

MINUTES
October 5, 2020
10:00 A.M.
Special Board Meeting-Zoom Video Conference
NDPISB

1. Chairman Mike Wetsch called the Zoom special meeting to order at 10:07 a.m. Board members present: Mike Wetsch, Justin Blinsky, Ernie Thurman, Randy Ziegler, Jason Nelson and Steven Lundin. Board members absent: None. Others present: Executive Director John J. Shorey III, Assistant Attorney General Allyson Hicks, Attorney Jennifer Racine, Attorney Tom Kelly, Attorney Tonja De Sloover, Attorney Chad Nodland, Attorney Shawn Grinolds, Allen Brown, W. Paul Smith, and another individual not identified: "14155160430".
2. Steven Lundin advised he was going to recuse himself from any voting and executive sessions on the agenda topics for this meeting.
3. Allyson Hicks advised the Board had before it a petition to intervene in the administrative case. Allyson advised ALJ Hogan wrote a letter advising she would not act on the petition to intervene unless it was requested of her since a notice of settlement that has been filed. Allyson advised the Board was going to need to decide if they wanted the ALJ to act on the petition to intervene, or if the Board intend to address the petition itself. Allyson advised there was also the outstanding final order in the TigerSwan case that needed to be considered.
4. Chairman Wetsch began reading the executive session verbiage and Jennifer Racine, on behalf of Energy Transfer, advised they would like to be heard before the Board went into executive session. Jennifer said alternatively they would like to be heard in the executive session. Chairman Wetsch allowed Jennifer to address the Board regarding their petition to intervene and the issues surrounding it. Chairman Wetsch advised the Board's sole intent was to be legal in this matter.
5. A motion was made by Ernie to close the meeting for an executive session for attorney work product and attorney consultation (44-04-19.1(1) and (2)) concerning discussion and consideration of ETP and DAPL's Motion to Intervene and proposed final administrative order in Board v. TigerSwan. Seconded by Randy. A roll call vote was taken, and it was unanimous to go into executive session. The executive session began at 10:19 A.M. The executive session adjourned at 10:38 A.M. The public was invited back for the open session of the meeting. Allyson told John they had received an email from Chad Nodland, and asked John to send Chad Nodland a reply email that the Board was back in open session. John did.
6. Justin made a motion that the Board decline to take action on EPT and DAPL's petition to intervene based on unclear procedural grounds. Ernie seconded. Jennifer advised she was unsure what the motion meant. Allyson advised the law at issue that the Board needs to manage in considering the petition to intervene was N.D.C.C. 54-46-07. Allyson advised because a notice of settlement has already been filed with the ALJ, it was unclear if the ALJ or the administrative case was the appropriate jurisdiction. Jennifer said their question was if the Board was deferring to the ALJ to make the decision. Allyson advised she would reach out to the ALJ, but that at this time Allyson did not know if the ALJ had that authority. Allyson advised the Board did not think the petition to interview was timely nor that the ALJ has the authority. Jennifer asked if they could consider this a final agency action. Allyson advised that would be up to their interpretation and that was not a question she was willing to take a position on at this time. Tonja advised the Board's attorney of record at the time, Monte Rogneby, agreed to keep

the administrative case open for a number of days. Tonja asked if the Board was changing its position and they were not agreeing to keep the administrative case open to resolve the Energy Transfer document issue. Tonja stated, if the ALJ does not have the authority, how does the ALJ have the authority to issue a final order in the matter. Allyson advised the Board itself issues a final order in the administrative case and they have already filed notice of settlement agreement. Allyson advised she was not privy to Mr. Rogneby discussions with Energy Transfer and was not sure what had occurred in these discussions with respect to the Board's position. Tonja advised Mr. Rogneby agreed to keep the administrative case open while they figured out the Energy Transfer documents issue. Allyson advised the Board still hopes that this issue can be resolved amicably. Allyson advised the Board was unsure if an ALJ order pursuant to the petition to intervene was the appropriate mechanism that would allow them to legally act under N.D.C.C. 54-46-07. Jennifer asked Allyson if she could clarify her thoughts on a path forward. Allyson said to make clear, the Board was not taking a substantive position on the petition to intervene, that the Board was not taking a position on the allegations in the petition, just that the procedural mechanism needs to be appropriate under N.D.C.C. 54-46-07. Jennifer advised this was the procedure proposed by the Board's attorney and accepted by ETP. Jennifer brought up ETP's desire for a clear path forward. Allyson advised she was uncomfortable discussing this as she had not discussed this with the Board. Allyson brought up to the Chairman if they wanted to go into an executive session to discuss a path forward. Tonja stated that Mr. Rogneby has acknowledged that he and the Board are in possession of privileged documents of Energy Transfer that the Board has not given back. Tonja advised Mr. Rogneby acknowledged that there are likely documents that are not relevant to the issues before the Board. Tonja said this has been going on for three or four months and they need to get their documents back. Tonja said that Energy Transfer needs to take action to get those documents back. Tonja said that previously the Board produced to third parties certain Energy Transfer documents that were attached to pleadings over their objection. Tonja advised if the Board's position was Energy Transfer cannot intervene in the administrative case that Energy Transfer was going to need to seek legal remedies elsewhere to get their documents back. Chairman Wetsch commented the documents were given to the Board; the Board did not take them. Chairman Wetsch advised the way the law reads, once they are in the Board's hands, they are public records. Chairman Wetsch advised the Board wanted to make sure they were legal with whatever decisions that were made. Allyson advised given the information that Energy Transfer has given; she would like to go back into executive session to discuss it with the Board. A motion was made by Randy to close the meeting for an executive session for attorney work product and attorney consultation (44-04-19.1(1) and (2)) concerning discussion and consideration of ETP and DAPL's Motion to Intervene and proposed final administrative order in Board v. TigerSwan. Seconded by Jason. A roll call vote was taken, and it was unanimous to go into executive session. The executive session began at 11:10 A.M. The executive session adjourned at 11:20 A.M. The public was invited back for the open session of the meeting. Allyson asked John to email Chad Nodland that the Board was back in open session due to his email request of the same. John advised he already did.

7. Justin made a motion to rescind the previous motion. Ernie Seconded. A roll call was taken, and it was unanimous to approve the motion.

8. Jason made motion for the ALJ to determine if they have the authority, and if the ALJ determines they do have the authority, for the ALJ to be a final decision maker on the petition to

intervene. Randy seconded. A roll call vote was taken, and it was unanimous to approve the motion.

9. Chairman Wetsch advised the Board was not going to take action at this time on agenda item # 3, discussion and consideration of proposed final administrative order in Board v. TigerSwan.

10. Allyson summarized the open records request listed in agenda item # 4. Tonja asked who provided the Board with a copy of the TigerSwan contract that was subject to the open records request. Allyson advised Attorney Lynn Boughey produced a copy of the TigerSwan contract to the Board during the District Court injunction case with TigerSwan. Tonja asked for the case number of the case. Allyson provided it: 08-2017-CV-01873. Tonja stated they wanted to go on record that they were unaware of this other action and they were concerned if there was a production of records by TigerSwan in that case some of those documents could be similar to the documents at issue in this case. Tonja advised she would object to anything being procured to a third party that was procured in that lawsuit until they can review those documents. Allyson advised their objection was noted. John informed the Chairman that the Board did subpoena Energy Transfer in the District Court injunction case, and his recollection was Energy Transfer advised the Board to get the documents subject to the subpoena from TigerSwan. A motion was made by Ernie to close the meeting for an executive session for attorney consultation (44-04-19.1(2) and 44-04-19.2(1) and 44-04-18(6), 44-04-24 closed records concerning discussion and consideration of the open records requests listed in agenda item 4 (a)-(c). Seconded by Jason. A roll call vote was taken, and it was unanimous to go into executive session. The executive session began at 11:38 A.M. The executive session adjourned at 11:52 A.M. The public was invited back for the open session of the meeting.

11. Randy made a motion to respond to Jennifer Recine's open records request as allowable by law. Ernie Seconded. A roll call vote was taken, and it was unanimous to approve the motion.

12. Randy made a motion to deny Chad Nodland's open records request for the unredacted TigerSwan and ETP contact pursuant to N.D.C.C. 44-04-18.4(1). Jason seconded. A roll call vote was taken, and it was unanimous to approve the motion.

13. Justin made a motion to stay Chad Nodland's open records request for the TigerSwan discovery documents until the Board received clarification from the ALJ. Ernie Seconded. A roll call vote was taken, and it was unanimous to approve the motion.

14. Randy made a motion to stay Alleen Brown's open records request for the TigerSwan discovery documents and respond to the remainder of Alleen Brown's open records request as allowable by law. Ernie Seconded. A roll call vote was taken, and it was unanimous to approve the motion.


15. Ernie made a motion to adjourn the meeting. Randy seconded. A roll call vote was taken, and it was unanimous to approve the motion. The meeting was adjourned at 12:00 P.M.



Chairman

11-19-20

Date


NDPISB Executive Director

11-17-20

Date