STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

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

ORDER DENYING MOTION FOR CLARIFICATION

(Issued March 10, 2015)

I. Background

a. The Motion for Clarification

On January 5, 2015, the Environmental Coalition[1] (or Coalition) filed a "Motion for Clarification" seeking a ruling regarding the adequacy of the notice given for the informational meetings held in connection with the proposed Dakota Access, LLC (Dakota Access), hazardous liquids pipeline (HLP). The Coalition says that the notice of the meetings that was published in newspapers stated that the proposed pipeline would be buried a minimum of 60 inches deep in agricultural land, but the Dakota Access representatives at the meetings said the pipeline would be buried a minimum of 48 inches deep. The Coalition says the notice could have caused some landowners or other members of the public to believe the pipeline would be buried deep enough so that it would not adversely affect their farmland, so they may have decided not to attend an informational meeting or to object to the project. The

[1] The Sierra Club Iowa Chapter, Iowa Citizens for Community Improvement, Food and Water Watch, Iowa Climate Advocates, Iowa Interfaith Power and Light, 100 Grannies for a Livable Future, 1000 Friends of Iowa, Women, Food and Agriculture Network, Iowa State University Sustainable Agriculture Student Association, Iowa State University ActivUs, Citizens Climate Lobby, Drake Environmental Action League, and Science and Environmental Health Network.

Coalition says this was a significant defect in the notice process for the informational meetings, adversely affecting landowners and other members of the public.

The Coalition also says that the informational meeting for Wapello County was originally scheduled for December 2, 2014, and notice of that date was sent to affected landowners and published in newspapers. The date of the meeting was later changed to December 16, 2014. The Coalition says that notice of the change was not sent to landowners by certified mail, as required by Iowa Code § 479B.4 and 199 IAC 13.3(4), so there is no assurance that all landowners were notified of the change and some may not have known of the rescheduled meeting and therefore did not attend. The Coalition says this was also a significant defect in the notification process.

The Environmental Coalition also notes that on December 31, 2014, an objection was filed in this docket by Mr. William Alexander stating that his mother-in-law, Reba McWilliams, is an owner of affected property and she was not given notice of the informational meeting in her county by certified mail. This raises the question of how many other landowners were not properly notified.

Due to these defects and issues, the Coalition says that Dakota Access should be required to reschedule all of the public informational meetings and to give proper notice of the new meetings as required by law. The Coalition also says that Dakota Access should not be permitted to file a petition for a permit until the informational meetings have been properly noticed and conducted.

b. The Resistance to the Motion for Clarification

On January 15, 2015, Dakota Access filed a resistance to the motion for clarification asserting that the company has complied with the notice requirements of Iowa Code chapter 479B and 199 IAC ch. 13. With respect to the 60-inch minimum burial depth in the published notices, Dakota Access acknowledges that "there was an error in the newspaper notice causing the difference between that [notice] and the informational meeting presentation…." (Resistance at p. 4.) Dakota Access argues the error in the newspaper notice is not a significant defect in the notice process for a number of reasons.

First, the affected landowners were provided with the correct information in the notices that were sent to them by certified mail. Those notices state that the line will be buried a minimum of 48 inches deep in agricultural lands. (See Att. C to the Resistance.)

Second, Rule 13.3(4) requires that the published notice provide only a "general" description of the proposed project, including the "general" nature of the right-of-way required, all of which is inherently preliminary information that is subject to change. Taken in context, Dakota Access says its notice fulfilled these requirements and put residents on notice of the plans for a new pipeline in their county.

Third, while Dakota Access proposes to build the pipeline a minimum of 48 inches deep, the top of the pipe will also be at least 24 inches below the bottom of any drainage tile, so in many locations it will be buried more than 60 inches below the

surface. Dakota Access says it needs this flexibility to address site-specific conditions and argues that the Coalition's strict reading of the notification requirements would not provide this necessary flexibility.

With respect to the rescheduling of the Wapello County meeting, Dakota Access says that notice of the rescheduled meeting was sent by certified mail to the owners of every affected parcel in Wapello County, as shown in Attachments B-2, B-4, and B-5 to the Resistance, complying with the legal requirements for notice. Dakota Access also sent notice of the rescheduled meeting to every landowner in the notice corridor, statewide, strictly as a courtesy in the event that the rescheduled Wapello County meeting would be more convenient for some of those landowners. This notice was not required by statute or rule, so the fact that it was sent by regular mail, rather than certified mail, is not a defect in the required notice. Dakota Access also published notice of the changed date in newspapers in adjoining counties and had a representative at the meeting site on the original date, December 2, 2014, to explain the rescheduling and provide accurate information to anyone who showed up. These efforts were also above and beyond the requirements of the statute and the rules. Thus, the required notice was given by certified mail and additional notice that was not required by law was given by other means. Dakota Access asserts that the Coalition's claim of a notice defect regarding the rescheduled meeting is baseless and without merit.

As for the alleged lack of notice to Reba McWilliams, Dakota Access says the assertion is untrue. Dakota Access provided a signed return receipt and U.S. Postal

Service tracking information showing delivery and receipt of certified mail to Ms. McWilliams at the address shown in the public land and tax records used by the Mahaska County Assessor's Office. (Attachment A to the Resistance.)

Dakota Access cites *Anstey v. Iowa State Commerce Comm'n*, 292 N.W.2d 380 (Iowa 1980), for the proposition that when there are flaws in the notification process for an informational meeting, substantial compliance with the legal requirements is sufficient "where as here there is a good faith effort to comply and no prejudice has been shown…." (At 385-86.) Dakota Access also relies on *Rutherford v. Iowa Dep't of Commerce,* No. 2-138, 2002 Iowa App. LEXIS 1348 (Iowa Ct. App., Dec. 30, 2002), for the same proposition.[2]

On January 20, 2015, Dakota Access filed its petition for a permit.

c. The Reply to the Resistance

On January 26, 2015, the Coalition filed a reply to the resistance, arguing that the published notice is a critical part of the overall notification process and the inaccurate depth in the published notice represents a significant error. The notices presumably included information about the depth of the proposed pipeline because Dakota Access thought that was significant information that would factor into a person's decision about whether the proposed pipeline should be constructed, so Dakota Access should not be permitted to argue now that its error was harmless.

The Coalition argues that the cases cited by Dakota Access are factually distinguishable from this case. The *Anstey* case involved the question of whether the

[2] The *Rutherford* decision can also be found at *Bradley v. Iowa Dept. of Commerce*, 2002 WL 31882863 (Iowa Ct. App. 2002).

Board (then the Iowa State Commerce Commission) had jurisdiction of a transmission line franchise proceeding when the notice process for the informational meetings was flawed. The Coalition says it is not challenging the Board's jurisdiction in this matter; it is only asking that the informational meetings be conducted according to the statutory requirements before the petition is addressed.

Similarly, in the *Rutherford* case the objectors sought to dismiss a petition for a construction permit. The Coalition says it is not seeking dismissal, just proper informational meetings.

As for the mailed notices of the rescheduled meeting in Wapello County, the Coalition notes that Iowa Code § 479B.4 requires that notices by sent by "restricted certified mail," which means the letter will be delivered only to the person to whom it is addressed. The exhibits submitted by Dakota Access indicate the notices were sent by certified mail, return receipt requested, which provides the sender with proof of mailing and verification that the letter was delivered to the address or that a delivery attempt was made. In other words, the notices were not sent in the precise manner required by the statute.

With respect to the notice to Ms. McWilliams, Dakota Access's exhibits show the notice was sent to Deborah Ide, not to Ms. McWilliams. The exhibits also make it clear that the property in question is jointly owned by Ms. Ide, Ms. McWilliams, and Pamela Alexander, and there is no showing of any notice to either Ms. McWilliams or Ms. Alexander. The Coalition included affidavits from Ms. McWilliams and Ms.

Alexander confirming that they did not receive a notice of the informational meeting by restricted certified mail directed to them. (Exhs. D and E to the Reply.)

d. The Surreply

On January 30, 2015, Dakota Access filed a "Surreply Regarding New Issues Raised by the Environmental Coalition" (Surreply). Dakota Access points out that it sent notice of the meetings to affected parties by certified mail with return receipt requested as required by Rule 13.3(4), although the statute (§ 479B.4) admittedly specifies "restricted certified mail." Dakota Access argues that its service meets the *Anstey* requirements that there must be a good faith effort to provide the required notice, no prejudice has been shown, and that there was substantial compliance with the notice requirement.

With respect to its good faith effort to comply, Dakota Access notes that it fully complied with the Board's rules regarding service of notice; it gave landowners courtesy notice of meetings in adjacent counties in the event those meetings were more convenient for some landowners; it mailed notice to all landowners when the Wapello County meeting was rescheduled, even though it was not required to notify landowners in other counties; it published notice as required; and it has made its meeting presentation available online so that everyone can see it at any time, even if they were unable to attend an informational meeting.

Dakota Access says that the Coalition has not proven that any prejudice to anyone's rights occurred as a result of any technical flaws in the notification process. As described above, there were numerous methods used to provide notice of the

meetings, along with articles and other mentions in both social and traditional media that were not placed there by Dakota Access, but that offered other avenues of information about the meetings. In the end, there can be no credible assertion that any significant number of affected landowners has been deprived of knowledge of the project, according to Dakota Access.

With respect to the property owned by Ms. Ide, Ms. McWilliams, and Ms. Alexander, Dakota Access says that it provided notice to landowners based upon the tax records of the Mahaska County Assessor; if these individuals choose to use an "in care of" address for those purposes, Dakota Access should be able to rely upon that information when preparing its notices.

e. The Surrebuttal

On February 2, 2015, the Coalition filed a "Surrebuttal to Surreply Filed by Dakota Access LLC" (Surrebuttal), saying that even if Dakota Access sent notice by certified mail as required by Rule 13.3(4), that rule does not take precedence over the statutory notice requirement that the notice be sent by *restricted* certified mail. Dakota Access should be required to comply with the law.

As for the alleged lack of any showing of prejudice, the Coalition says that Dakota Access is trying to make the Coalition prove a negative. If an error in the notification process caused an affected landowner to not be notified, that landowner would not know about the error and would not be able to contest the insufficient notice by showing prejudice.

As for the argument that Dakota Access acted in good faith, the Coalition says it is not accusing the company of acting in bad faith. Instead, it asks that proper notice be given to affected landowners and that the informational meetings be conducted again to ensure that all affected persons have their rights protected.

II. Legal Standards

Iowa Code § 479B.4 requires that the notice of public informational meetings for a proposed HLP be sent by "restricted certified mail."

Board rule 199-13.3(4) specifies that the notice of informational meetings should be served by "certified United States mail with return receipt requested."

Anstey v. ISCC, 292 N.W.2d 380 (Iowa 1980), holds that substantial compliance with the notice requirements related to public informational meetings is sufficient, even if there is not perfect compliance, if there was a good faith effort to comply and no prejudice is shown. The unpublished *Rutherford* decision applies the same standard.

In *Anstey*¸ landowners challenged the notice of the informational meetings, the notice of the franchise hearing, and the conduct of the hearing itself. The company sent out nearly 1200 notices of the informational meetings, based on a list of owners assembled using plat books, transfer books, title changes recorded in county auditors' offices, and miscellaneous mortgage indexes. It also contacted local grain elevator operators to identify farm tenants on affected property. The company sent notice to everyone it was able to find, but at the hearing the objectors presented several witnesses who had not received notice of the informational meetings. They

were not landowners, but tenants or others with an interest that was less than actual ownership. The objectors argued this failed notice was jurisdictional, making the entire proceeding null and void.

The Court rejected that argument, noting that if it were accepted, notice to non-owners would be required even if their existence was neither known nor ascertainable by a diligent search. The Court found published notice provided an adequate backstop for these interested persons, and there was therefore substantial compliance with the notice requirements of the statute.

In *Rutherford*, the notice of the informational meeting said that the company proposed to build a new double-circuit 69 kV line. However, when the petition was filed, the company sought a franchise for a double-circuit line consisting of one 69 kV line and one 161 kV line. Landowners challenged the notice. The Court concluded that they were given notice of the informational meeting and they were aware of the proposal to run a transmission line over their property. In those circumstances, and in the absence of any allegation that they had "suffered prejudice due to the relatively minor discrepancy between the notice and the petition," the notice was determined to be in substantial compliance. 20002 WL 31882863 at p. 3.

III. Analysis

Four alleged notification issues have been raised: the notice of the change of the date of the Wapello County informational meeting, the notices to the McWilliams property, the depth error in the published notice, and the failure to serve notices using restricted certified mail (as required by statute). With respect to each of these

issues, the Board finds that the notice provided by Dakota Access was in substantial, good faith compliance with the applicable requirements.

Anstey holds that an applicant does not have to provide perfect notice of the public informational meetings; substantial compliance with the applicable notice requirements is sufficient, if it was done in good faith and no prejudice to the rights of any person has been shown. Dakota Access appears to read this test as requiring that a challenger must show prejudice before a notification process can be declared deficient, but as the Coalition points out, that interpretation would render the test essentially meaningless. In order to show prejudice, the challenger would have to show that some person did not receive notice and was adversely affected by that failure, but that person would not know to come forward and challenge the notice that he or she never received. In the alternative, if that person were to find out about the defective notice and come forward, the person would be able to participate in the process at that time, so prejudice could never be shown.

The Board concludes that a better reading of *Anstey* is that the Court was simply acknowledging that no showing of prejudice had been made in that case. If such a showing had been made, it would have been a factor to consider, but the absence of any showing of prejudice was not, by itself, determinative. If an owner of land that is on the proposed pipeline route were to come forward and establish that his or her substantial rights had been compromised by a failure of notice, that would be an indicator that the notification process was not in substantial compliance with the applicable requirements. But that situation is not present here.

a. Notification of the changed date of the Wapello County meeting

Looking at the first alleged issue, involving the notification of the change in the date of the Wapello County informational meetings, it appears Dakota Access did, in fact, provide notice to affected landowners in Wapello County in the manner required by the Board's rules (certified mail, return receipt requested). The regular mail notices were merely courtesy notices, not required by law, sent to landowners located outside Wapello County. Serving those notices by regular mail was not an error or violation. The only remaining issue is whether that method of delivering the notice is in substantial compliance with the requirements of the statute. That issue applies to all of the required notices and will be discussed below.

b. Notices sent to Ms. McWilliams and her co-owners

The second alleged issue involves the notices sent to Ms. McWilliams and her co-owners. It appears from the record that Dakota Access used the information from the tax assessment roles, as permitted by Iowa Code § 479B.4, so the notices appear to be in substantial compliance with the statutory requirements.

c. Depth error in the published notices

The third alleged error involves the depth discrepancy in the published notices. Those notices indicated that the proposed pipeline will be buried at least 60 inches deep, but in the mailed notices and at the informational meetings Dakota Access indicated that the pipeline will be buried at least 48 inches deep. The Coalition argues that a landowner might have been misled by the published notices into believing the pipeline will have a reduced adverse effect on agricultural land because

it would be deeper and that landowner might have decided not to file an objection, and not to attend an informational meeting, on that basis.

The Board concludes that an erroneous statement that the pipeline will be buried at a greater minimum depth could just as easily cause a landowner to be more concerned about the impact on agricultural land, rather than less concerned. Burying the pipeline at a greater depth typically requires a wider construction trench, therefore increasing the total area of any adverse impact on soil structure. In the end, the Board does not accept the argument that the difference between a minimum depth of 60 inches and a minimum depth of 48 inches would affect any landowner's actions to any significant degree.

Further, the Board's rule at 199 IAC 13.3(4) requires only a general description of the proposed project and does not specifically require a statement about the minimum depth of burial. Failure to have listed the minimum depth altogether probably would not have been a violation of the rule, so providing a minimum depth that is slightly inaccurate is not automatically a violation.

Moreover, as Dakota Access points out, the published notices were just one of many sources of information about the proposed pipeline. Each affected landowner was mailed one or more notices that contained the correct information; the correct information was presented at the informational meetings; the meeting presentations are available online so that anyone can see them at any time; and there was substantial media coverage before and after the meetings. In the end, the Board finds that Dakota Access made a good faith effort to provide reasonably accurate

information about the proposed project and did so in substantial compliance with all applicable legal requirements, at least as far as the minimum depth is concerned. Moreover, given the media coverage, it is difficult to believe that any potentially-affected landowner was unaware of the meetings or otherwise prejudiced by the minimum depth error in the published notices.

d. Failure to use restricted certified mail

This leaves the issue of the manner in which Dakota Access served the notices on the landowners. It is clear that Dakota Access served the notices in a manner that complies with the Board's rules; it is equally clear that the manner of service does not comply with the requirements of the statute.[3] The question is whether service by certified mail, return receipt requested, is substantial compliance with a requirement of restricted service.

The Board finds that Dakota Access has achieved substantial compliance with the applicable notice requirements. First, the notice was served in a manner that is considered an acceptable means of service for other, similar notices, such as public informational meetings for proposed electric transmission lines (§ 478.2(3)(c)) and for intrastate pipelines (§ 479.5). While the HLP statute undeniably requires a different means of service for these notices, there is no indication in the statute of any reason

[3] The Board's rules were adopted in Docket No. RMU-97-4 on March 12, 1998. It is clear from a review of that docket that one of the goals of that rulemaking was to establish uniform procedural rules for intrastate pipeline permits and HLP permits. Unfortunately, this approach failed to recognize that there are minor differences in the statutes. The Board's staff is preparing a proposed rulemaking proceeding to address those differences and correct the HLP rules.

for doing so. A delivery mechanism for notices that is functionally sufficient for transmission lines and other pipelines is also sufficient for HLP lines.

Second, Dakota Access followed the procedures specified in the Board's rules, so there can be no credible claim that the company was acting in bad faith. Moreover, as described above, the mailed notice was not the only means of notice available to interested persons; there was published notice, widespread media reports, and online information, too. Admittedly, it is somewhat troubling that there were minor errors in both the published notices and the service of the mailed notices; typically, one or the other is accomplished without error, making it easier to rely on the perfected notice as a substitute for any errors in the other notice. But when the errors are more of a technical nature, not material, and when there is no showing of any prejudice, even these combined errors can still amount to substantial compliance with the notice requirements related to the public informational meetings.

e. Conclusion

In the end, the Board finds that the overall notification process used by Dakota Access was in substantial compliance with the applicable legal requirements. There was a good faith effort to comply and there is no showing of prejudice.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion for Clarification" filed on January 5, 2015, by the Environmental Coalition is denied.

UTILITIES BOARD

/s/ Elizabeth S. Jacobs

/s/ Nick Wagner

ATTEST:

/s/ Judi K. Cooper */s/ Sheila K. Tipton*
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 10th day of March 2015.