APPENDIX E

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Economic Impact Committee
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Testimony of Carlee McLeod

Chairwoman Triplett, members of the committee, my name is Carlee McLeod and I am president of the Utility Shareholders of North Dakota. I'm here today to speak on behalf of the one-call stakeholders. At the first interim hearing of this committee, a number of people presented concerns and ideas, and you asked us to meet prior to this hearing to see what sort of consensus we could reach. To that end, meetings were held on October 13, November 16 and 30, December 17, January 11 and February 3. Thank you for allowing us that time, and thank you for giving us time on the agenda today to report on our progress and provide you with recommendations.

Stakeholder Group Information

Composition. The stakeholder meetings started with the people present or mentioned during the first interim hearing who wanted to work on the issues discussed at that meeting. We expanded to the larger stakeholder group started in 2012, and grew as others expressed interest or issues expanded. The group was open to any who expressed interest, and each meeting was held in Bismarck with conference call capabilities. Approximately 20-30 people attended each meeting in person, with many others joining on the phone each time. Each meeting lasted 3-6 hours. We made it clear each time that our meetings were NOT a substitute for legislative hearings, and while we tried to work toward consensus with the group assembled, any other points of view could still be shared with the legislative committee at any time. I bring this to your attention, because you might have received calls from people who were dissatisfied they weren't involved in our group. We never claimed to represent an exhaustive list of all interested parties. We did strive to include anyone who would likely be connected to the one-call process, and as stated previously, we included anyone who expressed an interest to us of wanting to be included.

Goal. Our goal was to discuss one-call issues and reach consensus from the people who work with underground facilities and the one-call system: regulators, utilities, pipeline operators, telecommunications, excavators, builders, surveyors and planners. As the group expanded, we included one-call board members, representatives of One Call Concepts (the contract provider of services in ND), North Dakota Association of Counties, landowner representatives, and members of the agriculture community in our notices, updates, and meetings.

Procedure. We began by issue spotting. Our first meeting was dedicated entirely to listing concerns with the current system, either as experienced by the stakeholders or as conveyed to them from others. At the conclusion of the meeting, I arranged my notes on those issues into non-legislative issues and possible legislative issues and emailed them to the list of known stakeholders. At the second meeting, we reviewed those notes, discussed each issue and whether it was properly categorized, and began the discussion of potential solutions. After that meeting, my notes regarding the legislative issues were arranged into a table which was shared with the group by email and was updated after each subsequent meeting as our discussion progressed. It was made clear during the

process that these were my working notes, not an official finished working group product, which I hope helped ward off frustration or confusion by people who were not part of the group but with whom the notes were shared. The last update of those notes was shared after our February 3rd meeting, and the recommendations reached at that meeting are the recommendations I will bring you today.

It is the intention of our group to continue to work on these or any new issues through the 2017 legislative session.

RECOMMENDATIONS

There are 21 areas in which we reached consensus. Of those 21 areas, we agree to recommend specific change in 12 areas and to recommend no change in 9 areas. We discussed 4 areas on which we did not reach consensus. Additionally, we discussed the soil tester exemption, which all but the soil-tester representative opposed. Technically, that would mean there was no consensus, but to classify it as such gives a false impression of the group, so it will be explained separately.

The one-call laws are complex and interconnected. We looked at the chapter comprehensively, and our recommendations come as a whole as a means to protect the safety of anyone encountering underground facilities while minimizing the burden the system causes those who encounter it. Where possible, I will try to provide cross references to other areas each might affect.

1. Board composition

One of the issues presented at the initial Economic Impact meeting was the composition of the One-Call board. NDCC provides that North Dakota One-Call be organized as a non-profit corporation. While the law specifies the groups that would form the corporation and set up the board, the law provided that those 17 incorporators establish a board of 8 by August of 1996, but the law does not specify anything else about the nature of the board or selection of members. Current board composition includes a gas/oil member, but that member is and traditionally has been a gas distribution pipeline representative. There is a desire from the gathering and transmission oil and gas industry to have a pipeline representative on the board to represent industry knowledge on transmission and gathering lines. Like large and small communities, which have separate representation on the board, there is a vast difference in gas distribution lines, gathering lines, and transmission lines. Adding a position for gathering and transmission oil and gas pipelines, separate from the current gas distribution pipeline position, would better represent the composition of the state's underground facilities. Members of the current board don't think a change is necessary. When asked if they opposed the change, none said they did, but none embrace the change, either. Since none opposed the change, and the rest of the group was in agreement, it is included as a recommendation that the board expand to 9, with the new position designated as a representative of the oil and gas gathering and transmission pipeline industry.

DAMAGE PREVENTION AND ENFORCEMENT

The purpose of one-call laws is to prevent damage to people, equipment, and facilities. In order to prevent damage, the laws must define careful digging practices and provide for clear enforcement practices. The following recommendations reflect those goals.

2. **Prudent digging practice—change recommended**

Within a certain zone of a facility, careful and prudent digging must occur. However, the law regarding this issue is worded in a way that confuses many. Most of us understand the wording to mean an excavator must hand dig within 2 feet of the centerline indicated for any facility. However, current law doesn't adequately reflect that understanding. The wording of the statute needs to be clarified. Our group recommends the following language for NDCC 49-23-01(3):

3. "Careful and prudent manner" means 1) manually excavating within twenty-four inches [60.96 centimeters] of the outer edges of ~~an~~ any underground facility ~~manually and marked by the owner or operator by stakes, paint, or other customary manner,~~ on a horizontal plane as located and marked by the owner or operator; and 2) supporting and protecting the uncovered facility.

Cross reference: cost of location for abusive location requests

3. **Culpability Language—change recommended**

NDCC 49-23-06(1)(c) provides that damaging an underground facility without notifying the operator is a class A misdemeanor, but only if the action is done "knowingly". "Knowingly" is an extremely high standard to prove, as it requires knowing someone's thoughts. "Willfully" is a better standard, because it requires that a prosecutor prove someone acted contrary to commonly accepted levels of prudence, and includes knowingly, recklessly, or intentionally. (NDCC 12.1-02-02).

4. **License Revocation**—recommend **no** change

Currently, the PSC has tools to fine violators. If fines are not paid, the PSC can pursue collection actions. There is a general feeling that violators who refuse to pay fines should not be considered in good standing with the state for purposes of retaining a business license. However, after further discussion with representatives of the office of Attorney General and Secretary of State about the legal and procedural matters involved with license revocation, the stakeholder group agreed that this avenue probably isn't the best option.

5. **Escalating Fines**—recommend **no** change

The PSC has the authority to issue fines for one-call violations. During the 2013 session, the maximum fine amount was raised to $25,000 per offense. The goal of these fines is to deter bad actions. The fines do not go to the aggrieved party—they are merely a penalty on the violator. PSC action does not substitute for any other civil or criminal proceeding arising out of one-call violations. Violators often continue to violate the law, even after complaints have been filed. The discussion around this idea was that each subsequent violation, after a violator has received notice of a complaint, should hold a higher fine. It takes time to resolve complaints, and there was a desire to provide greater disincentive to deter people from continued bad actions. However, the PSC has escalators in its penalty matrix, and it may consider all offenses, not just those in each complaint, in order to assess the severity of conduct. So the stakeholders agreed that no change in the law is needed.

A. Minimum fines—no consensus to change

Some of our stakeholders would like to see a minimum fine set in law. Others would prefer to let the PSC review the issues and circumstances, as the current law allows. It was reiterated during our meetings that the 2012-2013 stakeholder group urged flexibility during the 2013 session when the maximum fine was raised from $5,000 to $25,000, and many in the group agreed setting a minimum fine regardless of circumstances was contrary to the flexibility we urged.

6. **Streamlining PSC Investigation and Enforcement Process—change recommended (if needed)**

The PSC investigates every complaint filed, and in the past, they have relied on responses from alleged violators prior to setting hearing dates. Violators are slow to respond, if they respond at all, so resolution has been slow. Likewise, there are often complaints filed that are meritless. Even if all facts claimed were true, there would be no recource under the law. In most (if not all) judicial proceedings, there is discretion to set a hearing, issue a default judgment if no answer or participation from the alleged violator is received, or dispose a complaint on its merits. Our stakeholder group felt that it would be helpful to clarify authority and procedure for the PSC, if clarification was needed. However, in recent discussions with the PSC legal staff, it was determined they do not need any clarifying language at this time. They are setting hearings, disposing of meritless claims, and issuing orders in an appropriately timely manner. These issues remain recommendations for change, in case further analysis shows changes are needed.

ONE-CALL PROCESS

The next group of recommendations addresses issues within the one-call process, like location time, cost, ticket length, etc. Each recommendation aims to make the process safer and less burdensome. We believe these recommendations, if enacted, will reach those goals and address many of the recurring issues.

Positive Response

Positive response is a service provided by One-Call Concepts (OCC) by which the ticket holder is notified when facilities are located or cleared. Current law allows an excavator to dig after 48 hours of issuing a ticket, or after receiving notice that all facilities are cleared or located. Many states require positive response, but ND stakeholders were not ready to embrace positive response previously.

7. **Positive Response—Location—change recommended**

Positive response would benefit the excavator by allowing excavation to proceed as soon as possible. OCC has the capability to facilitate positive response, and it has been tested and used for enough time to make parties comfortable with making its use mandatory. Positive response makes excavators more comfortable with other recommendations of this group, because with positive response, they can accommodate flexibility for locators without delaying work.

Cross reference: window for locates

B. Positive Response—Excavation—no consensus to change

This was a novel idea by a couple members of the group. This concept would require excavators to positively "close out" their tickets, at which time they would affirm their markings have been removed. There are often multiple groups excavating at a site under separate locate tickets. Respot tickets continue to occur, sometimes when excavation is finished. Forcing each ticket holder to close out a ticket rather than letting it expire could alleviate some of those issues. However, there wasn't much appetite for this concept among stakeholders. Since no consensus was reached, no recommendation was made.

Cross reference: flag management, long term project management

8. Site identification—change recommended

For many people, the term "white-lining" is a lightning rod for negativity. More importantly, it's a misnomer. "White-lining" is a phrase used to mean site identification, often because laws in various states require use of white paint, flags, or stakes to identify excavation zones. Our stakeholder group chose precision over common use, and we will refer to site identification by its proper term.

Language was added in 2013 to recommend providing additional site identification when a project was large or overly burdensome. Meetings have worked to provide clarity, as well. However, there is no requirement that sites are marked physically or electronically to narrow the scope of excavation for location purposes. There are many electronic options available to provide more information, so site identification would not have to be "white-lined". We believe mandating more precise site identification is the appropriate action at this time. Language was discussed by the group, and the following is language acceptable to the stakeholders:

49-23-04(1)(h)

h. ~~If the location of the excavation is too large or complex to be clearly and adequately identified by description in the location request~~, Unless otherwise exempted, an excavator shall provide ~~additional information~~ site identification by one or more of the following means: white marking, digital white marking, project staking, geographic information system shape file, detailed drawing, map, or other ~~appropriate mean~~ means agreed upon by the parties to the ticket. ~~An excavator may not be required to provide additional location information if the excavator plans a meeting with the affected operators at the location of thte excavation before beginning any excavation, or if the notice of record of the the location of the excavation.~~ An excavator is exempted from providing site identification under this subparagraph if:(1) the precise location of excavation can be clearly and adequately identified on the location notice and is limited to a single street address or a platted lot number of record; (2) the precise location of excavation can be clearly and adequately identified on the location notice and the excavation is an emergency excavation as defined in 49-23-01(5); or (3) if the excavator requests and conducts a meeting with the affected operators at the location of the excavation prior to any excavation.

Cross reference: ticket size, locate window, flag management

C. Standardized Communication Forms—no consensus to change

More meetings and phone calls are happening within one-call tickets, and our group views increased communication as a good thing. However, sometimes parties leave meetings thinking they agreed on different things. There was discussion about a standard form that could be used after

meetings/phone calls to capture meeting details, which could be attached to the original ticket. OCC said they wouldn't have the capacity to house additional data. Some suggested this idea should be used to develop a best practice rather than state policy/law.

9. Survey Ticket Creation-- change recommended

Many people use the one-call system to help plan projects. While it is important to consider underground facilities when planning, these requests take the same priority of all others coming into the system. Additionally, if planners do not capture data as intended, there are often respots requested. Further, flags used to locate aren't often removed if planners don't get to the site and realize their responsibility to remove flags. Creation of a survey or information gathering ticket could alleviate a few issues. First, data could be exchanged electronically when possible. Second, flag management could be enforced. Third, the location window could be adjusted in order to allow digging requests to remain the primary focus. The provisions agreed to by the stakeholders are as follows: 1) A survey ticket option made available with OCC; 2) Ticket holder will be provided list of facilities and contact information of each; 3) Facility owners will have 5 days to locate, hold a meeting, or send information; 4) Sharing of maps is at the discretion of facility owner: 5) Meeting/locate at discretion of ticket holder; 6) Reiterate requirement that ticket holder remove flags/stakes. NDCC 49-23-05 would be revised to include ticket holder, not just excavator.

D. Notification to landowners—no consensus to change

This would extend notice to landowners of record for each piece of property a ticket covers. Last session, landowners were upset about flags not removed after the expiration of a ticket. They often don't know who is working on their land. This would give them notice and a contact for the person filing the ticket. Some stakeholders didn't think this was necessary. Currently, this is not a viable option. OCC doesn't have a way to integrate property owner info into its system. Tax databases are not uniform, so there are 53 separate county systems from which to pull data. However, OCC has updated its website to help landowners who search its site find information about a ticket tied to a specific parcel of land. This is an issue that deserves more thought, but without an integrated county land database, it will not be possible for OCC to administer a notification process.

Flag Management

10. Protection and maintenance— recommend **no** change

Current law requires "reasonable efforts" to be used by excavators to protect markers. The group looked at a variety of options from other states as guidance for stronger language, but we could not strike a better balance between protecting existing marks and not discouraging people from calling if marks were obscured. Rather than set specific measures in law, stakeholders suggest best practices be developed.

11. Enforcement— recommend **no** change

While the general belief of stakeholders is that removal of flags by people not associated with excavation is a violation, the law does not provide criminal culpability. We have heard of people removing flags on their property to mow or because they are upset by the excavation. This poses serious safety risks, and if an incident occurs, blame is often placed on the operator or excavator

rather than the person who caused the risk by removing flags. There was no desire by the stakeholder group to place harsh penalties on ignorant but otherwise innocent people who pull flags. Education and community outreach is the preferred route at this time.

Collection of fees

12. Definition of excavation— recommend **no** change

NDCC allows collection of location fees if 3 tickets are called in and no excavation has occurred in the first 2 ticket periods. Often, those being billed say "prove it" rather than pay the bills. One idea discussed by the group was to better define the word "excavation" for collection of fees. However, that poses issues with consistency for the definition to cover both the need to call for a ticket and when the bill could be valid. Stakeholders declined to create this inconsistency, instead opting for burden of proof language as suggested in recommendation 13.

13. Burden of proof--change recommended

The law is silent on the placement of burden for purposes of showing excavation. Stakeholders discussed the idea and recommend that the burden fall on excavators (or requestors of the locate ticket) to show excavation has occurred when disputing a bill for 3rd and subsequent location fees if there is a belief no excavation has occurred in the two tickets immediately prior to the 3rd request. For most ongoing excavation projects, there would be little question. This provision would cover the instances where the excavation is less clear. 49-23-04(3)(h) and (i)

Cost of location

14. Reportable offense—recommend **no** change

Initial discussion among stakeholders identified a project where a spill caused remediation which required continual one-call tickets. The group discussed whether the law might be changed to allow cost of allocation to be billed to the entity responsible for the reportable offense. However, the group acknowledged there are many variables to consider with "reportable offense", and likely agencies with jurisdiction over those offenses have the ability to assign the costs as appropriate. The stakeholder group thought education would be a better option than unnecessarily amending the law.

15. Non-locatable— change recommended

There are instances where facilities are non-locatable. Prior to the 2013 law change, many facilities were not required to be locatable. However, for those facilities required to be locatable, some are not properly located. The stakeholder group discussed this issue and suggested that cost of locating facilities not locatable within a certain range or marking should be billable to the facility owner. Range: 2 ft from outer edge on either side.

Cross reference: prudent digging practices

16. When excavation has occurred—change recommended

Last session, there was an effort to shift the costs of location to the ticket holder rather than the facility owner. Stakeholders identified abuse of the one-call process as the real driver for this issue, so we worked to find a way to place the costs of abusive locations on the perpetrators rather than

shifting the whole cost structure. Stakeholders recommend language to allow facility owners to bill for reasonable costs if a violation is found by the PSC for ticket abuse.

17. Window for locates— change recommended

The law is inconsistent on when the window begins. Stakeholders recommend clarifying that the ticket is valid at the time of planned excavation or as otherwise agreed. Also, the group revisited the 48 hour locate window and recommends changing the law to start the 48 hour location window at midnight the day the ticket is entered, unless otherwise specified. We discussed lengthening the locate time to 72 hours, but excavator stakeholders did not agree. The concern was whether more extension would be requested in the future. Argument in favor focused on greater accuracy with longer response time. NDCC 49-23-04(3)(a)

Tickets

18. Size of ticket— change recommended

There is no limit in the size of a ticket. The law provides that a ticket should be no larger than the area to be worked in a 21 day period. However, there is a contingency who would like limits to be listed in order to better manage large projects. The recommendation is to have separate sizes for urban and rural projects. The following limits are recommended for inclusion in NDCC 49-23-04(1)(i):

Urban limit: 3 blocks; Rural limits: 5 miles linear or one quarter section in total area if not linear.

19. Ticket length— recommend **no** change

NDCC provides a 21 day ticket length. After discussion with stakeholders, there was agreement to leave the length of the ticket as is.

20. Long term project management— recommend **no** change

Projects may take a long time to complete, with multiple contractors placing tickets over months or years for a single project. The group discussed the possibility of developing a process for handling long term, complex projects, but at this time, there were no suggestions other than the recommendations included under other headings.

21. New facilities— recommend **no** change

The law doesn't provide a timeline for submitting facility information to OCC. This is not an issue at this time, as each facility owner submits information as required.

Soil testing one-call utilization

There has been much dialogue on this issue over the past few years with no resolution. One of the concerns from soil testers deals with the difficulty of using the one-call center which requires street addresses not commonly used by soil testers. A group of soil testers, agricultural software and data providers, one-call center technical personnel, and others met to help develop a way for ag data to "talk" with the one-call center in an effort to streamline the ticket process. We hope to be able to test the solution in the 2016 growing/harvesting season prior to the 2017 session. It is possible that the perceived burden of compliance will be eased by this effort. In addition, impact on locators will likely be less than perceived with proper site identification and avoidance of common right of way areas.