

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE
APPLICATION OF DAKOTA ACCESS,
LLC FOR AN ENERGY FACILITY
PERMIT TO CONSTRUCT THE
DAKOTA ACCESS PIPELINE**

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**STAFF’S BRIEF IN RESPONSE TO
YANKTON SIOUX TRIBE’S MOTION
TO COMPEL

HP14-002**

COMES NOW, Staff (“Staff”) of the South Dakota Public Utilities Commission (“Commission”) and hereby files this brief in response to the Motion to Compel (“Motion”) filed by Yankton Sioux Tribe (“Yankton”).

I. Jurisdictional Statement

In the current proceeding, Yankton filed a Motion to Compel requesting the Commission issue an order compelling Dakota Access, LLC (“Dakota Access”) to provide certain answers and documents requested by Yankton through discovery. The Commission has jurisdiction over this issue pursuant to ARSD 20:10:01:01.02 and 20:10:01:22.01 and SDCL § 15-6-37.

II. Timeliness of the responses

Staff does not take a position with respect to the timeliness of Dakota Access’ responses, other than to emphasize the need for strict adherence to the procedural schedule in matters such as this, where the Commission must operate within a statutory time frame. Staff, however, sent its discovery requests out in advance of the discovery request deadline and, therefore, received responses prior to May 1, 2015.

Staff does not consider the procedural schedule in this docket to be compressed. All parties were given an opportunity for input at the time the schedule was set. Moreover, initial discovery was not due until nearly a month after the telephonic scheduling conference and four-

and-a-half months after the application was filed. Knowing that we would have to comply with a one-year deadline, Staff worked to compile its discovery requests well in advance of the deadline and does not feel that the Commission issued a “compressed” schedule.

III. Motion to Compel

The legal standard for a motion to compel is established in SDCL § 15-6-37(a), which provides in relevant part:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(2) Motion. If ...a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action...

(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

In addition ARSD 20:10:01:22.01 provides:

A party may obtain discovery from another party without commission approval. The commission at its discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be in the same manner as in the circuit courts of this state.

Yankton seeks an order compelling Dakota Access to provide answers and documents requested through discovery. Staff understands that Dakota Access does intend to supplement its

responses. Therefore, it is anticipated that some of these issues will be resolved prior to the hearing.

When analyzing whether to compel a party to produce documents or answers over that party's objection, it is first necessary to determine whether the interrogatory or request falls within the scope of discovery. SDCL § 15-6-26(b)(1) defines the scope of discovery as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The South Dakota Supreme Court has held that the statute concerning discovery should be liberally construed. *Bean v. Best*, 76 SD 462, 80 N.W.2d 565, 566.

Staff does not take a position on whether or not the Motion should be granted with respect to individual interrogatories and requests for production. However, Staff does wish to address the confidentiality of historic and cultural sites.

Yankton states that Dakota Access refused to answer Interrogatory 19. The Interrogatory sought information regarding cultural or historic sites uncovered by Dakota Access. Dakota Access stated that this information was confidential. Staff understands that maintaining the confidentiality of cultural and historic sites protects the sites from looting, protects landowners from trespassers, and potentially protects the Commission from liability. Moreover, SDCL § 1-20-21.2 provides:

Any records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site shall remain confidential to

protect the integrity of the archaeological site. The state archaeologist may make the information from the records of an archeological site available to any agency of state government and any political subdivision of the state or to any tribe, which, in the opinion of the state archaeologist, may conduct an activity that affects any such site. The state archaeologist shall also make the information from the records of an archeological site available to the owner of the land that is an archeological site and may make the information available to any qualified researcher or research entity.

Therefore, Staff recommends the Commission maintain the confidentiality of these sites.

IV. Attorneys' fees and expenses

Yankton seeks an award of reasonable attorneys' fees and expenses associated with bringing the Motion. SDCL 15-6-37(a)(4) provides:

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under § 15-6-26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.


(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under § 15-6-26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Staff does not take a position as to whether or not attorneys' fees and expenses should be awarded.

V. Conclusion

At this time, Staff does not take a position on whether or not the Motion to Compel should be granted, but looks forward to Dakota Access supplementing its answers and hopes that the supplemented answers will resolve many of the issues prior to the hearing.

Dated this 8th day of May, 2015.



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**CERTIFICATE OF SERVICE

HP14-002**

I hereby certify that true and correct copies of Staff's Brief in Response to Yankton Sioux Tribe's Motion to Compel and Certificate of Service were served electronically to the Parties listed below, on the 8th day of May, 2015, addressed to:

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