

January 5, 2017



VIA HAND-DELIVERY

Mr. Darrell Nitschke
Executive Secretary
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**Re: Dakota Access, LLC
Case No. PU-14-842**

Dear Mr. Nitschke:

Enclosed for filing in the above entitled matter, please find an original and ten (10) copies of the following documents:

1. Dakota Access, LLC's Reply Brief in Support of Motion to Dismiss Complaint; and
2. Certificate of Service.

Also enclosed is a CD containing the above-referenced documents in PDF format. Should you have any questions, please advise.

Sincerely,


LAWRENCE BENDER

LB/dmk
Enclosures

cc: John Schuh – via e-mail
Julie Prescott – via e-mail
Judge Tim Dawson – via e-mail

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Reply Brief in Support of Motion to Dismiss Complaint

Dakota Access, LLC

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

Public Service Commission,)	
)	Case No. PU-14-842
Complainant,)	
v.)	
Dakota Access, LLC,)	DAKOTA ACCESS, LLC’S REPLY
)	BRIEF IN SUPPORT OF MOTION
Respondent.)	TO DISMISS COMPLAINT

INTRODUCTION

[¶ 1] The North Dakota Public Service Commission’s (“Commission”) opposition to Dakota Access, LLC’s (“Dakota Access”) motion to dismiss cannot change reality: the Energy Conversion and Transmission Facility Siting Act (“Siting Act”) does not allow for the imposition of the penalties sought by the Commission based on the allegations contained in the Complaint. The factual and legal grounds required to prosecute the Complaint and impose a penalty under Section 49-22-21 of the North Dakota Century Code for willful violations simply do not exist in this case. As such, the Commission has failed to state a claim upon which relief can be granted and the Complaint against Dakota Access should be dismissed.

I. Review of The Motion to Dismiss Generally

[¶ 2] As the Commission states in its Memorandum in Opposition to Respondent’s Motion to Dismiss Complaint (“Opposition Memo”), the purpose of a motion to dismiss is to test the sufficiency of the complaint, and facts not appearing on the face of the complaint should not be considered. *See* Opposition Memo 5, Docket No. 254 (citing *State v. Haibeck*, 2006 ND 100, ¶ 12, 714 N.W.2d 52). However, if the Complaint is devoid of allegations that would, if true, support the relief requested, or if “it is disclosed with certainty the impossibility of proving a

claim upon which relief can be granted,” then dismissal is an appropriate remedy. *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556 (quoting *Lang v. Schafer*, 2000 ND 2, ¶ 7, 603 N.W.2d 904).

[¶ 3] This administrative proceeding is unique in the sense that much of the background information leading to the filing of the Complaint is found in the extensive record before the Commission dating back to December of 2014. In the Opposition Memo, the Commission asserts Dakota Access “meander[s] around a number of Commission discussions with the public” and seems to suggest information is included in the motion that falls outside the purview of consideration for a motion to dismiss. However, the Commission fails to recognize that documents necessarily embraced by the pleadings and information which is part of the public record can properly be considered when determining whether to grant a motion to dismiss. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). This rule easily extends to all information set forth by Dakota Access in the Motion to Dismiss, including the “Commission discussions with the public” complained of in the Opposition Memo. All discussions had by the Commission occurred at public meetings and are part of the record in this matter. This information therefore may be considered in ruling on the motion to dismiss.

[¶ 4] In taking issue with the arguments set forth in the Motion to Dismiss, the Commission appears to miss the entire point of the Motion. Even if the Complaint includes conclusory allegations which the Commission views as alleging a violation of the Commission Orders and rules, the Complaint would fail. The problem with the Complaint is the Commission does not have the ability to impose the penalty sought based on the factual allegations set forth in the Complaint.

[¶ 5] To survive a motion to dismiss, a complaint must not only state a claim, but it must also include factual allegations of a violation for which relief can be granted. *See* N.D.C.C. § 28-32-21(a); *see also* N.D.R.Civ.P. 12(b)(6). As discussed below and in detail in the brief in support of the Motion to Dismiss, the absence of authority for the Commission to impose the penalty based on the facts alleged warrants dismissal of the Complaint for failure to state a claim upon which relief can be granted.

II. Dismissal is Warranted Based on the Failure to Allege a Sufficient Basis for the Relief Requested.

A. The Commission Does Not Have the Broad Authority and Discretion Asserted in the Complaint.

[¶ 6] The Commission is a constitutionally established body with powers delegated by the Legislature. *See* Opposition Memo 4; *see also Appl. of Neb. Pub. Power Dist.*, 330 N.W.2d 143, 148-49 (N.D. 1983). Administrative agencies only have the power which has been granted to them or necessarily implied from the legislative grant. *Heier v. N.D. Dept. of Corr. & Rehab.*, 2012 ND 171, ¶ 18, 820 N.W.2d 394; *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984). The North Dakota Legislature has only granted the Commission the authority to impose fines for *willful* violations of the Siting Act. *See* N.D.C.C. § 49-22-21.

[¶ 7] The Commission appears to argue that the Respondent in an enforcement proceeding may be penalized if (1) the Respondent willfully builds a pipeline, and (2) a rule (here a rule allegedly requiring notice of a minor location revision within an approved corridor) is in fact violated. Here, the Commission would argue that Dakota Access need not intend to violate a specific rule, or any rule for that matter, and that Dakota Access need not even be generally aware that its conduct was wrongful. Rather, Dakota Access would be strictly liable for penalties in the absence of any wrongful intent whatsoever. The Commission's logic would

permit the imposition of a *penalty for every violation of a rule* because it is almost impossible to imagine a case where the construction of a pipeline per se would be anything other than an intentional act.

[¶ 8] The Commission completely ignores the fundamental question posed by the Motion to Dismiss. If the North Dakota Legislature intended to authorize penalties for *every* instance where an applicant violated a rule or regulation under the Siting Act, or deviated from an intended route, why did the legislature require that penalties allowed under the Siting Act only be imposed for *willful* violations? The inclusion of the word “willful” in the statute could only have been intended to differentiate between non-willful violations, for which there is no additional monetary fine or penalty, and willful violations, for which there is a monetary penalty.

[¶ 9] The Commission argues that an “interpretation with the requirement of specific intent to violate the law as a necessary element of a regulatory offense would make the application of [the] regulation so cumbersome that it would clearly frustrate its purpose.” *See* Opposition Memo 8. But, the Commission has other means of enforcing compliance for inadvertent violations of rules without resorting to penalties and there is nothing cumbersome about complying with the legislature’s mandate that willfulness be alleged and proven before a penalty is imposed. Courts and regulators make those kinds of determinations every day.

[¶ 10] The Commission also argues, in apparent recognition of how broad its argument actually is, that the Commission must be allowed to penalize every violation of its rules, irrespective of whether the respondent acted willfully. The Commission argues that its regulations are complex and pipeline builders must be charged with notice of the regulations. Contrary to the Commission’s argument, the fact transmission facility construction under the Siting Act is subject to extensive regulation only reinforces the argument of Dakota Access. It is

precisely in areas where the regulations are complex and can be violated inadvertently or by mistake that legislatures and courts have required a showing of willfulness as a prerequisite to imposing fines and penalties. This higher burden avoids unfairly punishing innocent actors working in good faith to follow the rules and reserves the harshest penalties for those who act with wrongful intentions.

[¶ 11] Dakota Access agrees the Commission has oversight to enforce the Commission rules and regulations. Dakota Access also does not dispute the Commission should have the ability to “monitor and enforce a duty of care.” This ability, however, does not allow the Commission to impose restrictions and penalties the Legislature has not authorized. The deference and discretion allowed to the Commission merely allows for a “reasonable interpretation of a statute by the agency responsible for enforcing it.” *Grey Bear v. N.D. Dep’t of Human Servs.*, 2002 ND 139, ¶ 7, 651 N.W.2d 611. That deference and discretion does not extend to rewriting the laws of the state.

[¶ 12] As noted above, the North Dakota Legislature has only granted the Commission the power to impose penalties or fines for willful violations of the Siting Act and orders of the Commission issued pursuant to Chapter 49-22. *See* N.D.C.C. § 49-22-21. The Commission simply cannot rewrite the statute to expand its authority to impose penalties for innocent conduct. Under any statutory interpretation scheme, the Commission simply does not have the authority to impose penalties for what would amount to an inadvertent violation of a statute or order.

[¶ 13] In order to impose a penalty under Section 49-22-21 of the North Dakota Century Code, the Commission must not only prove a violation occurred, but also set forth a sufficient factual basis showing Dakota Access willfully violated the Commission Orders. As discussed

below, the Commission has failed to do so. The Complaint is insufficient when alleging a violation occurred, but then alleging nothing from which any finder of fact could infer willful conduct. Accordingly, the Commission does not have the authority to impose the penalties sought under the Siting Act.

B. The Complaint Fails to Establish Any Willful Conduct By Dakota Access Which Would Violate the Commission Orders or Rules.

[¶ 14] As established by the Administrative Agencies Practice Act, the Commission bears the burden of establishing facts for a claim. *See* N.D.C.C. § 28-32-21(a). The Complaint alleges Dakota Access violated the Commission Orders issuing a certificate of corridor compatibility and route permit for the Project “by failing to obtain a clearance to proceed from the Commission prior to beginning construction on the route adjustment.” *See* Compl. ¶ XI. The Complaint also alleges a violation of the Commission Orders “by failing to file with the Commission the required certifications under North Dakota Century Code section 49-22-16.3(1) prior to beginning construction on the route adjustment.” *See* Compl. ¶ XI.

[¶ 15] As support for the violations, the Commission simply states if the “allegations [contained in the Complaint] are indeed true, it is apparent [Dakota Access] was willfully engaging in construction out of compliance with the certificate and permit.” *See* Opposition Memo 7. However, this statement has no basis in the record and is completely contrary to the allegations set forth in the Complaint. In fact, the Commission has set forth no allegations to support a finding of willful conduct by Dakota Access.

[¶ 16] In discussing the review of willful behavior, the Commission improperly relies on cases interpreting securities laws. *See State v. Bilbrey*, 349 N.W.2d 1 (N.D. 1984); *State v. Goetz*, 312 N.W.2d 1 (N.D. 1981). The securities laws of the United States, and North Dakota, are intended to protect the investing public from fraudulent and deceptive practices. These cases

are simply inapplicable to this situation which deals with a highly regulated area of law for which Dakota Access has obtained a valid permit to construct the project. No actions of Dakota Access can in any way be viewed as fraudulent or deceptive to allow for the application of securities laws relied upon by the Commission.

[¶ 17] The reliance of the Commission on the additional line of cases is similarly misplaced. The other cases cited by the Commission involve situations where the conduct in question is inherently harmful and any person taking such actions would know that the conduct would cause harm. This class of activity is generally known in the law as conduct which is *malum in se*, or harmful in and of itself. For example, inflicting abuse on or exploiting a person, i.e., inherently wrongful conduct, results in added penalties if the victim is in fact disabled or a vulnerable elderly adult, even if the perpetrator was unaware of the age or vulnerable nature of the victim. *See* N.D.C.C. §§ 12.1-31-07 to 07.1. Based on the record before the Commission, such harmful conduct warranting a penalty is not found.

[¶ 18] Even if a lower standard for willful behavior is applied and only “proof that the person acted intentionally in the sense that he was aware of what he was doing” is required as requested by the Commission, Commissioner Fedorchak’s own statements in the public record show that any perceived violations were not intentionally done or harmful in any way. Commissioner Fedorchak stated the delay in providing notification to the Commission “could have been a miscommunication within the company . . . and it could have been that the people on the ground did not fully appreciate or know the process that was required.” Commission Admin. Meeting at 9:48 (Nov. 2, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611021000-admin-1.mp3>. Commissioner Fedorchak also stated she has no reason to believe Dakota Access has been acting in bad faith during the permitting process, and in reality, Dakota

Access did the right thing in notifying the State Historic Preservation Office (“SHPO”) in this situation. Commission Special Meeting at 20:07 (Nov. 8, 2016), <http://www.psc.nd.gov/public/meetings/audio/2016/201611081415-special-1.mp3>; Commission Admin. Meeting at 7:03. Finally, Commissioner Fedorchak stated that even though Dakota Access did not immediately notify the Commission, the most important thing was that the SHPO was notified, construction was stopped, and expertise was brought in to effectively delineate the site and develop a re-route to ensure any site was not impacted. Commission Admin. Meeting at 7:03.

[¶ 19] The deficient allegations contained in the Complaint, coupled with the statements of the Commission, clearly show the lack of willful behavior by Dakota Access to violate any order or Commission requirement. To the contrary, the record shows Dakota Access participated extensively and in good faith in a lengthy permitting process to obtain approval for the project. The route for the pipeline was modified some 140 times, with the appropriate information for such route modifications submitted to the Commission. Here, when the potential site was encountered, Dakota Access immediately stopped construction, notified the SHPO, designed a route modification approved by the SHPO, and completely avoided any impacts to the potential site. Having acted quickly, conscientiously, and in good faith, Dakota Access’ failure, assuming for purposes of this motion there was a failure, can only be characterized as inadvertent and not willful. Considering the lack of any willful behavior set forth in the Complaint, there is an impossibility of proving a claim upon which relief can be granted, and the Complaint should therefore be dismissed.

III. Leave to Amend the Complaint to Correct the Deficiencies Should Be Denied.

[¶ 20] Given the absence of willful behavior set forth in the Complaint, the Complaint should be dismissed and amendment of the Complaint should not be allowed. The Commission argues that normally, if a complaint fails to conform to the requirements under the Administrative Agencies Practice Act, then the Commission will notify the complainant and provide an opportunity to amend the complaint. *See* N.D.A.C. § 69-02-02-02(4). Here, however, nothing more can be gained from pursuing the Complaint or allowing the Complaint to be amended.

[¶ 21] Imposition of a fine will not deter conduct that was accidental to begin with and will not be a just punishment for an actor that did not act willfully. Dakota Access has acted in compliance with the Siting Act and accompanying rules, and has invested billions of dollars in this Project. The Dakota Access Pipeline exists primarily to benefit the citizens of North Dakota by providing a safe and efficient means of transporting North Dakota crude to market, and in the process, has created thousands of jobs. Following completion of the pipeline, North Dakota roads will be safer, rail traffic will be reduced, and millions of dollars will be generated in tax revenues. While none of these project benefits would justify a willful violation of the law, the actions of Dakota Access suggest the company has earned the benefit of the doubt. It is precisely in cases like this the Commission should dismiss the Complaint and avoid the cost and unfairness of further proceedings when the willful element of a potential violation is absent.

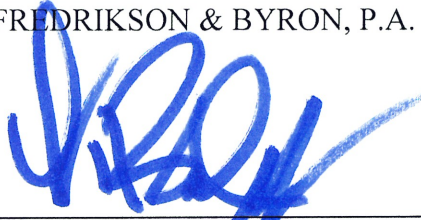
CONCLUSION

[¶ 22] Notwithstanding the Commission's attempts to rectify the deficiencies in the Complaint through its opposition to the Motion to Dismiss, the Complaint filed by the Commission does not set forth with specificity any willful conduct by Dakota Access which

would allow for the imposition of a penalty under Chapter 49-22 of the North Dakota Century Code. Given the threadbare assertions contained in the Complaint, the Commission has failed to state a claim upon which relief the Commission has the authority to grant. The Complaint against Dakota Access should therefore be dismissed.

Dated this 5th day of January, 2017.

FREDRIKSON & BYRON, P.A.



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

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

CASE NO. PU-14-842

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following document:

- Dakota Access, LLC's Reply Brief in Support of Motion to Dismiss Complaint

was on the 5th day of January, 2017 served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

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The original and ten (10) copies of the foregoing document were also hand delivered to the North Dakota Public Service Commission on said date.

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