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April 28, 2015

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Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
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St. Paul, MN 55101

RE: 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. 8-2500-31260

Dear Mr. Wolf:

On behalf of the Minnesota Department of Commerce, Division of Energy Resources (DOC-DER), I file DOC-DER's limited **Exceptions** to the Report of the Administrative Law Judge.

Sincerely,

/s/ Julia E. Anderson

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**BEFORE THE
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Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner
Betsy Wergin	Commissioner

In The Matter of the Application of
North Dakota Pipeline Company LLC
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**EXCEPTIONS
OF THE
MINNESOTA DEPARTMENT OF COMMERCE
TO THE
ALJ REPORT**

April 28, 2015

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EXCEPTIONS TO THE ALJ REPORT

I. INTRODUCTION

The Minnesota Department of Commerce, Division of Energy Resources, Energy Regulation and Planning (DOC-DER) appreciates the detailed Findings of Fact, Conclusions of Law, and Recommendations (ALJ Report) of the Administrative Law Judge (ALJ). The Report summarizes a voluminous record and provides significant discussion of parties' positions and public comments on the many issues raised, and is the product of much effort and careful review. While it accepts many of the recommended Findings of Fact (Proposed Findings) with respect to the proposed pipeline project configuration (Proposed Project) of North Dakota Pipeline LLC (NDPC or Applicant), including the ALJ Report's recommended adoption of DOC-DER's recommended conditions, DOC-DER continues to support its position that *economic* evidence shows that either the Proposed Project or SA-03 could meet the claimed need, as modified by DOC-DER's conditions. DOC-DER files a general qualifying Exception to address the Commission's consideration of *environmental* evidence in the event that the Commission is not persuaded by the ALJ Report's conclusion that Applicant demonstrated the superiority of the Proposed Project to that of SA-03.

DOC-DER also requests three clarifying Exceptions. First, as to the ALJ Report's analysis of SA-03 as modified (SA-03-AM),¹ DOC-DER requests clarification that SA-03-AM is a route alternative that continues to be available for Commission consideration in the now-stayed route permit docket, MPUC Docket No. PL-6668/PPL-13-474.² Second, DOC-DER seeks clearer language to ensure that NDPC must provide an adequate Financial Assurance in order to

¹ SA-03-AM would have the same delivery points of Clearbrook, Minnesota and Superior, Wisconsin.

² *Order Separating Certificate Of Need And Route Permit Proceedings And Requiring Environmental Review Of System Alternatives* at 2, MPUC Dockets PPL-6668/CN-13-473 and PPL-6668/PPL-13-474 (October 7, 2014) (October 7th Order).

protect Minnesotans in the event of a spill. Third, DEC-DER seeks inclusion of findings to clarify that Minnesota refiners have not experienced apportionment of crude oil shipments.

II. EXCEPTION REGARDING CONSIDERATION OF SA-03

DOC-DER files a general qualifying Exception in the event that the Commission is not persuaded by the ALJ Report's analysis of the record, particularly as to environmental evidence, that Applicant demonstrated the superiority of the Proposed Project to that of SA-03. DOC-DER provided a largely quantitative economic analysis of Applicant's need request, and did not offer expert testimony or analysis regarding environmental impacts of the proposed crude oil pipeline Project or systems alternatives. Based on its analysis of non-environmental factors, DOC-DER concluded that Applicant had shown that the Proposed Project as conditioned by DOC-DER is needed, and also that SA-03 could meet the claimed need.³

DOC-DER noted that the Commission may find, based on the record as a whole including non-environmental and environmental evidence that SA-03 would pose fewer risks of environmental harm to Minnesota than would the Proposed Project, as DOC-DER's Initial Brief provided:⁴

A substantial environmental record was developed by Applicant, DOC EERA,⁵ several parties, and by public comments. Given the level of, at best, indirect economic benefits of the Project to Minnesota, and certain parties' views that this private Project poses significant risk to public natural resources of the State, many parties urge the Commission to give greater weight to evidence that dictates protection of Minnesota's natural environment. The Commission may choose to do so: for example, considering the record as a whole (both economic as well as environmental impacts) the Commission might determine that SA-03 would pose fewer risks of detrimental environmental impacts to Minnesota than the Project as proposed such that SA-03 is a more reasonable and prudent alternative to the proposed Project. On the other hand, the Commission might conclude that there

³ DOC-DER Initial Br. at 3-6.

⁴ DOC-DER Initial Br. at 4-5.

⁵ Department of Commerce, Energy, Environmental Review and Analysis (DOC EERA).

is no more reasonable and prudent alternative to the proposed Project and, thus, would issue a CN for the Project as proposed.⁶

In the event that the Commission is not persuaded by the ALJ Report's assessment and conclusion regarding the environmental evidence that Applicant demonstrated that the Proposed Project is superior to SA-03, the Commission conceivably would deny the Proposed Project for lack of proof and would find that the record supports issuance of a CN for SA-03, as modified by DOC-DER's conditions.

III. CLARIFYING EXCEPTIONS

A. Route Alternative SA-03-AM

On page 2 of its October 7, 2014, *Order Separating Certificate Of Need And Route Permit Proceedings And Requiring Environmental Review Of System Alternatives*,⁷ the Commission stated that SA-03-AM is a potential alternative that has been forwarded for consideration in the route permit matter, MPUC Docket No. PL-6668/PPL-13-474. Nonetheless, some evidence regarding SA-03-AM, albeit incomplete, was provided by parties, and the ALJ Report includes significant discussion of the CN criteria as applied to SA-03-AM.⁸

Because SA-03-AM is not an alternative under consideration in this CN proceeding, DOC-DER recommends clarification of the Proposed Findings to reflect that SA-03-AM is a route alternative that has been forwarded to the route permit proceeding for further consideration and record development. DOC-DER proposes the following clarifying changes to the ALJ Report, as shown by the following strikeouts and underlining:

Proposed Finding 96. On October 7, 2014, the Commission issued a written order resulting from its September 11, 2014 meeting (October 2014 Order). The Commission separated the CN proceeding from the Route Permit proceeding and postponed action on the Route Permit Application until the Commission made a decision on the CN Application. In addition, the Commission authorized

⁶ Whether it issues a CN for the Proposed Project or for SA-03, the Commission may consider as a potential route alternative SA-03-AM, which is a route that would include delivery points near Clearbrook and at Superior.

⁷ October 7th Order.

⁸ See, e.g., Proposed Findings 384-397, 505 and Proposed Conclusion of Law 5.

environmental review of six System Alternatives (SA-03, SA-04, SA-05, SA-06, SA-07 and SA-08) in the CN proceeding, and noted its action on August 25, 2014, that forwarded 53 route alternatives as well as “modified system alternative SA-03” for consideration in the route permit proceeding.⁹ The Commission requested that DOC-EERA staff complete the environmental review of the six System Alternatives prior to the contested case hearings in the CN docket.[Footnote omitted].

[New Proposed Finding and Conclusion] The Commission makes no finding of fact, conclusion of law or recommendation in this CN proceeding with respect to SA-03-AM, which is a route alternative that may be considered in the route permit docket, MPUC Docket No. PL-6668/PPL-13-474.

Moreover, to clarify that the Commission makes no decision in the CN docket regarding route alternative SA-03-AM, DOC-DER recommends deleting Proposed Findings 384 through 397, which discuss SA-03-AM as if it were an alternative under consideration in the CN, and similarly that Proposed Conclusion of Law 5 be amended to delete reference to SA-03-AM.

B. Adequate Financial Assurance

DOC-DER appreciates the ALJ Report’s adoption of its recommendation to condition issuance of a CN on provision of an adequate financial assurance. The importance of such a condition to protect Minnesotans in the event of a pipeline spill or rupture is described in DOC-DER’s Initial Brief, as follows:¹⁰

DOC-DER strongly recommends that, if the Commission chooses to approve a CN, it condition approval on NDPC providing material financial assurances of its ability and commitment to fund all cleanup and remediation of all Minnesota oil spills from the Project.[FN] Requiring financial assurance to cover a risk of significant loss is a reasonable and accepted business practice. In its own TSAs, NDPC required financial assurances of its committed shippers who are financing the Project; those financial assurances could be in an amount and on terms that NDPC at its sole discretion reasonably selected.[FN]

The context for this important condition is unfortunate. In 2010, an Enbridge Energy crude oil pipeline leaked into the Kalamazoo River near Marshall, Michigan, causing over \$1 billion in environmental damage.[FN] Enbridge Energy paid for the Kalamazoo cleanup and ongoing remediation.[FN] NDPC acknowledged in the present matter the catastrophic potential of a crude oil

⁹ *Order Separating Certificate Of Need And Route Permit Proceedings And Requiring Environmental Review Of System Alternatives* at 2, MPUC Dockets PPL-6668/CN-13-473 and PPL-6668/PPL-13-474 (October 7, 2014) (October 7th Order).

¹⁰ DOC-DER Initial Brief

pipeline incident to threaten the existence of the company[.][Existing footnotes omitted].

To ensure that such a financial assurance condition is clear and unequivocal, DOC-DER recommends the following clarifying changes to the ALJ Report, as shown by the following strikeouts and underlining:

Proposed Finding 586. DOC-DER recommended that the Commission make clear that NDPC is financially responsible for all clean-up and remediation costs of any spills and impose ~~permit~~-conditions that NDPC maintain sufficient insurance or other adequate financial assurance to cover all these costs.[Existing footnote omitted]

Proposed Finding 592. In light of the recent catastrophic spill near Kalamazoo, Michigan in 2010, and NDPC testimony that another spill of that magnitude could threaten the existence of NDPC (i.e., potential bankruptcy),¹¹ it is reasonable to include a ~~permit~~-condition that requires NDPC to be fully and completely responsible for any damage that results from a spill related to the Project in Minnesota to the extent required by law. Thus, the condition should require NPDC to provide adequate financial assurance to cover all costs related to a spill even if NDPC itself does not have sufficient resources to do so, and to submit a description of the financial arrangements it has made, and will maintain, to meet its obligations under law including under Minn. Stat. § 115E.04, subd. 4 and 49 C.F.R. Part 194 would be appropriate. One possibility also might be to require submission of a copy of NDPC's narrative describing the "functional area of finance" required by 49 C.F.R. § 194.107(c)(3)

Proposed Recommendation 3. **CONDITION** the Certificate of Need upon:

* * *

(e) a requirement that NDPC be fully and completely responsible for any damage that results from a spill related to the Project in Minnesota to the extent required by law. Thus, NPDC must provide adequate financial assurance to cover all costs related to a spill even if NDPC itself does not have sufficient resources, and submission of a description of the financial arrangements NDPC has made, and will maintain, to meet its obligations under law including under Minn. Stat. § 115E.04, subd. 4 and 49 C.F.R. Part 194[.]

C. Apportionment

DOC-DER requests clarification that Minnesota refiners have not experienced apportionment on the existing pipeline. In its Initial Brief, DOC-DER distinguished Minnesota refiners from other refiners, as follows:

¹¹ Tr.V.1 at 53-54 (Eberth).

The record does not demonstrate that apportionment is or has been a concern of Minnesota refineries. Unlike the apportionment provisions applicable to the Alberta Clipper pipeline that were relevant to the recent Phase 2 upgrade (pumping stations) matter,[FN] the proposed Sandpiper pipeline is not under the same apportionment provisions and tariffs applicable to the Alberta Clipper line. In the Alberta Clipper Phase 2 matter, Enbridge emphasized that, as a common carrier, it had to accept all nominated volumes from all shippers without discrimination such that, to the extent nominations exceeded capacity, all shippers had been and would be apportioned.[FN]

For the Sandpiper Project at issue in this case, there exist historical shippers like the Minnesota refineries that have not been apportioned or have not been apportioned with the frequency identified in Alberta Clipper Phase matter.[FN] While the record in this case demonstrates that there may be planned and unplanned outages on Line 81 that serves the Minnesota Pipeline facilities and that, in turn, serve the Minnesota refineries, Minnesota refineries have not been apportioned.[FN] Finally, as Mr. Heinen observed, Line 81 will continue to exist for deliveries to Clearbrook and, ultimately, to Minnesota refineries whether or not the Commission grants a CN for the proposed Project or for SA-03.[FN] Thus, under either scenario, Minnesota refineries and, specifically, the St. Paul Park refinery, will continue to receive the 60,000 bpd that it has been receiving. [Existing footnotes omitted]

For purposes of clarification, DOC-DER recommends the following clarifying changes to the ALJ Report, as shown by the following strikeouts and underlining:

195. The Applicant testified that ~~the~~ NDPC System to Clearbrook was in constant apportionment between 2006 and 2012, intermittent apportionment during 2013, and back into apportionment in 2014.[FN] However, the St. Paul Park refinery and other shippers argued in the FERC proceeding that they have received timely service from NDPC and they have not been subject to apportionment.¹²[Existing footnotes omitted]

197. When apportionment is announced, refiners and shippers ~~refineries, including the Flint Hills and St. Paul refineries in Minnesota,~~ are ~~may be~~ unable to obtain all of the crude oil originally directed to them. Apportionment may have ~~has an~~ immediate negative impact on producers, shippers, and refiners.[Existing footnotes omitted]

¹² DOC-DER Ex. 50 at 24 (Heinen Direct).

IV. CONCLUSION

For the reasons provided, DOC-DER respectfully requests that the Commission adopt DOC-DER's Exceptions as identified above.

Dated: April 28, 2015

Respectfully Submitted,

s/Julia E. Anderson

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, TERESA A. WINGER, hereby state that on the 28th day of April, 2015, I filed to eDockets and served the attached:

DOC-DER’s limited **Exceptions** to the Report of the Administrative Law Judge

upon all parties on the attached service list, postage prepaid, by depositing the same at St. Paul, Minnesota.

See attached Service List

/s/ Teresa A. Winger
TERESA A. WINGER

Subscribed and sworn to before me
on April 28, 2015.

/s/Mary L. Moldestad
Notary Public - Minnesota
My Commission Expires 01/31/2016.

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