December 16, 2016

Via Hand Delivery

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

Re: Case No. PU-14-842
Dakota Access, LLC
Dakota Access Pipeline Project
Siting Application

Dear Mr. Nitschke:

Enclosed for filing in the above entitled matter, please find the Memorandum in Opposition to Respondent's Motion to Dismiss Complaint.

Best Regards,

John Schuh
PSC Legal Department

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION
OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION,	)	
	)	**Case No. PU-14-842**
Complainant,	)	
	)	**MEMORANDUM IN**
vs.	)	**OPPOSITION TO**
	)	**RESPONDENT'S MOTION**
	)	**TO DISMISS COMPLAINT**
DAKOTA ACCESS, LLC,	)	
	)	
Respondent.	)	

INTRODUCTION

Complainant, Commission Advocacy Staff ("Staff") herein submits this Memorandum in Opposition to Respondent's Motion to Dismiss Complaint filed by Respondent, Dakota Access, LLC ("DAPL"). The complaint that DAPL seeks to dismiss is an enforcement action under North Dakota Century Code ch. 49-22 ("Siting Act"). As explained below, the Formal Complaint ("Complaint") against DAPL not only meets, but exceeds the standards governing the form of complaint requirements of the Administrative Agencies Practice Act. Accordingly, DAPL's motion should be denied.

STATEMENT OF FACTS:

For brevity, and due to the Public Service Commission's ("Commission") familiarity with the case and process, Staff will only briefly highlight the pertinent matters relating to the Complaint and Motion to Dismiss. As a result of the extensive application process, the Commission ordered a corridor certificate and route permit be granted to DAPL on January 20, 2016. See Findings of Facts, Conclusions of Law and Order, Docket No. 134 (hereinafter

"Order"). The corridor certificate and route permit were "issued in accordance with the Order . . . and [are] subject to the conditions and limitations noted in the Order." Id. Provision 4 of the January 20, 2016 Order incorporates the Certification Relating to Order Provisions and the accompanying Tree and Shrub Mitigation Specifications ("Certification Provisions") that were signed and submitted by DAPL during the hearing process. Id.

Of the agreed upon Certification Provisions incorporated into the Order, and expressed in the Complaint, provision 12 states:

> 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.

Furthermore, Provision 38, states:

> 38. . . . 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.

Id. Provision 38 is a reiteration of North Dakota Century Code § 49-22-16.3(1) and is presented in the Certification Provisions to ensure that it is recognized and understood.

On October 21, 2016, Commission construction inspectors informed the Commission that construction of a route adjustment had taken place as a result of an unanticipated discovery on or around October 15, 2016. On October 27, 2016, DAPL provided the required information after Staff demand for documentation. See (Complaint at 3, Docket No. 234).

Based upon this information, Staff filed a Complaint alleging violations of the certificate and permit consistent with N.D.C.C § 49-22-21(3)(b). See (Complaint at 1-2). DAPL subsequently filed a motion requesting dismissal for failure to state a claim upon which relief can be granted by the Commission.

LEGAL PRINCIPLES FOR REVIEW OF A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The Commission may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice. N.D.C.C. § 49-01-07. A complaint must be drawn to advise the respondent and the Commission of the factual and legal grounds of the complaint, the injury complained of, and the specific relief sought. N.D. Admin. Code § 69-02-02-02. If a complaint fails to conform to this section, the Commission will notify the complainant and provide a reasonable opportunity to amend within a specified time. N.D. Admin. Code § 69-02-02-02(4); see also Kouba v. Febco, Inc., 543 N.W.2d 245, 248 (N.D. 1996) (where a complaint is inadequate, leave to amend the complaint is an appropriate course).

On a motion to dismiss, the Commission should be obliged to take the facts of the complaint as true and scrutiny of the pleadings should be deferential to the complainant. Wells v. First Am. Bank W., 1999 ND 170, ¶ 7, 598 N.W.2d 834. "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on

its face.'" Ashcroft v. Iqbal, 556 U.S. 662 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Criteria for evaluation of whether a complaint states a plausible claim are context specific, and the Commission "must draw on its experience and common sense" in making a determination. Iqbal, 556 U.S. at 663–64, 129. A complaint should not be dismissed unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶ 5, 649 N.W.2d 556.

ARGUMENT

The Commission is a constitutionally established body with its powers delegated to it by the legislature. N.D. Const. Art, § 2; N.D.C.C. ch. 49-01. Within these powers granted by the legislature, the Commission is given "some deference to a reasonable interpretation of a statute by the agency responsible for enforcing it . . . ." Grey Bear v. N. Dakota Dep't of Human Servs., 2002 ND 139, ¶ 7, 651 N.W.2d 611. Furthermore, an agency has a reasonable range of discretion to interpret and apply its own regulations, and the agency's expertise is entitled to deference when the matter is complex and technical. Americana Healthcare Ctr. V. North Dakota Dep't of Human Servs., 540 N.W.2d 151, 153 (N.D. 1995).

The Siting Act was enacted and is administered by the Commission in order to "ensure that the location, construction, and operation of . . . transmission facilities will produce minimal adverse effects on the environment and upon the welfare of the citizens of this state." N.D.C.C. § 49-22-02; see also Application of Nebraska Pub. Power Dist., 330 N.W.2d 143, 149 (N.D. 1983). Transparency and oversight are needed to assure that a company conducts construction and operation within the approved parameters, and to protect the environment, livelihood, and cultural heritage of North Dakota citizens when "circumstances of modern industrialism, are

largely beyond self-protection." United States v. Weitzenhoff, 35 F.3d 1275, 1284 (9th Cir. 1993). Therefore, to ensure the protection of the health, safety, and public welfare, the Commission must be able to monitor and enforce a duty of care.

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. State v. Haibeck, 2006 ND 100, ¶ 12, 714 N.W.2d 52. The Brief in Support of the Motion to Dismiss ("Brief") appears to meander around a number of Commission discussions with the public and the meaning of willful with little contestation of the sufficiency of the complaint, but it appears to request dismissal based upon (1) lacking the clarity required to advance the allegations in this proceeding, and (2) failing to allege any conduct that could rise to the level of a "willful" violation under N.D.C.C. ch. 49-22. Regardless, in this memorandum in opposition, Staff will attempt to respond to as many of the defendant's arguments as Staff can discern from DAPL's Brief.

A. The Complaint's claims are stated with sufficient clarity to advance the allegations

In its Brief, DAPL claims that "the Commission can only impose penalties for conduct engaged in *willfully*" and that the complaint fails to establish any willful conduct by DAPL which would violate the Commission's order. See (Brief ¶ 22, at 9-10). However, what does and does not constitute willfully engaging in conduct is a question of fact for the Commission to determine. See Cheetah Properties 1, LLC v. Panther Pressure Testers, Inc., 2016 ND 102, ¶ 9, 879 N.W.2d 423.

All Certifications Relating to Order Provisions are signed by a representative with the authority to bind the company and submitted to the Commission. See (Order) (stating "I certify the following" in the certification documents); *see also* (Hearing Exhibit 3, Docket No. 72). As

stated in the Complaint, two certification provisions agreed upon and incorporated into the Order were provisions 12 and 38. See (Complaint, at 2-3). Provision 12 requires that upon discovering a cultural resource, archeological site, historical site, or grave site during construction, in addition to marking, preserving and protecting the site until professional examination is done, a report of such examination must be filed with the Commission and the State Historical Society, and "clearance to proceed" must be given by the commission." (Complaint, at 2); see also (Order, at 2).

The Complaint continues in Provision 38 with "Before conducting any construction activities for any adjustment to the designated route . . . the company will file . . ." certification and supporting documents affirming, among other things, that no exclusion and avoidance areas will be affected, include a map identifying the route adjustment, and that the company will comply with the commission's order, law and rules for the newly designated route. (Complaint, at 2-3).

Subsequent to recitations of DAPL's duties and a statement of the N.D.C.C. § 49-22-21 penalty provision, the Complaint clearly explains the factual basis. See (Complaint, at 1). The Complaint follows with an explanation of the construction inspection which states that on October 21, 2016, an inspector discovered a route adjustment had already taken place as a result of an unanticipated discovery of cultural materials on or around October 15, 2016. *See Id.* at 3. There was no clearance to proceed given by the Commission, and no documents filed until October 27, 2016, until after the Commission demanded a response. See (Complaint ¶¶ III-V, at 3). DAPL's response included a description of the cultural find and the route adjustment. Additionally, the certification of route adjustment was included. The Complaint clearly shows

that the certification of route adjustment required by provision 38 was provided at least 7 days after construction of the route adjustment began.

If the above allegations are indeed true, it is apparent that DAPL was willfully engaging in construction out of compliance with the certificate and permit. As stated within the Complaint, Staff believes this action is a violation that allows for a penalty under N.D.C.C. § 49-22-21. The Complaint gives DAPL a fair notice of the claims, states sufficient grounds upon which it rests, and demonstrates above and beyond sufficiency that the violations are plausible.

B. DAPL misapplies N.D.C.C. § 49-22-21

While Staff acknowledges no definition of "willful" in the Siting Act, Staff disagrees with DAPL's interpretation of the statute. In interpreting N.D.C.C. § 49-22-21(3) ("Penalty Clause") within the regulatory framework, the Commission's interpretation of statutes and administrative regulations must be "reasonable and consistent with legislative intent, and done in a manner which will accomplish the policy goals and objectives of the statute or regulation." Heartview Found. v. Glaser, 361 N.W.2d 232, 235 (N.D. 1985).

The Penalty Clause states that "[a]ny person who willfully engages in the following conduct shall be subject to a civil penalty of not to exceed ten thousand dollars for each such violation for each day that such violation exists . . . ." The conduct presented in the current case is found in subsection b with, "[c]onstructs, operates, or maintains . . . a transmission facility other than in compliance with the certificate or permit and any terms, conditions, or modifications contained therein." Subsection c continues with, "[v]iolates any provision of this chapter or any rule adopted by the commission pursuant to this chapter." N.D.C.C. § 49-22-21(3).

Of notable disagreement between the DAPL and Staff, DAPL appears to submit that there must be an "intent to violate an order of the commission" in order for the company to have willfully engaged in the conduct. (Brief, at 12). This is an attempt to place a *scienter* requirement into a regulatory compliance framework where one does not belong. As understood from DAPL's Brief, DAPL would prefer the statute be read as "willfully engages in conduct with intent to violate the law or order." 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 regulation so cumbersome that it would clearly frustrate its purpose.

The court in State v. Goetz, 312 N.W.2d 1, 14 (N.D. 1981) addressed statutory framework when interpreting the term "willfully" with regard to the securities commissioner enforcing the Securities Act to protect investors and the public. In addressing the lack of definition of "willfully" within the Securities Act, the Goetz court looked to other states and federal courts before positing that the "better-reasoned rule" did not require specific intent to violate the law. Id. at 11, 13 (the Securities Act used similar language in, "Any person who willfully violates any provision of this chapter . . ."). In revisiting the absence of definition for "willfully" in State v. Bilbrey, 349 N.W.2d 1, 3 (N.D. 1984), the court looked to the comments of a federal SEC commissioner which posited that "all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing . . . .[I]ntent to violate the law, or knowledge that the law was being violated, is not required." Id. at 3.

This is a reasonable standard to be used with the Siting Act considering that the statute was effectuated to protect the public welfare, DAPL is engaged in highly regulated activity requiring a heightened duty of care, the penalties assessed are relatively small, and a possible criminal conviction may only be charged with a misdemeanor. When a statute "carr[ies]

relatively light sentences" and is "intended to accomplish the government's objective by mandating certain affirmative acts . . . [with] the primary purpose of . . . regulation rather than punishment or correction, wrongful intent should not be needed in the interest of enforcement." People v. Davis, 126 Cal. App. 4th 1416, 1435 (Cal. App. 4th 2005))(finding a failure to report physical abuse of elders is a general intent crime with a misdemeanor and a maximum of $5,000 fine); see also Morissette v. United States, 342 U.S. 246, 256 (1952); United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 559 (1971)(concluding that the Interstate Commerce Commission did not need to show facts to indicate a knowing violation of a statute requiring proper labeling of a corrosive liquid). But see United States v. Abboud, 438 F.3d 554, 581 (6th Cir. 2006)("Because of the complexity of the tax system, tax law is one of the few areas . . . that ignorance of the law is a defense.").

In support of their interpretation of the penalty clause, DAPL presents testimony regarding a failed amendment to N.D.C.C. ch. 49-07, which would have provided "an additional useful tool to assist the Commission in implementing the purpose of the Siting Act . . ." Hearing on S.B. 2122 Before the Senate Energy and Natural Resources Comm., 64th N.D. Leg. Assemb. (Jan. 15, 2015) (testimony of Illona Jeffcoat-Sacco). However, legislative intent is generally not determined by the Legislature's failure to act on a measure. "'[T]he defeat of legislation is not indicative of legislative intent, for public policy is declared by the Legislature's action, not by its failure to act." Warner and Company v. Solberg, 634 N.W.2d 65, 71 (N.D. 2001) (citing James v. Young, 43 N.W.2d 692 (N.D. 1950)). see also Coles v. Glenburn Public School District No. 26, 436 N.W.2d 262, 265, n.2 (N.D. 1989). This legislative testimony should be viewed with scrutiny, if at all.

Accepting DAPL's contention that intent to violate an order or law is required would impair the efficiency of controls essential to require a high duty of care; and anything short of having a construction inspector at the scene monitoring and notifying the company of every deviation from the permit would prevent the Commission from enforcing the Siting Act. The Goetz standard is the "better-reasoned rule" and consistent with the objective of "ensuring . . . transmission facilities will produce minimal adverse effects on the environment and welfare of the citizens of this state" and that "routes . . . be chosen which minimize adverse human and environmental impacts . . . ." N.D.C.C. § 49-22-02. Under a view of social betterment by deterrent regulation, rather than criminal punishment, this is the standard that the Commission should apply.

C. The Facts Alleged are sufficient to state a plausible claim of a willful violation

Regardless of whether the Commission shares Staff's interpretation of the Penalty Clause, Staff has alleged sufficient facts to show that a willful violation is not only plausible, but probable. "[W]illfully" is a "chameleon word" that "takes color from the text in which it appears," United States v. Starnes, 583 F.3d 196, 210 (3d. Cir. 2009), and the Commission will decide what color the word will assume. The very facts and circumstances alleged in the Complaint allow the Commission to "draw the reasonable inference that [DAPL] is liable [for] the misconduct alleged." Iqbal, 556 U.S. at 678 (2009).

When the Commission permits a pipeline route, it understands that adjustments may be required. However, being made aware of route changes is vital to safeguard exclusion and avoidance areas, prevent an inadvertent route variance outside what is acceptable to the health and safety of the citizens of North Dakota, and continue to verify that there are minimal

significant impacts. Failure to follow the reporting requirements and failing to obtain clearance to proceed precludes the Commission's discretion to intervene if a company intentionally or unintentionally deviates in a manner that may result in serious consequences for the environment, land use, or cultural resources of the state.

DAPL has assured the Commission and the public that trained construction staff and inspectors are on site "throughout the construction to ensure proper care and that proper notifications are made." Kelcy Warren, CEO of Energy Transfer Partners, *UPDATE with statement from Standing Rock – Statement on Dakota Access Pipeline from CEO of Energy Transfer*, Sept. 13, 2016, *http://www.valleynewslive.com/content/misc/Statement-on-Dakota-Access-Pipeline-from--Chairman-and-CEO-of-Energy-Transfer-393249261.html.*; see also (Second Supplemental Findings of Fact, Conclusions of Law and Order, Docket No. 194, Finding No. 54). This is a case where DAPL has failed to meet these assurances. DAPL is aware of the Order, they agreed to the provisions in the certification documents, and ignorance of the permit requirements is not acceptable to Staff and should not be looked upon fondly by the Commission.

CONCLUSION

The Complaint filed by Staff sets forth sufficient facts and allegations to proceed under N.D.C.C. § 49-22-21 and provides fair notice of the claims alleged and the grounds upon which they rely. Accordingly, for the reasons set forth herein, Staff respectfully requests that the Commission deny DAPL's motion to dismiss. However, if the Commission finds that any matter of the Complaint is not sufficiently pleaded, leave to amend is requested.

Dated: December 15, 2009

Respectfully Submitted,

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