STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: DAKOTA ACCESS, LLC	DOCKET NO. HLP-2014-0001

IN RE: ERIN RILEY, Complainant, v. DAKOTA ACCESS, LLC, Respondent.	DOCKET NO. FCU-2016-0006

ORDER DENYING APPLICATIONS FOR REHEARING OR RECONSIDERATION, OPENING COMPLAINT DOCKET AND ESTABLISHING GENERAL COMPLAINT PROCEDURES

(Issued April 28, 2016)

BACKGROUND

On March 10, 2016, the Utilities Board (Board) issued its "Final Decision and Order" (Order) in this docket, granting Dakota Access, LLC (Dakota Access), a permit pursuant to Iowa Code ch. 479B to construct, operate, and maintain approximately 346 miles of 30-inch diameter crude oil pipeline through Iowa. However, the Board did not issue the permit at that time; the permit was not issued until April 8, 2016, after Dakota Access made, and the Board accepted, certain compliance filings.

APPLICATIONS FOR REHEARING OR RECONSIDERATION

A number of applications for rehearing have been filed in this matter. One of them has been filed by a party to this proceeding (that is, an entity that petitioned for and was granted intervention), specifically the Sierra Club Iowa Chapter (Sierra Club). Other applications were filed by landowners who did not intervene and become parties to this docket. Iowa Code § 17A.16(2) only provides for applications for rehearing in a contested case that are filed by parties to the proceeding. However, those applications were filed by landowners whose property will be directly affected by the proposed pipeline and the Board finds it is appropriate to consider those applications at this time.

Furthermore, some of the filings are identified as applications for rehearing while others are identified as motions, or applications, for reconsideration. Pursuant to 199 IAC 7.27, the Board treats applications for reconsideration the same as applications for rehearing. That rule applies to hazardous liquid pipeline permit proceedings pursuant to 199 IAC 7.1(3).

On March 9, 2016, Mary Goodwin filed a two-page document styled as a "Post Hearing Brief." On March 17, 2016, she filed a substantially similar document titled "Motion to Reconsider." As described above, the Board will treat the filing as an application for rehearing or reconsideration. Goodwin's request is that the Board deny Dakota Access the authority to acquire an easement by eminent domain across her property, identified in this record as H-PO-004 (IA-PO-033). She asks that the

pipeline be re-routed 190 feet to the east to avoid her parcel so that she can, in the future, proceed with her business plans for the property.

On March 14, 2016, Barb Styke Hudelson and Gary Styke (collectively, the Stykes) filed a request for clarification or reconsideration of the Order with respect to certain property in Lyon County. The Stykes request clarification with respect to a parcel identified as H-LY-008 (IA-LY-003), belonging to Shirley Styke as Trustee of the Shirley Styke Revocable Trust. Specifically, they ask whether Dakota Access has been granted the right of eminent domain only for the pipeline easement and construction easement across the parcel, or if the grant includes the temporary access road easement requested by Dakota Access.

Under Iowa Code § 476.12, the Board was required to rule on these two applications within 30 days of the date they were filed. However, the parties to this proceeding had until March 31, 2016, to file applications for rehearing or reconsideration. In order to allow the Board to consider all of the applications together, on April 1, 2016, the Board granted these applications solely for purposes of giving them further consideration, allowing them to be considered at the same time and together with any later-filed applications.

On March 30, 2016, Sierra Club filed a motion for reconsideration of the Order, arguing that Dakota Access may have commenced construction of the pipeline prior to receiving its permit. Sierra Club argues that if Dakota Access has done so, the Order should be rescinded and no permit should be granted.

On March 31, 2016, Erin Riley, an owner of a parcel that would be crossed by the pipeline, filed a motion for rehearing, asking the Board to grant rehearing to consider amendments to the condemnation easement. Riley filed a supplemental statement of position on April 12, 2016, saying that Dakota Access has denied her request for a voluntary easement agreement based upon her proposed language addressing topsoil separation and certain indemnity clauses. It appears Riley may be alleging a failure on the part of Dakota Access to negotiate in good faith.

On April 1, 2016, the Joyce Pedersen Frish Estate (Frish Estate), another affected landowner, filed a motion requesting rehearing or reconsideration. The Frish Estate disagrees with the Board's analysis in the Order regarding safety, economics, the public convenience and necessity, and the grant of the right of eminent domain. The Frish Estate argues that while the pipeline may make railroads and highways somewhat safer, it will not make Iowa's land and water any safer. The Frish Estate also argues that the Board's economic analysis was based only on "hard dollars and cents" and failed to adequately consider future environmental costs and devaluation of the properties crossed.

Dakota Access filed a resistance to the Frish Estate's motion for reconsideration on April 15, 2016. First, Dakota Access argues the motion is untimely, having been filed more than 20 days after the Order was issued. Second, Dakota Access says the persons filing the Frish Estate motion lack standing to seek reconsideration or rehearing because they did not intervene in this matter and are not

parties. Third, Dakota Access argues the motion sets forth no new arguments or evidence for the Board to consider; instead, it simply asks the Board to change its mind. Dakota Access concludes the Frish Estate has failed to demonstrate that reconsideration or rehearing is warranted.

Goodwin asks the Board to deny the request for the right of eminent domain with respect to her property, identified as H-PO-004 (IA-PO-033). Goodwin asks that the pipeline be moved 190 feet to the east to avoid her property entirely, as she has future plans to build on the land. Goodwin has not offered any specific reasons for moving the pipeline onto her neighbor's property, other than her undefined future plans for the land, which are unsupported by any evidence in the record. The Board will not require relocation of the pipeline on this basis and will deny the request for reconsideration.

The Stykes' request for clarification regarding access easements has been addressed by the Board in an order issued April 1, 2016, "Order Regarding Applications, Motions, and Requests and Taking Official Notice." It was also addressed in the Order at page 86, where the Board considered language in Dakota Access's proposed condemnation easement that would have allowed the company to access the pipeline easement and the temporary construction easement by crossing any parcel in any manner and at any time that was convenient to the company. Landowners objected and asserted that the company should be allowed to access those easements only by means of the pipeline easement and temporary

construction easement unless a specific access easement is defined and requested (or unless otherwise agreed to by the landowner). The Board adopted the landowner position and required Dakota Access to file a modified condemnation easement that did not allow the company to access the pipeline and temporary construction easements using any part of the entire parcel. This ruling affected only the company's request for undefined, unrestricted access on all parcels; it did not affect the company's request for specifically-defined access easements on specific parcels, where necessary.

With respect to the Stykes' property, Dakota Access has requested a specifically-defined access easement generally along the north edge of the property. Ordering Clause No. 9 of the Order granted Dakota Access the right of eminent domain over the parcels listed in Attachments 1 and 2 to the order; the Stykes' property is listed on page 7 of Attachment 1. Accordingly, Dakota Access has been granted the right of eminent domain including the right to condemn a temporary access road as shown on Exhibit H-LY-008 (IA-LY-003).

The Frish Estate's motion raises issues already considered and addressed in the Order. Safety issues were addressed at pages 54 through 58 of the Order. Economic impacts and environmental issues associated with the proposed pipeline were considered at pages 41 through 54 of the Order. The public convenience and necessity was addressed at pages 108 through 114, and eminent domain was addressed at pages 114 through 122 of the Order. The Board has already

considered the arguments raised in the Frish Estate's motion and the motion presents no reason to reconsider the Board's decisions on these issues. The request for reconsideration will be denied.

Riley's motion for rehearing, when considered in connection with the later-filed statement of position, is different. It is not directly addressed to the Board's Order or the decisions made therein; instead, it appears the issues raised involve allegations about the post-Order behavior of Dakota Access with respect to negotiation of voluntary easements. The Board will address the motion in a subsequent section of this order.

Sierra Club's motion for reconsideration is also different in certain respects. Sierra Club is a party to this proceeding. Its motion is based upon information that was not available at the time of the hearing and therefore could not have been raised at an earlier stage of this proceeding, so it presents an appropriate subject for an application for rehearing under Iowa Code § 17A.16(2). However, the motion is a conditional one; it is predicated upon an allegation that Dakota Access may have commenced construction of the pipeline prior to issuance of the required permit. In other words, the motion does not actually allege that Dakota Access has commenced construction; it merely alleges the possibility. The Board is considering that allegation separately in this docket. Sierra Club's motion for reconsideration will be denied.

The Board notes that this order is the final agency decision on all pending applications for rehearing or motions for reconsideration. This means that the time for filing petitions for judicial review runs from the date of this order. Iowa Code §§ 17A.16(2) and 17A.19(3); *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 190 (Iowa 2013).

RILEY REQUEST

As noted above, Riley's request for rehearing does not seek to challenge or revise any decision made in the Order; instead, it appears to be a complaint regarding the post-Order actions of Dakota Access, specifically an alleged failure to negotiate in good faith with respect to a voluntary easement agreement drafted by Riley. Riley says the company refuses to agree to an indemnification provision and will not incorporate topsoil measures already addressed in the Agricultural Impact Mitigation Plan into the easement.

On April 15, 2016, Dakota Access filed a resistance to Riley's request for rehearing. Dakota Access says that Riley is not a party to this proceeding and argues that Riley therefore lacks standing to seek reconsideration or rehearing. Dakota Access says Riley cannot seek to have an issue considered under the guise of rehearing when Riley failed to participate at the hearing, citing *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) (stating that under the Iowa Rules of Civil Procedure, a motion to

reconsider "is not properly used as a method to introduce a new issue, not previously raised before the court.").

Next, Dakota Access argues that the Board has already granted the company the right of eminent domain over Riley's property and the motion sets out no reason why Riley's property should be treated differently from other, similarly-situated parcels.

Dakota Access also argues that Riley is requesting inappropriate relief. The company says that Riley is belatedly asking the Board to craft an indemnity provision to be added to the condemnation easements, requiring the company to indemnify landowners even in the event of the landowners' own negligence or failure to maintain their own property. Dakota Access says it is not the Board's role to draft easement agreements for the parties; instead, the agency should simply determine whether the rights requested by the petitioner will be granted. Put another way, Dakota Access says that while the Board has authority to determine what easement rights will be obtained through condemnation proceedings, the Board lacks authority to require the company or the landowner to enter into or negotiate regarding specific terms in a voluntary easement.

Dakota Access says that the Board has recently rejected a similar request regarding indemnity language in condemnation easements, in *In re: ITC Midwest, LLC,* Docket No. D-22156, "Proposed Decision and Order Granting Franchise" (I.U.B. Mar. 29, 2016). In that proceeding, the Board (through its administrative law judge)

considered a landowner's request that the company be required to indemnify the landowner for any damage that might occur if the landowner's cattle escaped their enclosure. The Board declined the request, noting that the easement documents, statement of damage claims, and Iowa Code § 478.17 already govern the company's liability for damages to the landowner and concluding that it would be unreasonable to require the company to indemnify the landowner if the cattle escape without also considering the reason for the escape.

Dakota Access argues the same reasoning applies here. The company has filed a Statement of Damage Claims pursuant to 199 IAC 13.2(3) and Iowa Code § 479B.17 expressly requires the company to pay the owner "for all damages caused by entering, using, or occupying the lands." Further, §§ 479B.29 and 479B.30 provide a non-exclusive list of additional compensable losses for which the company may be liable. Dakota Access concludes the law already dictates what losses Dakota Access is responsible for and it would not be reasonable to require the company to indemnify all landowners for all losses, regardless of the reason for the loss, including those losses caused by the landowner's own negligent acts or omissions.

Finally, Dakota Access takes issue with the factual allegations of the motion. Dakota Access says that rather than working from forms that have been used in other negotiations, Riley drafted her own easement agreement. Dakota Access says it tried to work from Riley's form, sending her numerous comments on it. As part of

those negotiations, Dakota Access's representative specifically told Riley that because many of her proposed provisions are addressed in the Agricultural Impact Mitigation Plan, the company hopes they can be referenced in the easement.

The Board will treat Riley's motion as a complaint, identified as Docket No. FCU-2016-0006. While Dakota Access has provided a response to the motion, the company reserved the right to submit further comment if the motion is converted to a complaint, so the Board will set a comment schedule allowing the company an opportunity to submit further comment and giving Riley the opportunity to submit reply comments, after which the Board will take such action as it deems appropriate.

It is possible that there may be other complaints submitted regarding this project. For example, pursuant to Iowa Code § 479B.20(5), if a county board of supervisors concludes that Dakota Access has failed to comply with the requirements of § 479B.20, the Agricultural Impact Mitigation Plan, the approved line location, or with an independent agreement on land restoration, the supervisors may file a complaint with the Board. It is appropriate in this order to set out the procedures the Board intends to use for processing any such complaints, whether they are filed by a county board of supervisors or by an affected landowner or tenant.

Each such complaint should name Dakota Access as respondent and will be assigned a separate FCU docket number. The complaint should be filed via the Board's electronic filing system and should include a complete statement of the facts relied upon as the basis for the complaint and a specific statement of the relief

requested. The complainant, Dakota Access, and the Office of Consumer Advocate (OCA), a division of the Department of Justice, will be made parties to the proceeding and will each be electronically served with a copy of the complaint. Dakota Access will be required to file its response to the complaint within seven calendar days and the complainant and OCA may file reply comments within seven calendar days after service of the Dakota Access response. (Any party may file a request for additional time for good cause shown; further, the Board may order shortened response times in appropriate circumstances.) The Board will then take such action on the complaint as may be appropriate. Depending upon the circumstances, that action may include, but is not limited to, granting or denying the complaint (if there are no material issues of fact to be resolved) or setting the matter for hearing.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The motion to reconsider filed on March 9, 2016, by Mary E. Goodwin, the request for clarification filed on March 14, 2016, by Barb (Styke) Hudelson and Gary Styke, the motion for reconsideration filed on March 30, 2016, by the Sierra Club Iowa Chapter, and the motion to request rehearing or reconsideration filed on April 1, 2016, by the Joyce Pedersen Frish Estate are denied.

2. The motion to apply for rehearing filed on March 31, 2016, and the Statement of Position, Comments, filed on April 12, 2016, by Erin Riley, and any related filings by any party, are deemed to be a complaint regarding the negotiations

of Dakota Access, LLC, and are docketed for further investigation as Docket No. FCU-2016-0006. The motion, statement of position, and the resistance filed by Dakota Access on April 15, 2016, are now part of the record in Docket No. FCU-2016-0006. Dakota Access shall file any additional comments it has with respect to the complaint within 7 calendar days of the date of this order; Riley and the OCA may file reply comments within 14 calendar days of the date of this order.

3. If other complaints are filed with the Board regarding the activities of Dakota Access, each such complaint will be assigned a separate FCU docket number. The complaint should include a complete statement of the facts relied upon as the basis for the complaint and a statement of the relief requested. The complainant, Dakota Access, and OCA will be made parties to the proceeding and will each be electronically served with a copy of the complaint. Dakota Access will be required to file its response to the complaint within seven calendar days and the complainant and OCA may file reply comments within seven calendar days after service of the Dakota Access response. (Any party may file a request for additional time for good cause shown; further, the Board may order shortened response times in appropriate circumstances.) The Board will then take such action on the complaint as may be appropriate.

4. This order is the final agency decision on all pending applications for rehearing or motions for reconsideration. The time for filing petitions for judicial review runs from the date of this order. Iowa Code §§ 17A.16(2) and 17A.19(3); *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 190 (Iowa 2013).

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano */s/ Nick Wagner*

Executive Secretary, Designee

Dated at Des Moines, Iowa, this 28th day of April 2016.