

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

David C. Boyd	Chair
J. Dennis O'Brien	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner
Betsy Wergin	Commissioner

In the Matter of the Application of Enbridge Energy Limited Partnership and Enbridge Pipeline (Southern Lights) L.L.C. for a Routing Permit for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project

ISSUE DATE: March 27, 2009

DOCKET NO. PL-9/PPL-07-361

ORDER DEFERRING DECISION

**PROCEDURAL HISTORY**

On June 22, 2007, Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC (collectively, Enbridge)<sup>1</sup> applied for a Pipeline Routing Permit pursuant to Minnesota Rules Chapter 7852 for two projects:

- The Alberta Clipper Pipeline project would transport petroleum from the Western Canadian Sedimentary Basin in Hardisty, Alberta, to Superior, Wisconsin.
- The Southern Lights Diluent project would transport light liquid hydrocarbons (diluent) from refineries near Chicago, Illinois, to Clearbrook, Minnesota.

Enbridge proposed to route these pipelines parallel to its existing pipelines which pass through the reservation of the Fond du Lac Band of Lake Superior Chippewa (the Band).

By January 7, 2008, Enbridge revised its preferred route, proposing to build the pipelines between Mileposts 1056.1 and 1073.0 along a path around the southern perimeter of the Band's reservation. The Band subsequently intervened in this matter.

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<sup>1</sup> Enbridge Energy Partners, L.P. – a Delaware Master Limited Partnership with headquarters in Houston, Texas – organized Enbridge Energy, Limited Partnership, as a subsidiary. Enbridge, Inc., organized subsidiary Enbridge Energy Company, Inc., which in turn organized subsidiary Enbridge Pipelines (Southern Lights) L.L.C. All of these entities are organized under the laws of Delaware except for Enbridge, Inc., which is a Canadian corporation.

On July 17, 2008, the administrative law judge (ALJ) presiding over this matter issued his SUMMARY OF PUBLIC TESTIMONY AT THE PUBLIC HEARINGS, FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS (ALJ's Report). The ALJ recommended, among other things, granting the Pipeline Routing Permit for a route that avoided the Fond du Lac reservation land. The Band and Minnesota Center for Environmental Advocacy (MCEA) took exception to this recommendation, and the Minnesota Department of Commerce's Office of Energy Security (OES) filed comments opposing this aspect of the ALJ's Report.

On December 29, 2008, the Commission issued its ORDER GRANTING PIPELINE ROUTING PERMIT. This Order deferred a decision on the route of the pipeline between Mileposts 1056.1 and 1073.0 in order to allow Enbridge and the Band additional time to negotiate an agreement regarding the route of the proposed pipelines.

On February 13, 2009, Enbridge filed a status report on negotiations, suggesting that the parties had reached an impasse.

On February 24, 2009, MCEA submitted comments as well as a copy of the federal Department of State Draft Environmental Impact Statement on the pipeline projects.

On February 26, 2009 the Band filed a response to Enbridge's status report. The Band also filed a request for reconsideration of the Commission's December 29, 2008 Order to correct a statement regarding the Band's authority over non-tribal lands.

On February 27, 2009 Enbridge filed replies to the Band and MCEA.

On February 27, 2009 the Minnesota Department of Natural Resources (DNR) filed comments. Enbridge subsequently filed replies to these comments.

On March 10, 2009, OES filed comments.

On March 18, 2009, Enbridge filed an excerpt of a letter from DNR clarifying DNR's position.

This matter came before the Commission on March 19, 2009.

## **FINDINGS AND CONCLUSIONS**

### **I. Legal Standard**

Before building a pipeline with a diameter equal to or exceeding six inches for transporting hazardous liquids, a person must obtain from the Commission a Pipeline Routing Permit

identifying the authorized route.<sup>2</sup> The process and criteria for obtaining a Pipeline Routing Permit are set forth at Minnesota Statutes Chapter 216G and Minnesota Rules Chapters 1405 and 7852. In brief, the Commission selects the route that minimizes human and environmental effects. Minnesota Rules, part 7852.1900.

## **II. Pipeline Routing**

### **A. Proponents of the route around the reservations's perimeter**

Enbridge asks the Commission to amend its routing permit to authorize construction in the route around the perimeter of the Band's reservation. Enbridge argues that the route through the reservation is no longer available because the terms the Band demands are unreasonable. Moreover, because land within the reservation is subject to federal jurisdiction, Enbridge cannot employ the state's power of eminent domain to establish a fair price for an easement.

Enbridge defends its proposed alternative route around the reservation's southern perimeter. Enbridge notes that it had examined other alternative routes around the reservation, but eliminated them from further consideration due to their adverse environmental and social consequences. The remaining route represents the route that minimizes those adverse consequences. Enbridge emphasizes that it adopted multiple plans for managing and mitigating environmental harm as part of the routing permit granted on December 29, 2008, and pledges to work with DNR to build the pipelines in the optimal locations within any Commission-approved construction corridor to further reduce environmental consequences.

### **B. Opponents of the route around the reservation's perimeter**

The Band, DNR, MCEA and OES oppose Enbridge's request.

First, they dispute Enbridge's arguments against the route through the Band's reservation. The Band states that it is still negotiating with Enbridge regarding the terms for permitting the new pipelines to be built on its land, so any allegations about the reasonableness of its demands are premature. OES argues that, in the absence of record evidence regarding the cost of Enbridge's proposed route around the reservation, the Commission has no basis for comparing the costs of the two routes regardless of the Band's negotiating position. Finally, MCEA argues that the focus on economic considerations is misguided because the Commission has a duty to select the route that minimizes *environmental* cost, not *economic* cost.

Second, these parties dispute Enbridge's arguments in favor of the route around the reservation's perimeter. They challenge Enbridge's claim that the record contains sufficient information regarding the environmental consequences of Enbridge's preferred route to permit the

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<sup>2</sup> Minn. Stat. § 216G.02. However, no route permit is required to build a pipeline that transports hazardous liquid by gravity. *Id.*

Commission to render a decision. And in any event, they argue that Enbridge's preferred route – a 20-mile detour through undisturbed native flora and fauna – would cause greater environmental damage than the alternative route along an existing pipeline right-of-way.

Among other options for Commission action, the Band and MCEA suggest postponing any decision in this matter pending further analysis by other governmental agencies. MCEA notes that the United States Department of State is preparing an environmental impact statement regarding this project.<sup>3</sup> MCEA cites Minnesota Rules, part 4410.3900, for the proposition that Minnesota agencies should be working in tandem with federal agencies in analyzing environmental consequences, and in any event Minnesota's own environmental analysis must be based on (and therefore be issued after) the federal environmental impact statement.

### III. Fond du Lac Band Request for Reconsideration

In its exceptions to the ALJ's Report, the Band asked the Commission to refrain from adopting the ALJ's Finding 8 without making changes to more accurately reflect the Band's identity:

The Band has federally-delegated regulatory authority for both on-reservation activities, and for off-reservation activities that affect air and water inside the Reservation. This includes:

- a. Treatment-As-a-State status under the Clean Water Act, giving the Band regulatory authority over water quality and Section 401 certifications, Section 404 dredge and fill permits, and NPDES permits. See generally, 33 U.S.C. § 518e; see also 40 e-CFR §§123, 131 and 233....

No party objected to this language. In adopting the majority of the ALJ's findings and conclusions, therefore, the Commission adopted Finding 8 as clarified above. ORDER GRANTING PIPELINE ROUTING PERMIT (December 29, 2008) at 16.

The Band now reports that this language is not entirely accurate. Consequently the Band petitions the Commission to reconsider its Order and revise this language as follows.

- a. Treatment-As-a-State status under the Clean Water Act, giving the Band regulatory authority over water quality certificates through federally approved water quality standards and ~~Section 401 certifications, Section 404 dredge and fill permits, and NPDES permits.~~ See generally, 33 U.S.C. § 518e; see also 40 e-CFR §§ 123, 131 and 233.

Again no party objects.

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<sup>3</sup> Construction of the proposed projects requires a Presidential Permit for Border Crossing Facilities (Canada), which requires an environmental assessment by the United States Department of State. Executive Order 11423, August 16, 1968 (33 Fed. Reg. 11741), as amended by Executive Order 13337. See also 40 C.F.R. §§ 1500 - 1508.

#### **IV. Commission Action**

##### **A. The Route Alternatives**

Although more than a year and a half has passed since Enbridge filed this case, many facts remain unresolved regarding the consequences of the routes through and around the Band's reservation – in particular, facts about the final terms under which the Band would permit Enbridge to build, and the environmental consequences of the alternative route.

Given that the United States Department of State is in the process of evaluating the environmental consequences of the proposed routes under discussion, the Commission is persuaded that the most prudent course of action is to defer any decision until that Environmental Impact Statement is complete. The Commission will then be in a position to evaluate these matters with the benefit of that analysis.

##### **B. Fond du Lac Band Request for Reconsideration**

In the interest of precision and accuracy, and given that no party has raised objection, the Commission will grant the Band's request to reconsider its December 29, 2008 ORDER GRANTING PIPELINE ROUTING PERMIT and will revise the language of Finding 8 as follows:

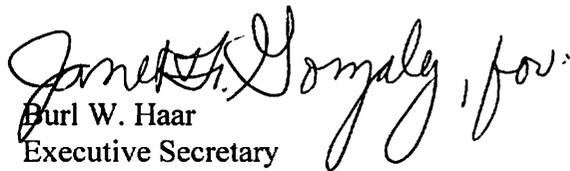
- a. Treatment-As-a-State status under the Clean Water Act, giving the Band regulatory authority over water quality certificates through federally approved water quality standards and ~~Section 401 certifications, Section 404 dredge and fill permits, and NPDES permits~~. See generally, 33 U.S.C. § 518e; see also 40 e-CFR §§ 123, 131 and 233.

#### **ORDER**

1. The Commission defers designating the appropriate route for the Alberta Clipper and Southern Lights Diluent pipelines between Milepost 1056.1 and 1073.0 until after the United States Department of State issues its Environmental Impact Statement.
2. The Commission grants the motion of the Fond du Lac Band of Lake Superior Chippewa (the Band) to reconsider its ORDER GRANTING PIPELINE ROUTING PERMIT (December 29, 2008), and hereby amends the Order, Finding 8, as follows:
  - a. Treatment-As-a-State status under the Clean Water Act, giving the Band regulatory authority over water quality certificates through federally approved water quality standards and ~~Section 401 certifications, Section 404 dredge and fill permits, and NPDES permits~~. See generally, 33 U.S.C. § 518e; see also 40 e-CFR §§ 123, 131 and 233.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

  
Burl W. Haar  
Executive Secretary

(SEAL)

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STATE OF MINNESOTA)  
  )SS  
COUNTY OF RAMSEY )

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 27th day of March, 2009 she served the attached

ORDER DEFERRING DECISION.

MNPUC Docket Number: PL-9/PPL-07-361

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

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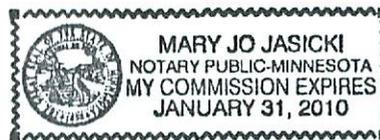
Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 27th day of

March, 2009

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Notary Public



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