakota Access agreed to provide exhibit lists of exhibits they intended to introduce at the evidentiary hearing. Standing Rock and Dakota Access filed prehearing briefs outlining issues each respective party wished to highlight in advance of the evidentiary hearing.

After the close of the evidentiary hearing, and after the Commission held a work session on January 23, 2020, Standing Rock filed two motions and related briefings: 1) Motion and Brief in Support of Motion for Issuance of a Subpoena and 2) Motion for Leave to File an Informational Brief, which contained Informational Brief Regarding the Commission's Authority to Request Documents from Transmission Line Applicants.

Law and Analysis

Discovery is a tool used to develop evidence prior to an evidentiary hearing. Discovery was a topic included in the Notice of Prehearing Conference dated September 20, 2019. Discovery in administrative proceedings is permitted by statute. See N.D.C.C. § 28-32-33(1) (explaining that the North Dakota Rules of Civil Procedure apply as to discovery in an administrative adjudicative proceeding); see also N.D.R.Civ.P. Rules 33 & 34 (setting forth the procedure for interrogatories and requests for production of documents). Standing Rock chose to proceed to the evidentiary hearing without conducting any discovery.

The issuance of subpoenas for the production of documentary evidence to be considered at an evidentiary hearing must be issued prior to the evidentiary hearing. See, e.g. *Grand Forks County v. Tollefson*, 2004 ND 161, ¶ 20, 684 N.W.2d 646 (explaining failure to subpoena a witness prior to an administrative hearing waives the right to have the witness present and available at the hearing) (citing N.D.C.C. § 28-32-33(3)). There

are many reasons for this basic principle, foremost being so the admissibility of the evidence can be considered at the evidentiary hearing and the witness proffering the document can be examined by the Commission and counsel participating at the administrative hearing. Such logical procedure forms the very basis for a fair adjudicative proceeding and allows all parties to review evidence in advance of a hearing and question the appropriate witness on the contents of the evidence at the hearing.

Expert witnesses testified and were cross-examined at the evidentiary hearing concerning state, federal, and local requirements, which included the subject matter of the documentation now requested by Standing Rock. The specific documentation contained in Standing Rock's Motion for Issuance of a Subpoena are not new documents or documents that "surprised" Standing Rock at the evidentiary hearing. Standing Rock knew that the specific documentation it seeks would not be submitted as exhibits by Dakota Access. Exhibit and Witness Lists were filed in advance of the evidentiary hearing by Dakota Access and Standing Rock even addressed the subject documentation in its prehearing brief. Now, although Standing Rock did not request production of the documents prior to the hearing, it seeks the subject documentation through discovery months after the close of the evidentiary hearing. The Commission rejects Standing Rock's attempt to correct that which it could have done well in advance of the evidentiary hearing.

The information provided in Standing Rock's Informational Brief is an attempt to respond to the January 23, 2020, work session. The Commission is aware of what legal requirements exist for it to review siting applications. The Commission is also aware of the authority it has under the law, which includes the ability to request documentation. The Commission has considered the information provided by Standing Rock in its Informational Brief Regarding the Commission's Authority to Request Documents from Transmission Line Applicants. More importantly, the Commission has fully evaluated and considered the evidence presented to it at the evidentiary hearing.

Dakota Access has provided evidence through expert testimony and documentation that its amended application complies with all federal hazardous liquid pipeline requirements. Dakota Access has provided evidence through expert testimony and documentation that its amended application complies with all state siting requirements. Dakota Access has provided evidence that it received a conditional use permit from Emmons County for the pump station. Dakota Access has complied with the legal requirements pursuant to North Dakota law.

Dakota Access remains accountable to the Commission to ensure it adheres to all legal requirements under the law. The Commission, as it does in every instance, will act to ensure compliance. The Commission is fully satisfied with the expert testimony and evidence presented at the evidentiary hearing that Dakota Access has fully complied with all state siting requirements. Adversarial administrative hearings allow parties to present the evidence they believe is relevant to the issue they are seeking to persuade an administrative body to decide in their favor. Such is the essence of due process. Again,

Standing Rock chose not to conduct discovery in advance of the evidentiary hearing. Due process afforded Standing Rock and Dakota Access the ability to present evidence. Due process, however, does not allow a party to change its course after the close of an evidentiary hearing.

Conclusion

For the foregoing reasons, Standing Rock's Motion for Issuance of a Subpoena is denied. For the foregoing reasons, Standing Rock's Motion for Leave to File an Informational Brief is granted only insofar as the Commission considered the arguments and information contained in the brief. To the extent the Informational Brief seeks any relief from the Commission, such relief is denied.

Having considered this matter, the Commission issues the following:

Order

The Commission Orders Standing Rock Sioux Tribe's Motion for Issuance of a Subpoena filed by Standing Rock Sioux Tribe is DENIED;

The Commission further Orders Standing Rock Sioux Tribe's Motion for Leave to File Informational Brief is GRANTED only insofar as the Commission considered the arguments and information contained in the Informational Brief and to the extent the Informational Brief seeks any relief from the Commission, such relief is DENIED.

PUBLIC SERVICE COMMISSION



Julie Fedorchak
Commissioner



Brian Kroshus
Chairman



Randy Christmann
Commissioner