

I. SUMMARY OF PROTEST

This is the second time that NDP and its predecessor, Enbridge Pipelines (North Dakota) LLC (Enbridge), have asked the Commission to approve a pipeline expansion project that has been repeatedly rejected by shippers in North Dakota.

On November 12, 2012, Enbridge first sought Commission approval of its Sandpiper project. Because shippers in North Dakota had repeatedly rejected participating in the project, Enbridge never held an Open Season. Instead, it filed a Declaratory Order petition that asked the Commission to impose the costs of building a new pipeline on shippers of the existing pipeline, more than doubling the rates that they would pay. At that time, as well as at the present time, there was considerable unused capacity in the existing Enbridge line.

On March 22, 2013 the Commission rejected the Enbridge Petition without prejudice. The Commission first pointed out that, “Enbridge North Dakota’s filing does not contain the cost support required by Part 346 of the Commission’s regulations to establish cost-of-service rates.”² The Commission then stated that if Enbridge refiles its Petition, it needed to file rates, “fully supported pursuant to the Commission’s regulations.”

Neither Enbridge nor NDP has done so. The current NDP Petition is much the same as the Enbridge 2012 filing, and does not include a cost of service.

As in 2012, NDP is now proposing to add a new 230,000 barrels per day (bpd) pipeline from Beaver Lodge, ND to Clearbrook, MN. When combined with its present pipeline, NDP would have the capacity to transport 440,000 bpd of Bakken crude oil to

² *Enbridge Pipelines (North Dakota) LLC*, 142 FERC ¶ 61,212 at P 28 (2013).

Clearbrook. NDP further proposes to extend its pipeline from Clearbrook to Superior, WI by constructing 233 miles of 30-inch pipe that would have an annual average pipeline capacity of 380,000 bpd. In connection with the new extension from Clearbrook, MN to Superior, WI, NDP proposes to eliminate Clearbrook as a destination for North Dakota shippers.

And again, once the new line is constructed, NDP is also proposing to raise the rates that current captive shippers would have to pay to levels that could potentially be double or more the current rates. In addition, NDP is again proposing to impose on uncommitted shippers the obligation of ensuring the pipeline's rate of return regardless of whether the new capacity that NDP proposes to build is in fact actually used by any shipper. In its Petition, NDP claims that it is abandoning any "true-up" mechanism, which previously required uncommitted shippers to bear the risk that shippers will not actually use the entire new capacity that NDP is building.³ NDP's statement is not correct. In its current Petition, it appears that NDP is asking uncommitted shippers to pay whatever rate is necessary after the first year of operation in order to ensure NDP's rate of return and recovery of its costs, including the cost of investment in the new and expanded pipeline segments.

In fact, contrary to NDP's representations in its Petition, there are still further similarities between the Enbridge 2012 proposal that the Commission rejected and the present NDP Petition. In its 2012 project, Enbridge abandoned an Open Season for lack of shipper interest. In its 2014 solicitations, NDP found as little support for the pipeline project as Enbridge encountered in 2012. According to NDP, there are approximately 185

³ Petition for Declaratory Order of North Dakota Pipeline Company LLC (NDP Petition), OR14-21-00, dated February 12, 2014, pages 42-43.

shippers on the NDP pipeline in North Dakota. Yet only 15 shippers, 8% of the total number of shippers on the NDP pipeline, were sufficiently interested to even ask for a *pro forma* Transportation Services Agreement (TSA) during the Open Season that NDP conducted from November 26, 2013 to January 24, 2014. NDP does not state how many of those 15 shippers went on to actually execute a TSA. However, only 155,000 bpd of the 440,000 bpd of total capacity of the Beaver Lodge to Clearbrook pipeline were committed during the Open Season.

Moreover, at least one of the committed shippers, Marathon Pipeline Company (Marathon), and possibly more, is an affiliate of the pipeline. According to news reports, Marathon is the “anchor” shipper on the pipeline and its parent company, Marathon Petroleum Corp., holds a 27% equity interest in NDP.⁴ Thus, it appears that the majority of the 155,000 bpd subscribed to during the Open Season is attributable to affiliates of the equity owners of the pipeline. Moreover, as we will discuss more fully below, it also appears that the very structure of the Sandpiper project is designed to permit Marathon to use capacity for which uncommitted shippers will be paying to transport crude oil at lower rates to its Illinois and Ohio refineries.

⁴ NDP stated that Marathon Pipeline Company was the anchor shipper for the project. According to a recent Wall Street Journal article, “Marathon Petroleum Corp., which operates refineries in Detroit, Mich., Canton, Ohio, and Catlettsburg, Ky., has agreed to help foot the \$2.6 billion construction bill and provide much of the oil in exchange for a 27% stake in Enbridge’s North Dakota pipeline network.” See “In Dakota Oil Patch, Trains Trump Pipelines,” Alison Sider, *Wall Street Journal*, dated March 3, 2014. <http://online.wsj.com/news/articles/SB10001424052702304071004579407140444547268?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304071004579407140444547268.html>.

It is clear that, NDP's current Petition represents an effort by the pipeline to use the Commission's processes to require captive shippers to finance and pay for a project that a majority of the shipping community does not want or need.

In this Protest, we will discuss in detail the reasons why a majority of the shipper community has not supported the Sandpiper project and why there is no justification for imposing on uncommitted shippers the unnecessary burden and unreasonable rate design that NDP is proposing.

- First, there is no substance to NDP's claim that an additional 230,000 bpd of pipeline capacity from Beaver Lodge to Clearbrook is necessary to meet crude oil demand for North Dakota Bakken production. Virtually every governmental study shows that current pipeline and rail facilities are more than sufficient for the foreseeable future to transport Bakken crude oil production from North Dakota to refining centers throughout the United States.⁵
- A Muse Stancil & Co. (Muse) study that NDP commissioned to support its contention that additional pipeline capacity is necessary is seriously flawed. It fails to taken into account existing North Dakota pipelines, is based on

⁵ The Declaration of Robert P. Garner (Garner Declaration), which is attached to this Protest as Exhibit D, discusses North Dakota Pipeline Authority data regarding the capacities of rail and pipeline projects in the Bakken. See Exhibit D, pages 5-6, as well as Attachment A to Exhibit D. The Declaration of Peter K. Ashton (Ashton Declaration), attached as Exhibit F to this Protest, discusses data from the Energy Information Agency (EIA) and United States Geological Survey (USGS) regarding crude production in the Bakken. See Exhibit F, pages 23-24.

secret data that Muse refuses to share with either shippers or the Commission, and is contradicted by NDP's own prior statements.⁶

- The present NDP pipeline is adequate. The present capacity of the NDP pipeline from Beaver Lodge to Clearbrook is 210,000 bpd. During a prior Enbridge proceeding, NDP reported to the Commission that only 100,000 bpd – i.e., less than 50% of the pipeline's capacity – were shipped on the pipeline during certain months in the January 2012 to July 2013 period.⁷ The monthly average shipment on the pipeline for the 12-month period from August 2012 through July 2013 was only 129,000 bpd or only about 60% of capacity.⁸ In addition, the Shippers have stated in sworn Declarations attached to the Protest that they have been able to ship all the crude oil they wished on the NDP pipeline in 2013 and 2014.
- There is approximately 1 million bpd of rail take-away capacity in Western North Dakota today. That rail take-away capacity is expected to increase by 2016 to approximately 1.35 million bpd, an amount equal to the maximum level of production expected in the whole Bakken for the foreseeable future.
- The NDP rate design appears to impose inordinate cost burdens on uncommitted shippers. NDP is proposing to charge committed shippers – largely, we believe, affiliates of the equity owners of the pipeline – as little

⁶ See Ashton Declaration, page 21-22, discussing statements made by Robert Steede in proceeding OR13-28-000.

⁷ Appendix to *St. Paul Park Refining Co. LLC v. Enbridge Pipelines (North Dakota) LLC*, 145 FERC ¶ 61,050 (October 17, 2013).

⁸ *Id.*

as one cent above the rates that uncommitted shippers pay in the first year. However, after that first year of operation, NDP could, under the rate design that it is now asking the Commission to approve, impose rates on uncommitted shippers that substantially exceed the rates that committed shippers pay. That could well mean that uncommitted shippers would bear the lion's share of the cost of constructing and operating a pipeline that they do not need. In fact, based on a review of the NDP rate structure, it is possible that current captive shippers could see their rates more than double if the NDP rate design were approved.

- The NDP project structure is inherently discriminatory and appears to be designed to confer economic benefits on an affiliated shipper, Marathon, at the expense of uncommitted shippers.

There is yet another critical issue that the Shippers are asking the Commission to address. As we pointed out previously, in its 2013 Decision dismissing the Enbridge Sandpiper project, the Commission pointed to the requirements that rates be justified by a cost of service filing, unless NDP was seeking market based rates or rates agreed to by all shippers on the pipeline.⁹ However, in its current Petition, NDP is instead attempting to push all cost issues to a later stage of this proceeding. Doing so would place an unjust and unreasonable burden on the Shippers. It is therefore critical that cost and rate issues be decided *at this time*. If the NDP rate design were approved at this time as NDP requests, the Shippers' only recourse to contest cost and rate issues would be to file a Protest of an NDP cost of service *after* the new Sandpiper pipeline has already been constructed. The

⁹ *Enbridge Pipelines (North Dakota) LLC*, 142 FERC ¶ 61,212 at P 28, 30.

Shippers would then only have 15 days to fully analyze and describe to the Commission the defects in NDP's cost structure. Moreover, even if the Shippers were successful in their Protest, the most likely outcome would be a protracted evidentiary hearing and subsequent appeal proceedings with the Shippers paying the pipeline's rates until the very end of the case. We respectfully suggest that this is a burden that is unjust and unreasonable.

For each of these reasons, the Commission should not approve an NDP rate design at this time that permits the pipeline to load disproportionate and unreasonable costs onto uncommitted captive shippers of the present NDP pipeline. We therefore respectfully urge the Commission to reject outright NDP's proposed Expansion Surcharge on uncommitted shippers and the rate design it proposes to establish. If, however, the Commission does not do so, it should certainly establish evidentiary hearing procedures, with all the attendant rights of discovery, so that disputed issues of fact regarding the underlying justification for the pipeline expansion and the costs that uncommitted shippers should properly bear if the pipeline project proceeds can be fairly resolved. That type of evidentiary hearing is expressly contemplated in Section 385.211(a)(4) of the Commission's procedural regulations.¹⁰ To underscore the necessity of holding an evidentiary hearing if the NDP Petition is not denied, we are attaching to this Protest as Exhibit A, a list of disputed issues of fact, which NDP has the burden of proving in order to justify the relief it seeks in its Petition for Declaratory Order.

II. COMMUNICATIONS AND CORRESPONDENCE

Communications and correspondence regarding this Protest should be directed to:

¹⁰ 18 C.F.R. § 385.211(a)(4).