

April 15, 2016

IOWA UTILITIES BOARD

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE:)
) Docket No. HLP-2014-0001
DAKOTA ACCESS, LLC)

**DAKOTA ACCESS' RESISTANCE TO ERIN RILEY'S
REQUEST FOR REHEARING OR RECONSIDERATION**

Dakota Access, LLC ("Dakota Access") hereby submits its Resistance to the Request for Rehearing filed by Erin Riley ("Riley") regarding tract number IA-WA-036.000.

INTRODUCTION

On March 10, 2016, the Board entered its Final Order (the "Order") in this docket approving the Application of Dakota Access under Iowa Code Chapter 479B and granting Dakota Access the right of eminent domain as specified in the Order. On March 31, 2016, Riley, self-identified as a remainderman and tenant in common on tract number IA-WA-036.000, filed her "Motion to Apply for Rehearing" (the "Motion"). The Riley Motion states, in relevant part,

Erin Riley hereby submits a Motion to Reconsider the "Standard Easement Rights Revised" filed by Dakota Access, LLC, and asks the Iowa Utilities Board to request an amendment in order to address an indemnity clause, related to damages and liability. Grantors to Easement Agreements, voluntary or otherwise, should not be legally nor financially liable for general negligence claims, and additionally should not be legally nor financially responsible for premises liability.

Riley Motion, at 1.

On April 11, 2016, Riley also filed a document titled "Statement of Position, Comments" in which she appears to supplement her motion with comments regarding certain terms she would like in a voluntary easement with Dakota Access (the "April 11 Filing"). It is unclear whether the Board is treating Riley's April 11 Filing as a motion for reconsideration and/or rehearing. On the one hand, at its' April 14, 2016 meeting, the Board appeared to indicate that it

believed Riley's April 11 Filing would be better characterized as a "complaint."¹ However, during its discussion of motions for rehearing and/or reconsideration at its' April 14, 2016 meeting, the Board did not appear to discuss the language in Riley's March 31, 2016 Motion for Rehearing, but rather discussed the three numbered comments in Riley's April 11 Filing.² As such, Dakota Access responds to both filings as a motion to reconsider; should the Board convert the April 11 filing to a Complaint, Dakota Access reserves the right to further comment on any revised schedule that is issued.

As set forth more fully below, Riley lacks standing to seek reconsideration and the Motion should therefore be denied. Moreover, even if Riley had standing, the Motion does not set forth any sufficient basis for granting rehearing or reconsideration, and must be denied for this additional reason. In addition, Riley's comments regarding negotiations for a voluntary easement are misleading, and in any event, the Board lacks authority to force Dakota Access and Riley to enter into specific terms in a *voluntary* easement.

ARGUMENT

As a threshold matter, the Motion should be denied because Riley lacks standing to seek reconsideration or rehearing. Riley is not a party to this proceeding. Riley, nor any other party, filed prepared testimony or testified at hearing in this matter regarding tract number IA-WA-036.000. In fact, Riley, nor any other party, appears to have even filed an objection in this matter regarding tract number IA-WA-036.000.

¹ Dakota Access notes that the deadline for filing motions for rehearing or reconsideration was March 31, 2016. *See* Iowa Code § 17A.16(2) (providing that a motion for rehearing must be filed within 20 days of the agency's final decision).

² This makes sense because the March 31 filing merely rehashed issues raised by other parties in the hearing and which were resolved by the March 10 Final Order; it appeared clear at the April 14 open meeting that the Board will not grant reconsideration for such arguments.

Simply stated, a person cannot seek to have an issue addressed for the first time through a Motion for Reconsideration or Rehearing where the person failed to meaningfully participate at the hearing. *See In Re: McLeod Telecommunications Services, Inc. v. Qwest Corp.*, Order Denying Request for Reconsideration (Iowa Utils. Bd. Jun. 17, 2011) (noting that “A review of Iowa case law indicates that rehearing is appropriate in order to hear new or additional evidence, *if there is good reason for the failure to present the evidence at the regular hearing.*”) (emphasis added); *see also Harvest Credit Mgt. VII, L.L.C. v. Lucas*, 772 N.W.2d 15 (Table), text at 2009 WL 1676660, *2 (Iowa App. Jun. 17, 2009) (noting that a motion to reconsider under Iowa Rules of Civil Procedure “is not properly used as a method to introduce a new issue, not previously raised before the court.”); 199 Iowa Admin. Code R. 7.27(1) (providing that “Any *party* to a contested case may file an application for rehearing or reconsideration of the final decision.”) (emphasis added); Iowa Code § 17A.16(2) (“Except as expressly provided otherwise by another statute referring to this chapter by name, any *party* may file an application for rehearing...”) (emphasis added). Accordingly, the Motion should be denied on this basis alone.

Moreover, there is no basis for Reconsideration of the Board’s Order regarding tract number IA-WA-036.000. As reflected on pages 122 – 124 of the Order, on all tracts for which no party intervened, filed prepared testimony, nor testified at hearing, the Board granted Dakota Access the right of eminent domain without further analysis regarding those tracts. *See* Order at 122 – 124 (identifying the “first category” and “second category” of tracts according to whether the party filed an objection, intervened, filed prepared testimony, and/or testified at hearing and granting eminent domain as to all parcels in those categories). The Motion sets forth no reason for why tract number IA-WA-036.000 should be treated any differently than the other parcels in category one.

Perhaps more to the point, Riley's basis for her Motion (and Riley's April 11 Filing) results from an apparent misunderstanding of the Board's role in granting eminent domain authority. In short, Riley's Motion asks the Board to craft an indemnity provision, which would indemnify all landowners, even in the event of their own negligence or failure to maintain their property, to be applied to every easement obtained through condemnation. However, it is not the Board's role with respect to eminent domain rights to draft easement agreements for the parties; rather, the Board's role is to determine whether the rights *requested by the Applicant* will be granted. Pursuant to Iowa Code § 479B.16,

A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, to the extent necessary and as prescribed and approved by the board, not exceeding seventy-five feet in width for right-of-way and not exceeding one acre in any one location in addition to right-of-way for the location of pumps, pressure apparatus, or other stations or equipment necessary to the proper operation of its pipeline. The board may grant additional eminent domain rights where the pipeline company has presented sufficient evidence to adequately demonstrate that a greater area is required for the proper construction, operation, and maintenance of the pipeline or for the location of pumps, pressure apparatus, or other stations or equipment necessary to the proper operation of its pipeline.

Iowa Code § 479B.16; *see also* 199 Iowa Admin. Code 13.2(h) (requiring a "specific description of the easement rights being sought.").

Further, the Board has recently rejected the same suggestion regarding indemnity in a similar scenario. In *In re: ITC Midwest, LLC*, No. E-22156, Proposed Decision and Order Granting Franchise (I.U.B. Mar. 29, 2016), the Board considered a landowner's request that ITC be required to indemnify the landowner for any damage that might result if the landowner's cattle got out of their enclosure. The Board rejected that suggestion, noting that ITC's easement documents, statement of damage claims, and Code Section 478.17 (requiring payment for damages caused by the applicant) already governed ITC's liability for damages to a landowner, and concluding,

“Beyond that, it would not be reasonable to require ITC to indemnify the Hoffmanns if their cattle get out no matter what the reason for their escape as the Hoffmanns would like.” *Id.* at 51.

The same is true here. Dakota Access, like ITC, has filed a Statement of Damage Claims pursuant to 199 Iowa Admin. Code 13.2(3), which provides a written statement as to how damages resulting from the construction of the pipeline shall be determined and paid. Similarly, like Code Section 478.17, Code Section 479B.17 expressly requires the pipeline company to pay the owner “for all damages caused by entering, using, or occupying the lands.” Further, Code Sections 479B.29 and 30 provide a non-exclusive list of additional compensable losses for which Dakota Access may be liable and create a procedure for recovering such losses. In sum, the law already dictates what losses Dakota Access is responsible for, and includes all damages “caused by entering, using, or occupying the lands.” Thus, just as in *ITC Midwest*, it would not be reasonable for the Board to require Dakota Access to indemnify all landowners, regardless of the reason for the loss, including a landowner’s own negligent acts or omissions. Accordingly, Riley’s request for rehearing and/or reconsideration should be denied for this additional reason.

With respect to Riley’s April 11 Filing, Dakota Access initially takes issue with the factual allegations of that filing. To be clear, rather than working from forms that have been used for other negotiations, Riley drafted her own easement agreement, much of which contained nonsensical or unreasonable terms.³ Nonetheless, Dakota Access attempted to work from Riley’s form, sending her numerous comments to it. In addition, contrary to Riley’s allegation that Dakota Access refused to include provisions in a voluntary easement that are required by law or

³ For example, Riley’s easement agreement required Dakota Access to agree that the proposed crude oil pipeline “will not carry... crude oil” (although it then said the Grantor “understands the pipeline will carry” light sweet crude oil, it is not clear the “understand” prevails over the explicit prohibition); disclaimed any warranty that grantor actually had title to the property; limited Dakota Access’s access to the easement to weekdays at certain times; required Dakota Access to post an additional \$80,000 surety bond; and required Dakota Access to pay grantor “negotiation costs” without defining them; among other questionable provisions.

the AIMP, Dakota Access's representative specifically expressed to Riley, in writing, that "Because many of the provisions in your easement are addressed by the Agricultural Impact Mitigation Plan ("AIMP") Dakota Access has filed with the IUB or by Iowa rules/regulations, I'm hopeful we can reference those documents/provisions in the easement."

More to the point, Riley's April 11 Filing lacks merit for the reasons set forth above. While the Board has authority to determine what easement rights will be obtained if an easement is *condemned*, the Board lacks authority to force Dakota Access and/or Riley to enter into or negotiate regarding specific terms in a private *voluntary* easement. Accordingly, to the extent Riley's April 11 Filing is interpreted as a motion for rehearing, it should be denied for these additional reasons.

WHEREFORE, Dakota Access, LLC respectfully requests that the Board enter an Order denying Riley's Motion for Rehearing and/or Reconsideration.

Respectfully submitted this 15th day of April, 2016.

By: */s/ Bret A. Dublinske*

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ATTORNEYS FOR DAKOTA ACCESS, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of April, 2016, he had the foregoing document electronically filed with the Iowa Utilities Board using the EFS system which will send notification of such filing (electronically) to the appropriate persons.

/s/ Bret A. Dublinske
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