

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger  
David C. Boyd  
Nancy Lange  
J. Dennis O'Brien  
Betsy Wergin

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota

ISSUE DATE: February 11, 2014

DOCKET NO. PL-6668/CN-13-473

ORDER FINDING APPLICATION  
SUBSTANTIALLY COMPLETE UPON  
SUPPLEMENTATION AND VARYING  
TIMELINES; NOTICE OF AND ORDER  
FOR HEARING

**PROCEDURAL HISTORY**

On November 8, 2013, North Dakota Pipeline Company LLC (NDPC or the Company)<sup>1</sup> applied for a certificate of need to build the Sandpiper Pipeline -- a 612-mile pipeline to transport crude oil from Tioga, North Dakota, to terminals in Clearbrook, Minnesota, and Superior, Wisconsin.

On December 5, 2013, the Commission received comments from Carlton County Land Stewards (CCLS), Kennecott Exploration Company (Kennecott), the Minnesota Department of Commerce (the Department), and some members of the public. CCLS, the Department, Kennecott, and a member of the public argued that the Company needed to provide additional information to make its application complete.

On December 5, 2013, Kennecott also petitioned to intervene in these proceedings under Minn. R. 7829.8000. As a mine operator and lease holder of property in the path of the proposed pipeline, Kennecott argued that it has an interest in this case that differs from the interest of the public in general, and this interest justifies becoming a party to this case. As no parties objected, the petition was granted by operation of law.<sup>2</sup>

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<sup>1</sup> Enbridge Pipelines (North Dakota) LLC made the initial filing, but later changed its name to North Dakota Pipeline Company LLC; see NDPC Reply Comments (December 16, 2013).

<sup>2</sup> Minn. R. 7829.8000, subp. 5.

On December 16, 2013, the Commission received reply comments from NDPC and the Laborers' District Council of Minnesota and North Dakota (the Laborers). In its reply comments, NDPC provided some but not all of the information sought by the initial commentors, and agreed to work with various parties to address their concerns as the docket progresses. The Laborers argued that NDPC's filing fulfilled the legal requirements for an application, although the Laborers did not oppose requests for NDPC to provide additional information.

On January 16, 2014, the Commission met to consider the matter. At that time the Department argued that the Company's application remained incomplete because NDPC continued to withhold information required by Minn. R. 7853.0510 and 7853.0530. NDPC argued that the federal law barred disclosure of the information sought by the Department in the absence of a non-disclosure agreement, which the parties had not yet negotiated.

## **FINDINGS AND CONCLUSIONS**

### **I. Summary**

In this Order the Commission finds that NDPC's application will become substantially complete as soon as NDPC files the information sought by the Department.

The Commission will vary timelines, refer this matter for contested case proceedings, and take other procedural steps to enable an evaluation of the need for the proposed pipeline.

### **II. The Proposed Project**

As noted above, the proposed Sandpiper Pipeline would transport crude oil 612 miles from Beaver Lodge Station south of Tioga, North Dakota, to terminals in Clearbrook, Minnesota, and Superior, Wisconsin. Approximately 299 miles of the new pipeline would be located in Minnesota.

As proposed, a 24-inch diameter pipeline with a capacity of 225,000 barrels per day would enter Minnesota approximately two miles south of Grand Forks, North Dakota. It would follow Enbridge Energy Partners' existing pipeline right-of-way for 75 miles to Clearbrook, Minnesota. There, NDPC proposes to build a new terminal and other facilities.

After Clearbrook, the pipeline would expand to a diameter of 30 inches and a capacity of 375,000 barrels per day, and extend for another 224 miles. It would generally follow the existing Minnesota Pipe Line Company right-of-way south to Hubbard, Minnesota. From Hubbard the route would proceed east traversing undeveloped areas and follows portions of existing rights-of-way for electric transmission lines and railroads. Finally, the pipeline would cross the Minnesota-Wisconsin border approximately five miles east-southeast of Wrenshall, Minnesota.

This route would pass through Polk, Red Lake, Clearwater, Hubbard, Cass, Crow Wing, Aitkin, and Carlton counties, and would require the acquisition of 25 to 50 feet of new right-of-way, plus an additional 40 to 70 feet of temporary right-of-way.

### **III. Commission Jurisdiction**

Anyone seeking to build more than 50 miles of pipeline in the state with a diameter of more than six inches must first obtain a certificate of need from the Commission under Minn. Stat. §§ 216B.2421 and 216B.243, and Minn. R. Chap. 7853.

Chapter 7853 identifies the procedural steps for securing a certificate of need. For example, Minn. R. 7853.0510 directs an applicant to provide data from the previous five years regarding the types of products transported or distributed (for example, crude oil, gasoline, fuel oil), usage patterns, suppliers, maps of existing facilities, and whether those facilities have unused capacity. And Minn R. 7853.0530 directs an applicant to describe the design, construction, and operation of the proposed facility, including a list of sources of petroleum or shippers that the applicant expects will use the pipeline.

In addition, Minn. R. 7853.0200, subp. 5, provides for the Commission to ask the Office of Administrative Hearings to assign an administrative law judge to hold hearings on the matter under that office's contested case procedures.<sup>3</sup>

### **IV. Completeness of Application**

#### **A. Timeline Varied**

Minn. Stat. § 216B.243, subd. 5, directs the Commission to rule on a certificate of need application within 12 months from the date the application becomes substantially complete. And Minn. R. 7853.0200, subp. 7, provides 15 days for the Commission to determine whether a petition for a certificate of need is complete. But 15 days is not enough time in which to review a filing as large and complex as NDPC's, proposing a pipeline that traverses the entire state.

Under Minn. R. 7829.3200, the Commission is authorized to vary any of its rules upon making the following findings:

1. Enforcing the rule would impose an excessive burden upon the applicant or others affected by the rule;
2. Granting the variance would not adversely affect the public interest; and
3. Granting the variance would not conflict with any standards imposed by law.

The Commission will vary the 15-day timeframe for evaluating the completeness of an application for a certificate of need, making the following findings:

1. Attempting to determine whether NDPC has filed a complete application within 15 days would impose an excessive burden on parties to the proceeding, including regulatory agencies, and upon the public in general, because this timeframe would needlessly compress the time for scrutinizing the complex proposal.

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<sup>3</sup> See Minn. Stat. §§ 14.57 to 14.62 and Minn. R. 1400.5100 to 1400.8400.

2. Varying the 15-day timeframe would not harm the public interest, but would serve the public interest by permitting a more thorough analysis of the application.
3. Varying the 15-day timeframe would not conflict with any other legal standard since this timeframe is set by rule, not statute, and may be varied under Minn. R. 7829.3200.

## **B. Completeness**

Most of the public comments addressed the merits of NDPC's proposal but did not allege any defect in the application's completeness. And where parties did allege shortcomings in the application, NDPC's reply comments addressed many of these concerns. At the Commission's January 16, 2014 meeting, only the Department continued to ask that the Commission find NDPC's application incomplete, citing NDPC's failure to provide the information required by Minn. R. 7853.0510 and 7853.0530.

NDPC acknowledges that it must provide the information required by Minn. R. 7853.0510 and 7853.0530 to obtain a certificate of need. But NDPC argues that the federal Interstate Commerce Act<sup>4</sup> -- regulating various modes of transportation, including interstate pipelines -- effectively bars disclosure of the requested information in the absence of a protective order designed to preclude further dissemination of the information. Because there is no dispute about NDPC's duty to provide the information requested, NDPC argues that there is no need to delay finding its application substantially complete and referring this matter to the Office of Administrative Hearings for further record development via contested case proceedings. According to NDPC, the Office of Administrative Hearings would then assign an administrative law judge to preside over this matter, and that judge would have authority to issue the necessary protective order permitting NDPC to provide the required information.

The Department does not oppose granting NDPC an appropriate protective order. But the Department argues that finding NDPC's application complete would not merely expedite referring this matter to the Office of Administrative Hearings. It would also reduce the time remaining for analyzing NDPC's proposal, which could prejudice the parties' ability to develop issues critical to evaluating the need for the pipeline.

The Commission concurs with the Department, and consequently will deny NDPC's request. As previously noted, Minn. Stat. § 216B.243, subd. 5, limits the time the Commission has to act on a certificate of need application to 12 months from the date the application becomes substantially complete. Granting NDPC's request would have the effect of starting the timeline for evaluating NDPC's application before all the required information is available, leaving the Commission and the parties with less than 12 months to evaluate the relevant data. This outcome would be burdensome to the parties, prejudicial to the public interest, and contrary to the Legislature's intent.

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<sup>4</sup> 49 U.S.C.A. § 1 *et seq.*

Instead, the Commission concludes that NDPC's application, as supplemented by its reply comments, will become substantially complete once NDPC files the information specified by Minn. R. 7853.0510 and 7853.0530. Once NDPC provides the necessary information, the Commission and the parties will have 12 full months to analyze the completed application and determine the need for the proposed pipeline.

The Executive Secretary will issue a notice when the specified information has been filed with the Commission.

#### **V. Referral for Contested Case Proceedings**

The Commission finds that it cannot satisfactorily resolve all questions regarding the need for the proposed pipeline project on the basis of the current filings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings under Minn. Stat. § 14.57 *et seq.*

#### **VI. Issues to be Addressed**

The ultimate issue in this case is whether NDPC's proposed pipeline meets the need criteria set forth in Minn. Stat. § 216B.243 and Minn. Rules Chapter 7853. This issue turns on numerous factors that are best developed in formal evidentiary proceedings. The parties to this proceeding should address whether the proposed project meets these criteria and address these factors. The parties may also raise and address other issues relevant to the application.

#### **VII. Review Process – Housekeeping Issues**

To facilitate the review of the application, and the public's participation in that review, the Commission will do the following:

- A. Ask the Department to continue studying issues and indicate during the hearing process its position on the reasonableness of granting a certificate of need to NDPC.
- B. Direct NDPC to facilitate in every reasonable way the continued examination of the issues requested by the Department and Commission staff.
- C. Direct NDPC to place a copy of the application, printed or on a compact disc (CD), for review in a Government Center or public library in each of the counties traversed by the proposed pipeline.
- D. Direct NDPC to post the application and any required supplements to a publicly available website.
- E. Direct Commission staff to work with the administrative law judge in selecting suitable dates and locations for the public hearings on the application.

F. Provide for the public to be notified of the public hearings and evidentiary hearings. In particular:

- Commission staff shall work with the administrative law judge in developing a notice of public and evidentiary hearings.
- NDPC shall send a notice of public and evidentiary hearings to the entities identified in Minn. Stat. § 216E.03, subd. 6, and Minn. R. 7829.2560, subp. 3, at least ten days before, but no earlier than 45 days before, the start of the hearing.
- NDPC shall publish the notice of the public and evidentiary hearings in newspapers of general circulation in the areas likely to be affected by the proposed pipeline at least ten days before the start of the hearings.
- NDPC shall demonstrate compliance within 20 days of the notice's issuance and publication by submitting a filing, such as proofs of publication and a list of the names and addresses of notice recipients.

G. Delegate administrative authority, including timing issues, to the Commission's Executive Secretary.

### **VIII. Public Participation**

Minn. Stat. § 216B.243, subd. 4, encourages public participation in certificate of need proceedings. The statute requires at least one hearing to obtain public opinion on the application and requires the Commission to designate an employee to facilitate public participation in the hearing process.

The Commission will designate the following staff member to facilitate and coordinate public participation in the proceeding:

Tracy Smetana, Public Advisor  
Minnesota Public Utilities Commission  
121 7<sup>th</sup> Place East, Suite 350  
St. Paul, Minnesota 55101-2147  
(651) 296-0406, or 1-800-657-3782  
[Consumer.puc@state.mn.us](mailto:Consumer.puc@state.mn.us)

## IX. Joint Hearings with Routing Permit Docket

In addition to securing a certificate of need, anyone seeking to build a pipeline with a nominal diameter of six inches or more designed to transport hazardous liquids must secure a routing permit from the Commission.<sup>5</sup> On November 8, 2013, NDPC applied for a routing permit for its Sandpiper project.<sup>6</sup>

The Legislature favors conducting joint hearings for a certificate of need and a routing permit for large energy facilities unless doing so would be infeasible, inefficient, or otherwise contrary to the public interest.<sup>7</sup> In general, the Commission has found that joint hearings promote administrative efficiency and enhance understanding of the issues. In addition, joint hearings generally provide a more convenient forum for members of the public to provide comments pertaining to both dockets, and reduce the chance of public confusion and frustration.

However, Minn. R. 7853.0200, subp. 5, states that “[a]n administrative law judge shall be assigned, and a public hearing shall be scheduled to commence, no later than 80 days after the receipt of the application” for a certificate of need. Eighty days is not enough time in which to prepare an analysis of the route alternatives to be considered at the public hearings in the route permit docket. Consequently, the Commission must choose between ordering separate hearings for these two dockets or varying its 80-day deadline.

Again, under Minn. R. 7829.3200 the Commission is authorized to vary any of its rules upon making the following findings:

1. Enforcing the rule would impose an excessive burden upon the applicant or others affected by the rule;
2. Granting the variance would not adversely affect the public interest; and
3. Granting the variance would not conflict with any standards imposed by law.

The Commission will vary the 80-day deadline for convening a public hearing, and will make the following findings:

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<sup>5</sup> Minn. Stat. § 216G.02. However, a routing permit is not required for pipelines that transport fluids solely by gravity, nor for pipelines exempted by Commission rules. *Id.*

<sup>6</sup> See *In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, Docket No. PL-6668/PPL-13-474.

<sup>7</sup> Minn. Stat. § 216B.243, subd. 4, provides for joint hearings on the need for, and site or route for, a proposed *large energy facility* as defined at Minn. Stat. § 216B.2421. This includes “any pipeline greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of coal, crude petroleum or petroleum fuels or oil, or their derivatives...” Minn. Stat. § 216B.2421, subd. 2(4).

1. Enforcing the 80-day deadline would impose an excessive burden on parties to the proceeding, including regulatory agencies, and on the public, by depriving all parties of the convenience of addressing both dockets in at a single hearing.
2. Varying the 80-day timeframe would not harm the public interest, but would serve the public interest by permitting members of the public to address both dockets in a single hearing.
3. Varying the 80-day timeframe would not conflict with any other legal standard since this timeframe is set by rule, not statute, and may be varied under Minn. R. 7829.3200.

## **X. Procedural Outline**

### **A. Administrative Law Judge**

The administrative law judge assigned to the contested case is Tammy Pust. Her address and telephone number are as follows: Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101; (651) 361-7875. The mailing address of the Office of Administrative Hearings is P.O. Box 64620, St. Paul, Minnesota 55164-0620.

### **B. Hearing Procedure**

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57 to 14.62; the rules of the Office of Administrative Hearings, Minn. R. 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. R. 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at: [www.revisor.mn.gov/pubs](http://www.revisor.mn.gov/pubs).

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. R. 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.



- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. R. 1400.6700 to 1400.6800 or informal disposition under Minn. R. 1400.5900 should be directed to Scott Ek, Energy Facilities Planner, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2255 (voice), (651) 297-7073 (fax), [scott.ek@state.mn.us](mailto:scott.ek@state.mn.us) (email).

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the administrative law judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the administrative law judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the administrative law judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the administrative law judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the administrative law judge, may result in facts or issues being resolved against the party who fails to appear or comply.

### **C. Parties and Intervention**

The current parties in this case are NDPC, the Department, and Kennecott. Other persons wishing to become formal parties shall promptly file petitions to intervene with the administrative law judge. They shall serve copies of such petitions on all current parties and on the Commission.

### **D. Prehearing Conference**

A prehearing conference will be held at a date, time, and place to be set by the administrative law judge in consultation with Commission staff.

Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the prehearing conference and to file their petitions to intervene as soon as possible.

#### **XI. Application of Ethics in Government Act**

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to certificate of need cases. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, or (800) 657-3889 with any questions.

#### **XII. Ex Parte Communications**

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this order. Those restrictions and reporting requirements are set forth at Minn. R. 7845.7300 to 7845.7400, which all parties are urged to consult.

### **ORDER**

1. The Commission varies Minn. R. 7853.0200, subp. 7, to extend the period for acting on the completeness of the certificate of need application of North Dakota Pipeline Company LLC.
2. The Commission accepts NDPC's certificate of need application as substantially complete as modified by NDPC's December 16, 2013, reply comments, and upon submittal of the information required under Minn. R. 7853.0510 and 7853.0530.
3. The Commission authorizes public hearings addressing both NDPC's application for a certificate of need and its application for a routing permit, and varies Minn. R. 7853.0200, subp. 5, to extend the period for convening public meetings in these matters.
4. The Commission hereby refers this matter to the Office of Administrative Hearings for contested case proceedings under Minn. Stat. § 14.57 *et seq.* as described herein.
5. The Commission asks the Department to continue studying issues and indicate during the hearing process its position on the reasonableness of granting a certificate of need to NDPC.
6. NDPC shall facilitate in every reasonable way the continued examination of the issues identified by Commission staff and the Department.
7. NDPC shall place a copy of its application, printed or on a compact disc (CD), for review in a government center or public library in each of the counties traversed by the proposed pipeline.

8. NDPC shall post the application and any required supplements to a publicly available website.
9. Commission staff shall work with the administrative law judge in selecting suitable dates and locations for the public hearings on the application.
10. Regarding notice of the public and evidentiary hearings in this matter:
  - A. Commission staff shall work with the administrative law judge to develop a notice of the hearings.
  - B. Between 10 and 45 days before the start of public hearings on this matter, NDPC shall send the notice of public and evidentiary hearings to the entities identified in Minn. Stat. § 216E.03, subd. 6, and Minn. R. 7829.2560, subp. 3.
  - C. At least ten days before the start of public hearings on this matter, NDPC shall publish the notice of the public and evidentiary hearings in newspapers of general circulation in the areas likely to be affected by the proposed pipeline.
  - D. Within 20 days of the notice's issuance and publication, NDPC shall make a filing demonstrating compliance with these notice requirements – for example, by filing proofs of publication and a list of the names and addresses of notice recipients.
11. The Commission delegates administrative authority over this matter, including authority over timing issues, to its Executive Secretary.
12. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary



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BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
600 North Robert Street  
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
121 Seventh Place East Suite 350  
St. Paul, Minnesota 55101-2147

In the Matter of the Application of  
North Dakota Pipeline Company LLC  
for a Certificate of Need for the  
Sandpiper Pipeline Project in  
Minnesota

MPUC Docket No. PL-6668/CN-13-473

OAH Docket No. 84-2500-31260

**NOTICE OF APPEARANCE**

Name, Address and Telephone Number of Administrative Law Judge: Tammy Pust, Office of  
Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101; Mailing Address:  
Box 64620, St. Paul, Minnesota 55164-0620; Telephone Number: (651) 361-7875.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: \_\_\_\_\_

DATE: \_\_\_\_\_