

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001
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**ORDER REQUIRING INFORMATION,
SCHEDULING ORAL ARGUMENT, AND
ISSUING TEMPORARY REMEDY**

(Issued August 23, 2016)

INTRODUCTION

On March 10, 2016, the Utilities Board (Board) issued its “Final Decision and Order” (March 10 Order) in this docket. A number of parties to this proceeding have filed petitions for judicial review of that order (and associated orders), including the case of *Richard R. Lamb, et al., v. Iowa Utils. Bd., et al.*, Polk County District Court No. CVCV051997. On August 9, 2016, the petitioners in that case filed with the Court a motion for a stay of enforcement of the Board’s March 10 Order with respect to their properties. On August 22, 2016, the Court issued a ruling denying the motion for stay; however, the ruling expressly preserved the right of the petitioners to file a motion with the Board pursuant to Iowa Code § 17A.19(5). Pursuant to that statute, “the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.”

Also on August 22, 2016, the petitioners filed with the Board an emergency motion for a stay of enforcement of the Board's March 10 Order while they pursue judicial review of that order.

ANALYSIS

A. Jurisdiction

As noted above, multiple petitions for judicial review of the Board's March 10 Order have been filed. The general rule is that the filing of a petition for judicial review divests the agency of jurisdiction of the matter unless and until the district court remands the case to the agency. *McCormick v. N. Star Foods, Inc.*, 532 N.W.2d 196, 199 (Iowa 1995). However, there are exceptions to this general rule. Here, the exception is statutory; Iowa Code § 17A.19(5) gives the agency jurisdiction to consider a request for stay after a petition for judicial review has been filed.

B. Required Information

In order for the Board to consider whether to grant a stay, the Board must have detailed information regarding the progress of Dakota Access's activities in Iowa, both in general and as it relates to the particular properties that are the subject of the motion for stay. This information will be useful in the Board's evaluation of the merits of the request for stay and in considering the potential impact on the parties of grant or denial of a stay. Accordingly, the parties will be required to provide certain information and answers for the Board's consideration.

Dakota Access will be required to file the following information with the Board:

1. For the properties that are the subject of the request for stay:
 - a. Detailed information regarding the pipeline-related activities that are either underway or completed.
 - b. The projected schedule of future pipeline-related activities that may take place, including but not limited to projected dates (if not already underway or completed) for:
 - i. Staking;
 - ii. Initial clearing;
 - iii. Grading;
 - iv. Trenching;
 - v. Pipeline stringing;
 - vi. Pipeline bending;
 - vii. Pipeline welding;
 - viii. Pipeline coating;
 - ix. Lowering in the pipeline;
 - x. Final tie-in;
 - xi. Backfilling;
 - xii. Hydrostatic testing;
 - xiii. Final ROW cleanup; and
 - xiv. Land restoration.

c. As noted above, the Polk County District Court has ruled upon a similar request for stay, finding that the request should be presented to the Board in the first instance. The Board understands that in that judicial proceeding, Dakota Access alleged an approximate cost to move around a parcel.

i. Provide the basis for the cost to Dakota Access for each move around a parcel including a breakdown of labor, material, equipment, and other costs that make up that figure.

ii. Has Dakota Access actually bypassed a parcel or parcels? If yes, provide the actual cost Dakota Access incurred for bypassing each parcel and the basis for that cost, including a breakdown of labor, material, equipment, and other costs that make up that figure.

2. For determining the overall progress of Dakota Access's pipeline-related activities in Iowa, the following information, by county and by spread:

- a. The percentage of ROW staked;
- b. The percentage of ROW cleared;
- c. The percentage of ROW graded;
- d. The percentage of ROW trenched;
- e. The percentage of road bores completed;
- f. The percentage of other bores completed;

- g. The percentage of pipeline stringing completed;
- h. The percentage of pipeline welding completed;
- i. The percentage of pipeline lowered in;
- j. The percentage of trench backfilled;
- k. The percentage of hydrostatic testing done;
- l. The percentage of final ROW cleanup completed;
- m. The percentage of land restoration completed; and
- n. Whether winter construction (as defined in the August 3, 2016, Winter Construction Plan) is expected to be required on any properties in Iowa.
- o. Dakota Access shall also file maps showing the progress of each spread in terms of grading, trenching, backfilling, and land restoration. The county maps Dakota Access prepared to show the location of eminent domain parcels within each county should be used for this purpose. The progress for each specified activity should be shown in a different color, with an appropriate legend to identify which color is for which activity, so that it is clear which parcels in that county have been graded, trenched, backfilled, and restored.

Dakota Access must file written answers to the questions relating to the specific parcels that are the subject of the request for stay by 2 p.m. on Wednesday, August 24, 2016. If some of the required information is not available in that time

frame, Dakota Access shall timely file the information that is available and shall supplement its filing with each missing piece of information as soon as that information becomes available.

Dakota Access shall file updated information relating to the specific parcels that are the subject of the motion for stay (List B1, above) on a weekly basis. Further, if any projected dates for pipeline-related activities are accelerated or advanced for any of these parcels, that information shall be updated immediately.

The information identified in List B2, above, relating to the overall progress of pipeline-related activities in Iowa is of continuing interest and is very likely to be useful to the Board in ruling on future motions, complaints, or other matters related to this project. Accordingly, the Board will require Dakota Access to update that information on a weekly basis until all final ROW cleanup has been completed. The weekly reports should include a table showing the amount of each activity completed during the reporting period and a running total of the overall amount completed, by percentage or by other consistent measure, such as distance.

3. The Board will also require information from the petitioners.

Specifically, petitioners must provide detailed answers to the following questions:

- a. Explain why the petitioners waited until August 22, 2016, to seek a stay of an order issued March 10, 2016.

- b. What activities has Dakota Access taken on each of the petitioners' properties as of the date of this order (such as surveying, clearing, grading, and so on)? Has each landowner received a 48-hour notice of construction? When were those notices received?
- c. Where is each property in the condemnation process?
- d. The emergency motion for stay appears to identify 18 separate parcels with a number of owners, some of whom appear to own at least some interest in multiple parcels. Provide all information necessary to fully identify all owners and the location of each parcel for which petitioners seek a stay.

Petitioners must file written answers to these questions by 2 p.m. on Wednesday, August 24, 2016. To the extent petitioners are unable to provide complete written answers in that time frame, petitioners should be prepared to answer these questions at oral argument (see below).

C. Oral Argument

As noted above, the Polk County District Court has ruled upon a similar request for stay, finding that the request should be presented to the Board in the first instance. The Board understands that at oral argument in that judicial proceeding, counsel for Dakota Access indicated that the next phase of construction activities could reach some of these properties as early as the end of this week, that is, by

August 26, 2016. Accordingly, the Board will schedule oral argument on this motion for 10 a.m. on Thursday, August 25, 2016.

D. Temporary Remedy

While the Board is setting a schedule that is intended to allow the agency to consider the motion in a timely manner, there is a possibility that the next phase of pipeline activities could begin to affect at least some of these properties before the Board can take final action on the motion. Iowa Code § 17A.19(5) authorizes an agency to grant a stay or other temporary remedies. Pursuant to that authority, and in order to prevent harm to any party while the Board gathers the information it needs to rule upon the request for stay, the Board will temporarily prohibit Dakota Access from conducting any construction or other pipeline-related activities on the properties that are the subject of the emergency motion for stay until 9 a.m. on Monday, August 29, 2016.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Dakota Access is directed to file in this docket the information identified in this order according to the deadlines and timelines specified.
2. On or before 2 p.m. on August 24, 2016, Dakota Access shall file its response to the emergency motion for stay.
3. On or before 2 p.m. on August 24, 2016, the parties who filed the emergency motion for stay shall file the information identified in this order.

4. Oral argument on the emergency motion for stay is scheduled for 10 a.m. on Thursday, August 25, 2016, in the John Norris Hearing Room at the Board's offices at 1375 East Court Avenue, Des Moines, Iowa. Oral argument time will be divided as follows:

- a. Petitioners and those parties aligned with the petitioners shall have 45 minutes.
- b. Dakota Access and those parties aligned with Dakota Access shall have 45 minutes.
- c. Petitioners and those parties aligned with the petitioners may have 10 minutes for rebuttal.

Parties on either side shall file a statement indicating how they are allocating their oral argument time by 2 p.m. on August 24, 2016.

5. On or before 2 p.m. on August 24, 2016, any party that is not aligned with either side that desires to participate in the oral argument shall file a request for argument time.

6. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-725-7334 by August 24, 2016, to request that appropriate arrangements be made.

7. Pursuant to Iowa Code § 17A.19(5), a temporary remedy is hereby entered that prohibits Dakota Access, LLC, from conducting any construction or other pipeline-related activities on any of the properties that are the subject of the

emergency motion for stay filed in this docket on August 22, 2016, until 9 a.m. on
Monday, August 29, 2016.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 23rd day of August 2016.

DISSENT

I respectfully dissent from Ordering Clause No. 7 in this order, granting a temporary remedy prohibiting construction or other pipeline-related activities on the subject properties until 9 a.m. on August 29, 2016. Iowa Code § 17A.19(5)(c) and 199 Iowa Admin. Code 7.28 requires that a four-factor analysis be used when determining the granting of a stay. Neither Iowa Code nor Board rules differentiate between a temporary remedy that is a stay and a stay itself, therefore the Board must first consider the four-factor analysis in deciding whether to grant a temporary remedy of this nature. At this time the Board lacks sufficient information from the parties to perform the required four-factor analysis and thus cannot issue a temporary remedy that has the same effect as a stay.

I concur in the remainder of this order.

/s/ Nick Wagner

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 23rd day of August 2016.