

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: June 1, 2009

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

ORDER AMENDING PIPELINE ROUTING PERMIT

PROCEDURAL HISTORY

On June 22, 2007, Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC (collectively, Enbridge)¹ 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 (the Initially Proposed Route). Between Mileposts 1056.1 and 1073.0 of that route, the pipelines would pass through the reservation of the Fond du Lac Band of Lake Superior Chippewa (the Band). Enbridge and the Band, however, had not agreed on terms for permitting the pipeline to follow this route, and control of these lands are subject to federal – not Minnesota – law.

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,

¹ 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.

CONCLUSIONS AND RECOMMENDATIONS (ALJ's Report), recommending that the Commission approve a route that avoided the Band's reservation (the Fond du Lac Route Alternative).

On November 21, 2008, the Office of Energy Security (OES) of the Minnesota Department of Commerce filed comments recommending that the Commission grant a permit for a route through the Band's reservation, and opposing the Fond du Lac Route Alternative. The comments included, among other things, 1) a letter from the Minnesota Department of Natural Resources (DNR) dated April 21, 2008, 2) maps of OES's recommended route, including detailed aerial photos listed on Sheets 1 through 371, and 3) a list of supplemental findings, including the following:

89. The Fond du Lac alternative is a 100 percent greenfield route while the Proposed Route is adjacent to existing rights of way for its entire length. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative.

90. Most of the 21.4 miles of the Fond du Lac Route Alternative goes through county or state forest. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative.

91. The Fond du Lac Route Alternative opens up a significant new corridor through large tracts of undisturbed [communities of flora and fauna], including Sites of High Biodiversity Significance.² See the April 21, 2008 letter of the Minnesota Department of Natural Resources (DNR) to the Administrative Law Judge (ALJ).

92. The Fond du Lac Route Alternative crosses more water bodies than the Revised Preferred Route and affects an additional 23,859 feet of NWI-mapped wetlands³ including at least five stands that are designated as ecologically important lowland conifers. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative; DNR April 21, 2008 letter to ALJ.

93. Construction of two large-diameter pipelines [along the Fond du Lac Route Alternative] will permanently alter these communities [of flora and fauna], fragment large areas, and open the area to invasive species. Existing forested area would be replaced with an unnatural grassy habitat. Wildlife habitat and timber production will be impacted. See DNR April 21, 2008 letter to ALJ.

² The Minnesota County Biological Survey (MCBS) of the Minnesota Department of Natural Resources (DNR) identifies Sites of High Biodiversity Significance by systematically collecting data on the distribution and ecology of rare plants and rare animals, native plant communities, and functional landscapes.

³ The U.S. Fish and Wildlife Service, a branch of the U.S. Department of the Interior, maps the nation's wetlands as part of its National Wetlands Inventory (NWI).

On December 29, 2008, the Commission issued its ORDER GRANTING PIPELINE ROUTING PERMIT. In this Order, the Commission generally approved Enbridge's proposed routes, and incorporated aerial photographs of the route in Attachment E. But the Commission also granted Enbridge and the Band additional time to negotiate terms for routing the proposed pipelines through the reservation. To this end, the Commission declined to designate a pipeline route between Mileposts 1056.1 and 1073.0, omitted aerial photo Sheets 325 through 357 corresponding to this path, and declined to make findings that might prejudice these negotiations – including Supplemental Findings 89-93, listed above.

On March 27, 2009, the Commission issued its ORDER DEFERRING DECISION. Given the degree of dispute about the environmental consequences of the Fond du Lac Route Alternative, the Commission elected to refrain from designating a route between Mileposts 1056.1 and 1073.0 pending an environmental impact statement from the United States Department of State.⁴

On March 30, 2009, the Band and Enbridge jointly submitted a letter informing all state and federal agencies involved in the current docket that the Band and Enbridge had agreed to terms for routing the proposed pipelines through the reservation. Enbridge joined the Band in advocating for this route, declaring the route to be environmentally preferable. Consequently these parties asked all agencies to issue permits for the existing reservation corridor as opposed to the Fond du Lac Route Alternative.

On April 23, 2009, OES filed comments recommending approval.

This matter came before the Commission on April 30, 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.⁵ 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 considering the factors listed in Minnesota Rules, part 7852.1900:

⁴ 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.

⁵ Minn. Stat. § 216G.02. However, no route permit is required to build a pipeline that transports hazardous liquid by gravity. *Id.*

- A. human settlement, existence and density of populated areas, existing and planned future land use, and management plans;
- B. the natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands;
- C. lands of historical, archaeological, and cultural significance;
- D. economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations;
- E. pipeline cost and accessibility;
- F. use of existing rights-of-way and right-of-way sharing or paralleling;
- G. natural resources and features;
- H. the extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the permit conditions contained in part 7852.3400 for pipeline right-of-way preparation, construction, cleanup, and restoration practices;
- I. cumulative potential effects of related or anticipated future pipeline construction; and
- J. the relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws....

The Commission refers pipeline routing cases to the Office of Administrative Hearings for a contested case proceeding.⁶

If, in the Commission's judgment, after rehearing a decision, order, or determination appears in any respect unlawful or unreasonable, the Commission may reverse, change, modify, or suspend the original action accordingly.⁷

II. Prior Analysis of the Fond du Lac Route Alternative

A. The ALJ's Report

The ALJ conducted a contested case proceeding and prepared a Report summarizing the testimony of 14 public hearings, making 310 findings, making 55 conclusions, and ultimately recommending that the Commission approve the requested Certificate of Need and the Routing Permit. In particular, the ALJ's Report recommended approving the Fond du Lac Route Alternative. But among the myriad topics addressed in the Report, the ALJ restricted his specific discussion of the Fond du Lac Route Alternative to Findings 282 - 287 and Conclusions 48 - 52.

⁶ Minn. Rules, part 7852.1700; see also part 7829.1000.

⁷ Minn. Stat. § 216B.27, subd. 3; Minn. Rules, part 7829.3000.

In sum, as part of the Certificate of Need process,⁸ the ALJ concluded that the proposed pipelines are needed. But for purposes of the current docket the ALJ notes that the Band and Enbridge had not agreed to terms permitting the pipeline to be built through the reservation. Enbridge would not be able to obtain a right of way through the reservation without the Band's consent, and in any event, any right-of-way that crossed through federally-governed reservation lands would need to be renegotiated every 20 years.⁹

In contrast, the Fond du Lac Route Alternative would not require the Band's consent and would not be subject to the need for periodic renewals. In addition, because the Route Alternative would pass mainly through forest and wetlands, it would not affect urban or heavily populated areas. Finally, the ALJ found that the National Heritage Inventory listed no archeological sites or architectural resource sites along the Route Alternative – although the ALJ acknowledged that the Band alleged that two historical trails traversed this route.

On this basis, the ALJ found the Fond du Lac Route Alternative to be the better alternative.

B. Commission Decisions

In its December 29, 2008 ORDER ADOPTING PIPELINE ROUTING PERMIT, the Commission largely adopted the ALJ's recommendations. But the Commission refrained from ruling on the Fond du Lac Routing Alternative in order to provide the Band and Enbridge additional time to negotiate.

Given the continuing dispute about the environmental consequences of the Fond du Lac Route Alternative, the Commission then issued its March 27, 2009, ORDER DEFERRING DECISION, electing to refrain from resolving this matter before it had the benefit of the Environmental Impact Statement being prepared by the U.S. Department of State.

III. Commission Action

Enbridge has been the sole party advocating the Fond du Lac Route Alternative. The sole merit of this alternative was that it would cross only land that would be subject to the powers of Minnesota's eminent domain laws, providing a means by which Enbridge could compel a resolution to a land dispute. OES and other parties continued to object that the Fond du Lac Route Alternative's cost – environmental and otherwise – would be greater than the cost of building the pipeline along the existing right-of-way.

⁸ Docket No. PL-9/CN-07-465, *In the Matter of the Application of Enbridge Energy, Limited Partnership, and Enbridge Pipelines (Southern Lights) LLC for a Certificate of Need for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project.*

⁹ See 25 U.S.C. §§ 321, 324.

Since the time of the ALJ's Report and the Commission's prior decisions, however, new developments had altered the Commission's view of this matter. The Band and Enbridge have now agreed to terms permitting the pipeline to be built through the reservation parallel to the existing lines. Having secured the Band's consent, Enbridge has no more reason to seek the Fond du Lac Route Alternative. And all parties now agree that using the Route Alternative would have more adverse environmental consequences than simply routing the pipelines along the existing rights-of-way.

As noted above, the Band and Enbridge jointly submitted a letter to inform all state and federal agencies involved in the permitting for the Projects that both the Band and Enbridge now prefer the Initially Proposed Route. They agree that the route through the Fond du Lac reservation is environmentally preferable. And as there is no remaining financial dispute between the parties, they argue that the Initially Proposed Route through the reservation is now practicable and feasible, and ask all agencies to issue permits for the existing reservation corridor as opposed to the Fond du Lac Route Alternative.

In addition, no party now opposes the OES's proposed Supplemental Findings of Fact. These new developments and findings provide a clear basis for rejecting the ALJ's recommendation to approve the Fond du Lac Route Alternative, and to move immediately to approve the Initially Proposed Route. The Initially Proposed Route will clearly minimize the pipelines' human and environmental effects, as demonstrated by consideration of the ten factors set forth in Minnesota Rules, part 7852.1900:

A. Human settlement, existence and density of populated areas, existing and planned future land use, and management plans

No party has sought to distinguish between the Initially Proposed Route and the Fond du Lac Route Alternative on the basis of human settlement, existence and density of populated areas, existing and planned future land use, and management plans. This factor does not promote the Commission to favor either alternative over the other.

B. The natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands

With respect to the natural environment, public and designated lands, however, the parties identify important distinctions between the two pipeline routes.

The Initially Proposed Route tracks an existing pipeline right-of-way. In contrast, the Fond Du Lac Route Alternative would involve disturbing a 21.4 miles "greenfield" corridor composed mostly of state and county forest land. The Route Alternative would cut through large tracts of undisturbed flora and fauna, including areas the DNR has identified as Sites of High Biodiversity Significance. It would also cross more water bodies than the Initially Preferred Route

and affect an additional 23,859 feet of wetlands recognized by on the U.S. Fish and Wildlife Service's National Wetlands Inventory. And it would cross at least five stands of ecologically important lowland conifers.

This factor favors the Initially Proposed Route.

C. Lands of historical, archaeological, and cultural significance

As noted above, the ALJ found that the National Heritage Inventory listed no archeological sites or architectural resource sites along either route.

However, the ALJ acknowledged that the Band alleged that two historical trails traversed the Fond du Lac Route Alternative. In addition, the Commission notes that the U.S. Department of State is continuing to analyze the pipeline routes to evaluate their consequences for sites of historical, archaeological and cultural significance under the National Historic Preservation Act.¹⁰ Pipelines built along the existing right-of-way are less likely to encounter a previously undiscovered sensitive site – both because the Initially Proposed Route is shorter, and because the Band and Enbridge have used this route for decades.

This factor favors the Initially Proposed Route.

D. Economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations

The Band provided information about its use of the land including the Fond du Lac Route Alternative corridor for hunting, fishing, and wild rice gathering.¹¹ In addition, OES states that the Fond du Lac Route Alternative could affect timber production along its route. Although maps illustrate that building pipelines along the Route Alternative would affect a significant amount of timber, no party estimated the number of timber acres affected.¹²

This factor favors the Initially Proposed Route.

E. Pipeline cost and accessibility

It is reasonable to expect that installing pipelines along a shorter route that parallels existing pipelines will cost less, and be more readily accessible, than installing the pipelines along a longer route through less familiar terrain. This factor favors the Initially Proposed Route.

¹⁰ ORDER GRANTING PIPELINE ROUTE PERMIT at 19, Ordering Paragraph 2.Q. (revised Finding 287).

¹¹ *Id.*, at 19, Ordering Paragraph 2.Q. (revised Finding 287).

¹² *Id.*, at 18, Ordering Paragraph 2.J. (revised Finding 178).

F. Use of existing rights-of-way and right-of-way sharing or paralleling

As acknowledged in the ALJ's Report, Finding 20, an optimal route would provide for building the new pipelines following the route of existing pipelines because, among other reasons, this route would require the least amount of additional right-of-way and permit Enbridge to use existing pumping stations. This factor favors the Initially Proposed Route.

G. Natural resources and features

Again, the Initially Proposed Route would entail installing the pipelines along an existing pipeline corridor; the Fond du Lac Alternative would involve installing the pipelines through undisturbed forests and wetlands. This factor favors the Initially Proposed Route.

H. The extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the permit conditions contained in part 7852.3[6]00¹³ for pipeline right-of-way preparation, construction, cleanup, and restoration practices

Citing the DNR's letter of April 21, 2008, OES states that construction of two large-diameter pipelines along the Fond du Lac Route Alternative would replace forested areas with an unnatural grassy habitat, permanently altering natural communities of flora and fauna, fragmenting large areas, opening the area to invasive species, and affecting wildlife habitat. No amount of preparation, construction, cleanup or restoration would erase this damage.

This factor favors the Initially Proposed Route.

I. Cumulative potential effects of related or anticipated future pipeline construction

Enbridge has not stated any intention to add new pipelines along either route. This factor does not cause the Commission to favor either route proposal over the other.

J. The relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws including ordinances adopted under Minnesota Statutes, section 299J.05, relating to the location, design, construction, or operation of the proposed pipeline and associated facilities

¹³ Minnesota Rules, part 7852.1900, subp. 3.H., refers to the "the permit conditions contained in part 7852.3400 for pipeline right-of-way preparation, construction, cleanup, and restoration practices..." but those conditions actually appear at part 7852.3600.

As the Commission noted in its March 27, 2009 ORDER DEFERRING DECISION, various parties have argued that the Fond du Lac Route Alternative has not been subject to adequate environmental review and would face potential challenges from the U.S. Department of State, among other entities. All parties agree that use of the Initially Proposed Route along an existing pipeline right-of-way would face fewer environmental challenges than building through a greenfield corridor. Consequently, this factor favors the Initially Proposed Route.

K. Conclusion

The Commission hereby acknowledges and adopts the new, uncontested facts agreed to by the parties, as well as Supplemental Findings of Fact 89 - 93 proposed by OES.

Based on this new record, the Commission finds that the Initially Proposed Route will minimize the pipelines' effect on humans and the environment. In particular, the Commission finds that the ten-factor test of Minn. Rules, part 7852.1900, demonstrates that building the proposed pipelines along the Fond du Lac Route Alternative would have more negative consequences than building the pipelines along the existing right-of-way. Consequently the Commission will reconsider and reverse its prior decision to await the Environmental Impact Statement from the U.S. Department of State before proceeding, and will decline the recommendation of the ALJ.

Instead, the Commission will amend the Routing Permit it issued on December 29, 2009, to authorize construction of the proposed transmission lines through the Fond du Lac Reservation along the existing right-of-way. Because this decision is informed by the findings, supplemental findings, and conclusions set forth in the December 29, 2008 ORDER GRANTING ROUTING PERMIT, the amended permit is subject to the conditions contained therein.

ORDER

1. The Commission reconsiders its March 27, 2009 ORDER DEFERRING DECISION and amends it to retract the decision to await an Environmental Impact Statement from the United States Department of State before designating the appropriate route for the Alberta Clipper and Southern Lights Diluent pipelines between Milepost 1056.1 and 1073.0.
2. The Commission makes the following Supplemental Findings of Fact:
 89. The Fond du Lac alternative is a 100 percent greenfield route while the Proposed Route is adjacent to existing rights of way for its entire length. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative.
 90. Most of the 21.4 miles of the Fond du Lac Route Alternative goes through county or state forest. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative.

91. The Fond du Lac Route Alternative opens up a significant new corridor through large tracts of undisturbed communities of flora and fauna, including Sites of High Biodiversity Significance. See the April 21, 2008 letter of the Minnesota Department of Natural Resources (DNR) to the Administrative Law Judge (ALJ).

92. The Fond du Lac Route Alternative crosses more water bodies than the Revised Preferred Route and affects an additional 23,859 feet of NWI-mapped wetlands including at least five stands that are designated as ecologically important lowland conifers. See Exhibit 117, Supplemental Filing to the Fond du Lac Route Alternative; DNR April 21, 2008 letter to ALJ.

93. Construction of two large-diameter pipelines along the Fond du Lac Route Alternative will permanently alter these communities of flora and fauna, fragment large areas, and open the area to invasive species. Existing forested area would be replaced with an unnatural grassy habitat. Wildlife habitat and timber production will be impacted. See DNR April 21, 2008 letter to ALJ.

93a. The Band and Enbridge jointly submitted a letter to inform all state and federal agencies involved in the permitting for the projects that both the Band and Enbridge now prefer the existing route through the reservation.

93b. The Band and Enbridge jointly asked all agencies to issue permits for the existing reservation corridor as opposed to the proposed new route around the reservation.

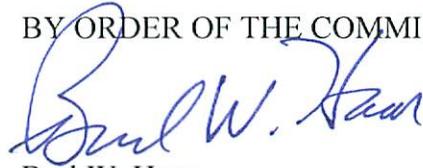
93c. The Band and Enbridge agreed that the route through the Fond du Lac reservation is environmentally preferable.

93d. As there is no remaining financial dispute between the parties, and the Initially Proposed Route is now practicable and feasible, the Band and Enbridge request that the permitting agencies authorize the construction of the projects within the existing Enbridge corridor on the reservation.

3. The Commission hereby amends the Pipeline Routing Permit issued to Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) L.L.C., in the Commission's December 29, 2008, ORDER GRANTING ROUTING PERMIT to incorporate a route between Mileposts 1056.1 and 1073.0 in the Minnesota counties of St. Louis and Carlton. This route is depicted in the attached Appendix E Supplement, Sheet Numbers 325 through 357.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary



(SEAL)

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