

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

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

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

ORDER LIFTING STAY, REJOINING  
NEED AND ROUTING DOCKETS,  
AND REFERRING FOR  
CONTESTED CASE PROCEEDINGS

**PROCEDURAL HISTORY**

On November 8, 2013, North Dakota Pipeline Company LLC (the Company) filed two applications with the Commission—the first for a certificate of need and the second for a pipeline route permit to construct the Sandpiper Pipeline Project (the Project), a new 612-mile pipeline to transport crude oil from the Company’s Beaver Lodge Station, south of Tioga, North Dakota, to a Company affiliate terminal in Superior, Wisconsin.

After completion of contested case proceedings in the certificate of need case, the Commission issued its Order Granting Certificate of Need with Conditions on August 3, 2015.

On September 14, 2015, the Minnesota Court of Appeals issued its opinion in an interlocutory appeal taken in this matter by Friends of the Headwaters.<sup>1</sup> On September 30, 2015, the Court clarified its opinion, ruling that when certificate of need proceedings precede routing permit proceedings for a large oil pipeline, the Minnesota Environmental Protection Act<sup>2</sup> requires that an environmental impact statement (EIS) be completed before a final decision is made on the certificate of need. The Court reversed and remanded the matter to the Commission for completion of an EIS before a final decision is made to grant or deny a certificate of need.<sup>3</sup>

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<sup>1</sup> *In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need and Route Permit for the Sandpiper Pipeline Project*, Case No. A15-0016.

<sup>2</sup> Minn. Stat. Ch. 116D.

<sup>3</sup> On October 14, 2015, both the Commission and the Company petitioned for review of the decision of the Court of Appeals. On December 15, 2015, the Minnesota Supreme Court denied the petitions.

On October 7, 2015, the Commission issued an order reopening and staying its August 3 order granting the certificate of need. The Commission requested that parties file comments on how best to proceed in the Sandpiper certificate of need and route permit dockets in light of the Court of Appeals decision.

On October 21, 2015, the administrative law judge assigned to the route permit proceeding issued an Order for Continuance and Certification. The administrative law judge declined to set a schedule in the matter because recommencement of the route permit proceeding was premised on Commission approval of the certificate of need application.

On October 30, 2015, the Sierra Club filed a petition to intervene in the Sandpiper certificate of need and route permit cases for the limited purpose of protecting its procedural rights and interests in the related proposed Line 3 Replacement Project proceedings.<sup>4</sup>

The following parties filed comments in response to the Commission's request for procedural comments:

- Minnesota Chamber of Commerce
- United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada
- Laborers District Council of Minnesota and North Dakota
- Friends of the Headwaters
- Carlton County Land Stewards
- Honor the Earth
- White Earth Band of Ojibwe
- Mille Lacs Band of Ojibwe
- Sierra Club
- Minnesota Department of Commerce
- North Dakota Pipeline Company

On December 17, 2015, the Commission met to consider how to proceed in light of the September 2015 decision of the Minnesota Court of Appeals.

## **FINDINGS AND CONCLUSIONS**

### **I. Summary of Action**

In this order the Commission lifts the stay on the certificate of need docket, rejoins that case with the route permit docket, and refers both dockets back to the administrative law judge for joint contested case proceedings. The Commission also authorizes the Department to administer a combined EIS process that addresses issues related to both need and routing.

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<sup>4</sup> *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/PPL-15-137.

Further, the Commission will require the completion and issuance of a final EIS prior to the filing of intervenor direct testimony in the contested case. Finally, the Commission grants Sierra Club's petition to intervene and takes various actions to implement these decisions.

## **II. Rejoinder of Certificate of Need and Route Permit Proceedings**

### **A. Background**

On February 11, 2014, the Commission found that joint hearings in the certificate of need and route permit dockets would provide administrative efficiencies and a more convenient means for the public to provide comments. On July 7, 2014, the Commission declined to separate the public hearing in the two proceedings as requested by Honor the Earth, finding that, at that stage of the proceedings, separate proceedings were not necessary.

On October 7, 2014, the Commission decided to bifurcate the proceedings, finding that as the proceedings had developed, the number and complexity of the contested issues had significantly increased. The Commission found just cause to separate the proceedings, stayed the route permit proceeding, and allowed the certificate of need docket to proceed to contested case.

### **B. Positions of the Parties**

Following the Court of Appeals decision in the interlocutory appeal in the certificate of need case, the Company requested that the Commission rejoin the certificate of need and route permit proceedings and refer both dockets to the Office of Administrative Hearings for joint contested case proceedings. The Company asserted that the Court of Appeals decision did not limit the Commission's discretion to rejoin the certificate of need and route permit dockets in this manner.

The Company argued that compelling reasons exist to order rejoinder of the two dockets at this time, including making more efficient use of resources and adding regulatory consistency to the process. The Company also asserted that continuing the bifurcated proceedings would add layers of additional regulatory and legal complexity, and unnecessarily increase the delay before Commission analysis of the merits in these proceedings.

The Department agreed with the Company that the Court of Appeals decision did not limit the Commission's discretion on how the administrative process in both the certificate of need and route permit dockets should now be conducted. The Department recommended rejoinder of the dockets. Minnesota Chamber of Commerce, United Association, and Laborers Council also recommended that the Commission rejoin the two proceedings.

Carlton County Land Stewards, Friends of the Headwaters, Mille Lacs Band of Ojibwe, Honor the Earth, and White Earth Band of Ojibwe argued for the continued bifurcation of the proceedings.

### **C. Commission Action**

Minn. Stat. § 216B.243, subd. 4 establishes the statutory preference for joint siting and need proceedings for large energy facilities:

Unless the Commission determines that a joint hearing on siting and need under this subdivision and Section 216E.03, subdivision 6, is not feasible or more efficient, or otherwise not in the public interest, a joint hearing under those subdivisions shall be held.

The Commission will lift the stay in the certificate of need case and rejoin the Sandpiper certificate of need and route permit proceedings at this time. While bifurcation was helpful in focusing attention on need-related issues—and resulted in a comprehensive record that will inform the recommenced proceeding—it is clear that circumstances have changed, and the advantages of rejoining the two cases now outweigh the disadvantages of continued bifurcation. A staged, coordinated review, using a single comprehensive environmental review document in both cases, will be more efficient and better reflect the Court of Appeals decision than requiring the preparation of an EIS in the certificate of need docket and a comparative environmental analysis in the route permit docket.

For these reasons, the Commission will rejoin the matters. Rejoinder will essentially restart the proceedings, with appropriate limitations in the certificate of need docket to incorporate the proceedings that have already taken place. To accomplish this, the Commission will take the following actions:

- refer both proceedings back to the Office of Administrative Hearings and require joint contested case proceedings
- incorporate the existing certificate of need record into the record of the joint proceedings
- limit further record development in the need docket to avoid duplication of the existing evidence

Finally, and importantly, prior to making its decision in the certificate of need docket, the Commission will determine the adequacy of the joint environmental review of these matters to be administered by the Department as set forth herein.

### **III. Combined Environmental Impact Statement and Procedures for Contested Case Proceedings**

#### **A. Positions of the Parties**

##### **1. The Company**

Following the Court of Appeals decision, the Company filed comments recommending that a combined EIS be prepared for the Sandpiper need and routing dockets, following the timelines and processes set forth in Minnesota Rules Chapter 4410.

The Company recommended that a draft EIS, not a final EIS, be available to parties for use in the contested case. Finally, the Company stressed its concern over the already considerable length of these proceedings.

##### **2. Minnesota Chamber of Commerce, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Laborers District Council of Minnesota and North Dakota**

The Minnesota Chamber of Commerce, United Association of Journeymen and Apprentice of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Laborers District Council of Minnesota and North Dakota also expressed concern over the amount of time the Sandpiper

certificate of need proceeding has taken. The parties agreed with the Company's procedural recommendations and timetable and its recommendation for a joint EIS for both dockets.

### **3. Minnesota Department of Commerce**

The Department agreed with the Company that the Court of Appeals decision did not limit the Commission's discretion on how the administrative process in both the need and route permit matters should be conducted. The Department also agreed that completion of an EIS to address both need and routing issues would meet the Court of Appeals' requirement that an EIS be completed before a final decision is made on issuing the certificate of need.

The Department stated that a combined EIS would avoid unnecessary duplication of environmental review processes. The Department recommended that the combined EIS include an evaluation of the Company's preferred route, System Alternative SA-03-AM, and other route alternatives to be identified through the EIS scoping process.

Although the Department initially took no position, at hearing it agreed that the final EIS, not the draft, be available before the submission of intervenor direct testimony in the joint contested case proceedings. The Department recommended that other scheduling issues be left to the administrative law judge to determine.

Finally, the Department stated it would enter into an agreement with the Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources to ensure completion of an EIS that fulfills the legal requirements set forth in the Minnesota Environmental Protection Act.

### **4. Carlton County Land Stewards, Friends of the Headwaters, White Earth Band of Ojibwe, Mille Lacs Band of Ojibwe, and Honor the Earth**

Carlton County Land Stewards (CCLS), Friends of the Headwaters, White Earth Band of Ojibwe, Mille Lacs Band of Ojibwe, and Honor the Earth agreed that the appropriate process to follow in light of the Court of Appeals decision was to lift the stay on the certificate of need case, authorize the preparation of an EIS, and refer the certificate of need application back to the administrative law judge. These parties argued that further action on the route permit matter should be postponed pending a final decision by the Commission on the certificate of need.

CCLS argued that the Commission should set a schedule that includes no unnecessary delay, but that the schedule should not be shortened by virtue of the Court of Appeals decision. CCLS requested that the Commission not set a procedural schedule without the benefit of the scoping decision in the EIS process to be administrated by the Department. Finally, CCLS asserted that it is the final, not draft, EIS that must be timely available to the parties, the administrative law judge, and the Commission to inform the decision-making process.

The White Earth Band of Ojibwe, Mille Lacs Band of Ojibwe, and Honor the Earth agreed that it would be most efficient for the final EIS to be completed and available to the parties prior to the submission of intervenor direct testimony in the contested case, so as to narrow the issues that go before the administrative law judge for decision.

## **B. Commission Action**

In addition to rejoining the need and routing dockets, the Commission will authorize the preparation of a combined EIS that addresses issues related to both the certificate of need and route permit dockets under Minnesota Statutes Chapter 116D and Minnesota Rules Chapter 4410. The Commission will authorize the Department to administer the EIS process in consultation with the Commission's Executive Secretary, and to enter into an agreement with the Department of Natural Resources and the Pollution Control Agency to ensure that the EIS fulfills the requirements of the Minnesota Environmental Protection Act (MEPA).

As explained above, the Commission will refer both the need and route permit cases back to the Office of Administrative Hearings and require joint contested case proceedings. Recognizing that the need application has already progressed through public hearings and contested case proceedings, however, the Commission will incorporate the existing certificate of need record into the record to be submitted to the administrative law judge, and limit further record development as necessary to avoid duplication.

To best reconcile the contested case process with the MEPA process, and to avoid delay related to use of the EIS document in that process, the Commission will require the issuance of a final EIS prior to the filing of intervenor direct testimony.

In the contested case proceeding, following the filing of the final EIS, the parties should focus on how the facts developed in the EIS support or undermine their positions. This will allow for the development of a robust record, but, importantly, avoid having the contested case proceeding become a second arena in which to vet the EIS.

Finally, as proceedings in the routing matter develop, the Department may choose to eliminate or to increase the route alternatives being considered. The Commission asks that the Department return to the Commission for approval of the alternative route or route segments selected, to comply with Minn. R. 7852.1400.

The Commission will also rescind the November 16 and 23, 2015 notices requesting comments from parties on the *Draft Scoping Document for the Sandpiper Pipeline Environmental Review* filed by the Department in the routing docket.

## **IV. Sierra Club**

The Commission will grant the Sierra Club's petition to intervene in these dockets for the limited purpose of protecting its procedural rights and interests in the related Line 3 Docket. No party objected to the Sierra Club's intervention, and Line 3 will likely track portions of the Sandpiper proposed route.

## **ORDER**

1. The Sierra Club's petition to intervene in these dockets for the limited purpose of protecting its procedural rights and interests in the Line 3 docket is granted.

2. The Commission lifts the stay on the certificate of need matter and rejoins the certificate of need docket with the route permit docket.
3. The Commission hereby refers the certificate of need and route permit matters back to the administrative law judge for joint contested case proceedings. The Commission hereby incorporates the existing certificate of need record into the record of the joint proceedings as explained herein and asks the administrative law judge to limit further record development in the certificate of need matter as necessary to avoid duplication.
4. The Commission authorizes the preparation of a combined EIS that addresses issues related to the certificate of need and route permit dockets in accord with Minnesota Statutes Chapter 116D and Minnesota Rules Chapter 4410.
5. The final EIS shall be issued prior to the filing of intervenor direct testimony.
6. The Commission authorizes the Department to administer the EIS process in consultation with the Executive Secretary, and to enter into an agreement with the Department of Natural Resources and the Pollution Control Agency to ensure that the EIS fulfills the requirements of MEPA.
7. The Commission requests that the Department return to the Commission for approval of alternative routes or route segments, to comply with Minn. R. 7852.1400.
8. The Commission rescinds the November 16 and 23, 2015 notices requesting comments from parties on the *Draft Scoping Document for the Sandpiper Pipeline Environmental Review* filed by the Department of Commerce.
9. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf  
Executive Secretary



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