



**JOINT LEGISLATIVE COMMISSION ON GOVERNMENTAL
OPERATIONS, SUBCOMMITTEE ON ATLANTIC COAST PIPELINE
November 14, 2018
Room 643 of the Legislative Office Building**

The Joint Legislative Commission on Governmental Operations, Subcommittee on Atlantic Coast Pipeline met on Wednesday, November 14, 2018 at 1:00 PM. The meeting was held in Room 643 of the Legislative Office Building.

Senate members in attendance were: Senators Harry Brown, Joyce Krawiec, Floyd McKissick, and Paul Newton. House members in attendance were Representatives Dean Arp, Becky Carney, Ken Goodman, Jon Hardister, and John Torbett.

Senator Harry Brown presided. Senator Brown called the meeting to order at 1:06 PM and welcomed members, staff and visitors. He recognized and thanked Sergeants-at-Arms Terry McCraw, Jonas Cherry, Jim Moran, Billy Fritscher and Hal Roach.

Opening Remarks: Co-Chairman Senator Harry Brown

Senator Brown opened the meeting by providing the following background: Senator Brown said the committee began asking questions about the relationship between the governor's \$58 million discretionary fund and the Atlantic Coast Pipeline water quality permit earlier this year. He said that on February 8th, the committee asked questions of Lee Lilly at a joint meeting of the Appropriations Committee and Mr. Lilley could not answer the questions at that meeting. Mr. Lilley promised he would get the questions answered if the committee provided the questions in writing.

Senator Brown said that on February 12th, a letter was sent to Mr. Lilly asking 15 detailed questions about the relationship between the Memorandum of Understanding (MOU) and the Atlantic Coast Pipeline permits. On February 15th, the committee received a non-responsive reply from Kristi Jones. The committee resent their questions on February 16th along with new questions and asked for a complete response. On February 19th, Ms. Jones responded saying the whole matter is a "partisan charade." The committee picked the issue back up on August 29th at a meeting of the Joint Legislative Commission on Governmental Operations. At that meeting, Ms. Jones said the governor's office has no secrets. On September 7th, the committee sent another letter asking 20 detailed questions and also asking for documentation.



Senator Brown said the committee scheduled the original subcommittee meeting for October 4th, but DEQ secretary Regan asked for a delay due to Hurricane Florence. This was a reasonable request and the meeting was delayed until November 14th. In the response letter to Secretary Regan the committee said they hoped the delay would provide enough time to answer the questions and provide documentation. None of this was public. There was no public show made of this prior to the election because the committee simply wanted answers to the questions.

Senator Brown said the questions the committee is trying to get answered are serious and they get to the heart of honest government. He said the governor still refuses to answer the questions or provide the committee with the documents the committee has requested. The governor could have closed this months ago by answering the committee's questions.

Senator Brown stated that the committee sent a letter to the governor and Secretary Regan on September 28th saying the subcommittee would be meeting November 14th. Senator Brown said he is unaware if anyone from the governor's office or DEQ was sent over to make a statement or not.

Senator Brown went on to say that he will allow any administration representative to make any statement they would like. Senator Brown made it clear that any administration representative speaking before the subcommittee will be asked the questions to which they sought answers for, for 9 months. They will also be asked to produce the documents they have been requesting for just as long and explain the basis for their continued refusal to obey the law.

Senator Brown said the governor has stonewalled for nine months now and he has a legal obligation to answer the committee's questions and provide the requested documents. He said the governor has been given every opportunity to respond both privately and publicly. The committee is interested in whether or not the governor of North Carolina held a permit for one of the state's largest employers hostage. A permit for which Duke Energy met all the regulatory and legal requirements to obtain. A permit that had already been recommended for approval by technical staff at DEQ. Senator Brown said he wanted to know whether or not the governor held this permit hostage until Duke agreed to fund \$58 million into a slush fund under the governor's direct control. North Carolina cannot operate like that and expect to continue economic growth. That kind of government should be unacceptable to every member of this subcommittee. This subcommittee will uncover the truth and hold those responsible accountable, regardless of how big of a role they played in this matter.

Senator Brown then recognized Representative Arp for his presentation to the subcommittee.

Presentations:

1. ACP Permit and other information



- Representative Dean Arp. (See Attachment 1.) The presentation includes information about what is known so far about the process, background information on the Virginia agreement, information on the changes to the North Carolina agreement between the governor and the ACP and, finally, questions and concerns.

Senator Brown recognized Senator Newton for his presentation to the subcommittee.

2. Discussion of un-answered questions

- Senator Paul Newton (See Attachment 2.) The presentation is a continuation of Senator Newton's discussion from the full Joint Legislative Commission on Governmental Operations meeting in which he raised concerns about the Memorandum of Understanding that established the \$57.8 million discretionary fund under the governor's control in the approval of the ACP water quality permit.

Senator Brown mentioned at this point that he has not had anyone from DEQ or the governor's office approach him and asked if there was anyone in the audience from those respective offices that would like to make a comment or respond to the questions that had been raised. No one responded.

Public Comments:

Senator Brown recognized a public citizen for a comment. Therese Vick with Blue Ridge Environmental Defense League was recognized. Ms. Vick explained how the members of the committee are not the only ones who are struggling getting answers from Governor Cooper's administration. She said her organization has had a public records request since February 9, 2018 that has not been responded to appropriately. Their concern is that the permit had sufficient reasons to be denied and their concern is that the money was used to "sweeten the pot". She said that affected community leaders and landowners that are in the path of the pipeline demand answers and they deserve answers.

Committee Questions and Discussion:

Senator Brown recognized Senator McKissick. Senator McKissick asked what the motion to hire outside assistance entails, what kind of proposed budget is involved and what type of resources the committee would recommend to be allocated for the investigation.

Senator Brown responded that the motion is for the chairs to find someone who is right for that job. He said he wanted the process to be as open as possible and if Senator McKissick would like to volunteer to aid the chairs in that process Senator Brown said he would welcome it.

Senator McKissick clarified that he is trying to discern what capacity outside council has and can do that the committee cannot.



Senator Brown said the committee's attempts to get information have not been successful and it is up to the committee to decide on how to proceed. He said it seems the committee has no choice at this point but to find outside assistance to help them get the information they are seeking.

Senator McKissick said he would be happy to be part of the process and asked again what powers outside authority would have that this committee seeks. He said he is unaware of any additional authority they may have.

Senator Brown said he believes the individuals for the job are out there and the committee will do its best to find the most qualified person to help get that information.

Senator McKissick asked Senator Newton if he thought it was reasonable for somebody within an agency considering all options relating to a project to look at all the options on the table which he listed as "approval, denial, approval in part or denial in part so that everything of an evidentiary nature could be before the final arbiter to make a decision." Senator McKissick reiterated he would like to see all the options connected with a project and their factual basis for the decisions made so the arbiter can examine everything to make a final determination.

Senator Newton responded that as a concept he agreed with what he described. Senator Newton pointed out that the denial letter came weeks after the hearing officer had recommended approval of the pipeline permit, so there is no basis that is stated in the denial letter. He said this makes it appear it was a tool to be leveraged by the governor's office, not the agency which had already made its determination to approve the pipeline permit. The legal requirements for the permit were met and the hearing officer gave them approval and then weeks later the draft denial letter came with no substance and then several days later the ACP signed on to the terms and conditions demanded in the MOU demanded by the governor.

Senator McKissick followed up by asking if it was equally plausible that someone was examining all the options and we do not know what was in the minds of those involved in the process and if a different interpretation of the process could reveal the appropriate context of the decisions made.

Senator Newton agreed and said they would like to know the other side to the story.

Senator McKissick asked about the timing of the Virginia agreement and the possibility that their 57.85 million dollar fund needed in the agreement is comparable to the 57.8 million dollar fund in North Carolina.

Senator Newton said there are differences in the Virginia and North Carolina law and the Virginia MOU did not give the governor discretionary use over the funds. He said the dollar amount is the lesser issue to what is in the discretionary fund.



Representative Arp informed Senator McKissick on the Virginia agreement stating it went public January 25, 2018. Subsequent to that the final draft indicated an increase without regard to material facts other than Virginia's amount was 57.85 million.

Senator McKissick commented on how he doesn't necessarily see an attempt to gain leverage on partners in the ACP but he does see how North Carolina would have a desire to have comparability with Virginia. Senator McKissick also agreed that the questions should be answered and put into the public domain because it clarifies ambiguity and it can eliminate false perceptions.

Senator Brown commented that he thinks a key concern is in the MOU – how the money would be directed on requirements to get a permit. How the dollars were negotiated outside of the permit or if it were in order to get the permit is the question.

Representative Arp commented that a significant difference in the memorandum of agreement for Virginia was that it required mitigation in its statutory requirements and North Carolina does not.

Senator Newton commented on another difference between Virginia and North Carolina was that North Carolina required the applicants to establish an \$11 million mitigation fund that he believes did not exist in Virginia. The 57.85 million included what would have been the 11 million in NC. He said you cannot just say just because Virginia did it, we can do it too, and that's why this needs to be looked into further.

Senator McKissick agreed that there are questions to be answered.

Representative Goodman asked about the term "investigative assistance" saying the term is vague and wondered what it would consist of and then asked if the committee had subpoena power to require members of the executive branch to appear before the committee and answer their questions.

Senator Brown said in response he thinks we can get to that point.

Senator Newton said his understanding is that the subcommittee, with the approval of the chairs, would have subpoena power and at this stage we are trying to identify a compatible, capable, excellent investigator to help us get to the bottom of the things we are shining a light on here. In regards to subpoenas we will cross that bridge when we come to it and in the meantime the investigator would be able to take voluntary depositions if people are willing to give them.

Representative Carney asked if when HB 90 was passed and the money was directed to go to education, if this would dissolve the MOU because in the MOU it said the money would go to job development, job creation, economic development and environmental concern.



Representative Arp commented that the facts leading up to the permitting process and the association of the approval of a permit with a required payment is still left unanswered. The outcome of whether schools will get that money or not is a separate issue regarding the payment of the source of those funds. He said the committee is trying to investigate the integrity of the permitting approval process and whether violations have occurred.

Representative Arp commented that the question of whether the MOU was dissolved might not be in the purview for this subcommittee to answer.

Senator Brown said as this investigation proceeds that might be a question we get answered.

Representative Carney asked about the two payments that would have allowed the projects to move forward and said from her research the final notice to proceed was issued on July 24th and wanted to know if this was correct. Her question was whether the payment that was due has been paid and she wanted to know if we have received any money.

Senator Newton said there has been litigation filed so the final notice to proceed hasn't been effected yet and still needs to be resolved. He noted he expects the ACP partners will not make the first payment until they have a clean notice to proceed.

Representative Hardister asked if there has been a situation in the past in which the governor's office has created a discretionary fund of this nature.

Senator Brown said not to his knowledge and staff did not know of any such situation.

Representative Hardister said it was his understanding that the General Assembly is charged to raise, control and disburse funding and asked Senator Brown if this was his understanding as well.

Senator Brown said as appropriations chair that would be his understanding.

Representative Hardister asked to have explained the legal difference between an MOU and an MOA (Memorandum of Agreement).

Senator Newton said Memorandum of Agreement implies a contract and a Memorandum of Understanding generally is non-binding, it is more like a step to get to a binding agreement, however there can be terms and conditions in an MOU that could be binding. It would be a question of law.

Representative Torbett was recognized and made the following motion: "I would move that the Subcommittee on the Atlantic Coast Pipeline authorize the co-chairs of the subcommittee to employ an investigator to investigate the state's negotiations and activities concerning the Atlantic Coast Pipeline and the development of the execution of documents pertaining to the Atlantic Coast Pipeline."



Senator Brown asked if there was any discussion on the motion.

Representative Carney followed up on what Representative Goodman said about subpoena power from the committee. She asked do we move ahead to hire outside council to do some investigating for the committee, or do we go one more step and take the opportunity, before we go spending any more money, to subpoena someone from the executive branch to come and answer the questions. She commented that at that point she would prefer to come back to this mission, but first to exercise the subpoena power of the committee to have someone come answer questions first, then if it is necessary return to the motion.

Senator Brown responded saying Lee Lilley was before the committee before and basically refused to answer questions under perjury. Requests have been sent out and the committee has gotten no answers and others around the state, including the woman who spoke today, cannot get answers from the administration. He said the committee has been stonewalled and gotten no answers. He said we are to the point where we don't have much choice. We don't want to get to the point that members of the legislature are sending subpoenas to the governor's staff to get answers. He said he hopes an investigator can get some of those answers so they don't have to go to the point of issuing subpoenas.

Representative Arp pointed out that it is undesirable for politicians to be in the position of investigators and it would be wise to utilize the talents of an investigator to get to these questions without the appearance and taint of sitting elected officials doing that as a committee. He believes it is necessary to be cautious before issuing subpoenas so that it does not directly involve elected officials.

Representative Carney asked if the motion could be read again.

Representative Torbett re-read his motion.

Representative Carney asked how much the investigation will cost.

Senator Brown said he shared her concerns and said he promises to be as frugal as can be through the process.

Representative Carney asked if it would be appropriate to add into the motion that it is subject to the investigator's cost.

Senator Brown said he would be willing to give Representative Carney an idea on the cost after they have interviewed several candidates by the next meeting.

Representative Goodman asked why they might have changed the agreement from a MOA to an MOU.



Senator Brown said his take was that it was a way for the governor to move the money into an account that he could manage instead of going to the state.

Representative Goodman asked if under the MOA the money would go to the General Assembly instead of the governor's office.

Senator Newton responded by saying he does not want to leave the impression that just because they said it was an MOU, doesn't mean it was an MOU. He said we believe under the constitution, raising and appropriating funds is a legislative function only. Just because it is said in the document it is beyond the purview of the legislators doesn't make it true.

Representative Arp cautioned the committee about ascribing motives to others and this investigation is to determine what the facts are and what were the effects on the parties involved? Did they fear revocation of permit if the payments were not made? The original agreement identified the payment as a required mitigation payment, subsequently it was changed. He said we are trying to understand the thought process of the parties involved. He said speculation at this point was premature. Senator Brown agreed and said he should not have speculated earlier as to motive.

Representative Hardister spoke in favor of the motion. He emphasized that the committee is trying to ascertain facts and not to debate whether the permit should have been given, and an investigator would be a good way to do that.

Senator McKissick said it was his understanding that when the MOU was entered into it was a temporary tool/vehicle to state what the funds were supposed to be, but there would be greater specificity provided in a subsequent document or agreement that had not been worked out, but would be in a more formalized agreement. Senator McKissick said political drama should be avoided and he believes avoiding subpoenas at this point will accomplish this. He would like to leave that as a last resort and then raised questions about how much outside investigative support would cost, but understood that the cost would be presented before the committee before proceeding forward.

Representative Arp responded by saying as stipulated in the final MOU, "the funds shall be allocated pursuant to the guidelines and directions set forth in a subsequent executive order that would be issued prior to the completion of the state permitting for the ACP." In the agreement it ties the permitting process in the executive order directing the payment of those to the permitting process. The permitting process was concluded on January 26th. He said the committee raised questions about draft executive orders being composed or not and those questions still remain.

Senator McKissick said we need information to clarify ambiguity to understand what happened and how it happened.

Senator Brown commented that the committee has quietly tried to get the information throughout the process, the committee has tried working with the administration to get information and for



whatever reason they do not want to provide answers. The committee, in Senator Brown's opinion, has no choice but to move forward. The people of the state who are seeking answers demand them and we demand them. Senator Brown said he believes this reflects on all of the members who serve and puts into question the public's trust and this is an opportunity to provide transparency.

Senator McKissick asked if they would be coming back with the amount that would be spent.

Representative Carney raised her concern about not being able to know what an investigator will cost before proceeding forward.

Senator Brown said no interviews have been done and no one has been consulted so he has no numbers at that point to provide to Representative Carney, but he will be as transparent as possible moving forward and that Senator McKissick will be involved in the process.

Representative Torbett suggested that Representative Carney could support the motion here and then later she could offer a motion not to move forward.

The motion made by Representative Torbett was voted on and the motion passed.

Senator Krawiec emphasized the concerns her colleagues have brought up and asked to make a motion to facilitate the first motion.

Senator Krawiec made the following motion:

In order to facilitate Motion #1, move that the Clerks of the Co-Chairs of the Subcommittee on the Atlantic Coast Pipeline submit the following public records requests to the Department of Environmental Quality and the Office of the Governor, asking that responses be made within 5 business days after receipt of the requests; and further, that the Clerks compile the responses and forward them to the investigator:

1. All documents, correspondence, and e-mails from the Governor's Office related to the Atlantic Coast Pipeline (ACP) from July 1, 2017 to March 1, 2018, including all correspondence and e-mails with the Atlantic Coast Pipeline partners, all correspondence and e-mails to and from the Department of Environmental Quality (DEQ) related to the Atlantic Coast Pipeline, and any documentation regarding the times, dates, list of attendees, and subject matter of any meetings held between the Governor, any member of the Governor's Office, or his Cabinet and any representative of Duke Energy or the Atlantic Coast Pipeline between July 1, 2017 and March 1, 2018.
2. All e-mails from the Department of Environmental Quality pertaining to the ACP from July 1, 2017 to March 1, 2018.



3. Unredacted copies of the documents present in the DEQ ACP Permit file as specified in the letter to Governor Cooper from Senators Brown and Newton on Sept 7, 2018.

4. Any drafts or work products related to the Executive Order that was to be issued prior to the completion of the state permitting for the ACP, as specified in the Memorandum of Understanding of Jan 25, 2018.

The motion was voted on and the motion passed.

There being no further business before the subcommittee, the meeting adjourned at 2:31 PM.

Senator Harry Brown
Presiding

Lorie Byrd, Committee Clerk

Attachments:

1. Agenda for November 14, 2018 meeting
2. Presentation titled "ACP Permit and other information"
3. Presentation titled "Serious Unanswered Questions"
4. February 12, 2018 Letter from Senator Rabon and Representative Lewis to Lee Lilley
5. February 15, 2018 Letter from Kristi Jones to Senator Rabon and Representative Lewis
6. February 16, 2018 Letter from Senator Rabon and Representative Lewis to Kristi Jones
7. February 19, 2018 Letter from Kristi Jones to Senator Rabon and Representative Lewis
8. September 7, 2018 Letter from Senator Brown and Senator Newton to Governor Cooper
9. September 19, 2018 Letter from Senator Brown and Senator Newton to Governor Cooper
10. September 28, 2018 Letter from Representative Arp and Senator Brown to Sec. Regan
11. November 9, 2018 Carolina Journal article titled "Atlantic Coast Pipeline committee will examine timing of MOU, permit"
12. Visitor Registration Log
13. Public Comments Log