

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

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**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  
JOINT MOTION TO AMEND  
PROCEDURAL SCHEDULE**

**HP14-002**

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this brief in response to the Joint Motion to Amend Procedural Schedule ("Motion") filed by Yankton Sioux Tribe, Rosebud Sioux Tribe, Indigenous Environmental Network, and Dakota Rural Action, and joined by parties represented by attorney Glenn Boomsma (collectively "Movants"). For the purposes of this response, all references to the Transcript refer to the Transcript of the Prehearing Scheduling Conference.<sup>1</sup>

**I. Argument and Authority**

Movants request an amendment to the procedural schedule based on the failure of Dakota Access, LLC ("Dakota Access") to timely file responses to discovery requests, due May 1, 2015. As stated in its response to Yankton Sioux Tribe's Motion to Compel, 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. Moreover, all parties were given an opportunity for input at the time the schedule was set.

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<sup>1</sup> A copy of this transcript is available in the docket at <http://www.puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/transcript030315.pdf>.

Because this is in effect a request for a continuance, Staff analyzes this Motion in that context. Grant or denial of a motion for continuance is discretionary with the Commission. *Saastad v. Okeson*, 16 S.D. 377, 92 N.W. 1072. However, there are certain factors the Commission must consider when decided whether to grant a motion for continuance. These factors are:

- (1) whether the delay resulting from the continuance will be prejudicial to the opposing party;
- (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel;
- (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and
- (4) whether there have been any prior continuances or delays.

*Meadowland Apartments v. Schumacher*, 2012 S.D. 30, 813 N.W.2d 618. (quoting, *State v. Moeller*, 2000 S.D. 122, ¶ 8, 616 N.W.2d 424, 431). Staff relies on the first factor in its analysis, as the Motion does not appear to have been made upon poor planning, Movants have adequately addressed the third factor, and there have been no prior continuances. However, the first factor is the deciding factor in this case. Staff, as an opposing party, would be greatly prejudiced by a continuance in this matter. Staff, as well as all other parties and the Commission itself, is required to finalize its case within one year. As the schedule is currently set, the evidentiary hearing will conclude approximately nine weeks before the end of the one-year time period. In those nine weeks, parties are tasked with writing briefs and response briefs, if ordered by the Commission, and the Commission is tasked with rendering a decision and drafting an Order. Nine weeks is a short amount of time in which to accomplish this.

Movants further argue that parties will not receive responses to the final round of discovery until after pre-filed direct and rebuttal testimony are due. See Motion at ¶16. This statement is not only correct, but was contemplated during the conference call in which the

parties agreed upon the schedule. See Transcript 7-8. At that time, the parties felt that discovery should be on-going leading up to the evidentiary hearing to afford the opportunity to discover information necessary to respond at the evidentiary hearing to issues raised in pre-filed testimony. Therefore, this deliberate and agreed upon schedule does not render the final round of discovery moot, but allows for an important tool to acquire information and cross-examine witnesses at the hearing. No party is forced to engage in this continuing discovery should they prefer to conclude their discovery prior to pre-filed testimony deadlines. However, Staff would like the opportunity to utilize this fact-finding tool.

Movants next argue that the date to submit witness lists and exhibit lists is too close to the date final discovery is due. See Motion at ¶17. Again, this was done deliberately when the schedule was set. It makes little sense to submit witness lists prior to the conclusion of discovery, but it makes sense to allow time to evaluate witness lists and formulate cross-examination prior to the hearing. Therefore, a certain amount of time constraint is unavoidable on one end or the other of the date witness and exhibit lists are due. If a party is concerned they will not have enough time to submit their witness or exhibit list subsequent to receiving final discovery answers, the best course of action is to submit final discovery early and, thus, receive final answers prior to September 21, 2015. As an example, in an effort to maximize economy of time, Staff submitted its first round of discovery well in advance of the initial due date and received responses prior to the May 1, 2015, deadline. It was contemplated during the scheduling conference that answer deadlines would be controlled either by the scheduled deadline or the thirty-day statutory deadline, whichever was earliest. See Transcript at 14:14-24.

Finally, Staff notes that not all of the parties who joined in this motion participated in the first round of discovery. See Motion at ¶13. If a party has delayed in their attempts to engage in

discovery, that party should bear some of the responsibility for any constraint they might encounter in attempting to bring discovery-related motions.

## **II. Conclusion**

Because the legislature has mandated this docket be processed within one year from the date of filing, Staff does not believe the luxury of an expanded procedural schedule is available. Further, Movants have not provided a proposed schedule upon which Staff could comment, nor has the need for a continuance been analyzed within the context of the effect of the Commission's May 12 decision. Staff questions whether the amount of discovery compelled merits an amendment to the procedural schedule.

Staff notes that the discovery dates set-forth in the procedural schedule are established to prevent delays in the proceeding and parties can submit interrogatories earlier than the due dates. Staff encourages all parties to submit interrogatories as early as possible in order to facilitate timely completion of discovery.

Therefore, Staff respectfully requests this Motion be denied.

Dated this 14th day of May, 2015.

  
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