

OAH 65-2500-32764
MPUC PL-9/CN-14-916

OAH 65-2500-33377
MPUC PL-9/PPL-15-137

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of
Enbridge Energy, Limited Partnership,
for a Certificate of Need for the Line 3
Replacement Project in Minnesota
from the North Dakota Border to the
Wisconsin Border

**ORDER REGARDING PETITIONS
TO INTERVENE BY WHITE EARTH BAND OF
OJIBWE, FRIENDS OF THE HEADWATERS
AND MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY**

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

TO: All Persons on the Attached Service List:

This matter is currently pending before Administrative Law Judge Ann C. O'Reilly.

On January 19, 2016, the White Earth Band of Ojibwe (White Earth Band) filed a Petition to Intervene with the Minnesota Public Utilities Commission (Commission). On January 29, 2016, Enbridge Energy (Enbridge) filed a response to the White Earth Band's intervention petition. On February 11, 2016, the White Earth Band filed a reply.

On February 9, 2016, Friends of the Headwaters filed a Petition to Intervene with the Office of Administrative Hearings. No objections to Friends of the Headwaters' intervention request were filed.

On February 22, 2016, the Minnesota Center for Environmental Advocacy (MCEA) filed a Petition to Intervene with the Commission. On February 29, 2016, Enbridge filed an objection to the MCEA's intervention petition. On March 7, 2016, the MCEA filed a response to the objection.

On March 31, 2016, the Minnesota Public Utilities Commission (Commission) issued an Order referring MCEA's Petition to Intervene to the Office of Administrative Hearings for decision.

Based on the record, the Administrative Law Judge makes the following:

ORDER

1. The Petition to Intervene filed by the White Earth Band of Ojibwe is **GRANTED**.
2. The Petition to Intervene filed by the Friends of the Headwaters is **GRANTED**;
3. The Petition to Intervene filed by the Minnesota Center for Environmental Advocacy is **GRANTED**;
4. The White Earth Band, the Friends of the Headwaters, and the Minnesota Center for Environmental Advocacy shall be admitted to this proceeding as full parties.

Date: April 29, 2016



ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Background

On April 24, 2015, Enbridge Energy, LP (Enbridge) applied for a Certificate of Need and Route Permit to build an oil pipeline and related facilities extending from the North Dakota-Minnesota border to the Minnesota-Wisconsin border (the Proposed New Line 3).¹ The Proposed New Line 3 would replace Enbridge's existing Line 3 pipeline (Line 3), but would be two inches greater in diameter and provide an increased pumping capacity.² The proposed route for the Proposed New Line 3 would follow the route of the existing Line 3 pipeline from the North Dakota-Minnesota border in Kittson County to the Clearbrook Terminal, but would require a new right of way from the Clearbrook Terminal to Superior, Wisconsin.³ The proposed route for the Proposed New Line 3 travels through the following Minnesota counties: Kittson, Marshall, Pennington, Polk, Red Lake, Clearwater, Hubbard, Wadena, Cass, Crow Wing, Aitkin, and Carlton.⁴

¹ NOTICE OF HEARING at 3 (Feb. 1, 2016).

² *Id.*

³ *Id.*

⁴ *Id.*

Enbridge's Application for a Certificate of Need was originally referred to the Office of Administrative Hearings (OAH) by the Commission on August 12, 2015.⁵ The Commission did not, however, refer the Route Permit Application to the OAH at that time. Instead, the Commission authorized the Department of Commerce (Department) to administer a process for developing alternative routes for the Commission's consideration, and to develop an analysis comparing the environmental consequences for each alternative.⁶ The Commission refrained from referring the Route Permit Application to the OAH pending further developments in the Certificate of Need docket.⁷

In September 2015, the Minnesota Court of Appeals issued an opinion regarding the Sandpiper Pipeline project, a separate but related oil pipeline matter (Sandpiper).⁸ In its opinion, the court held that, where proceedings for a route permit follow proceedings for a certificate of need, the Commission must receive a complete environmental impact statement (EIS) before ruling on the certificate of need.⁹ While the court's decision related to the Sandpiper Pipeline, the court's holding was broad enough to impact the progress of this matter. As a result of the decision, the Administrative Law Judge in this Certificate of Need proceeding issued an order "indefinitely staying" the Certificate of Need proceeding, "pending further guidance from the Commission."¹⁰

On September 25, 2015, Enbridge petitioned the Commission to refer the Route Permit to the Office of Administrative Hearings for a joint contested case proceeding with the Certificate of Need.¹¹

On February 1, 2016, the Commission referred the Route Permit to the Office of Administrative Hearings¹² and joined the Certificate of Need and Route Permit proceedings.¹³ As of February 1, 2016, there were six entities recognized by the Commission as parties in the combined Certificate of Need and Route Permit proceedings: Enbridge, Kennecott Exploration Company (Kennecott), Laborers' District Council of Minnesota and North Dakota (Laborers' Council), Mille Lacs Band of Ojibwe (Mille Lacs Band), the Minnesota Department of Commerce (Department), and the Sierra Club.¹⁴

⁵ ORDER FINDING APPLICATION SUBSTANTIALLY COMPLETE AND VARYING TIMELINES; NOTICE AND ORDER FOR HEARING (Aug. 12, 2015).

⁶ ORDER JOINING NEED AND ROUTING DOCKETS (Feb. 1, 2016).

⁷ *Id.*

⁸ See *In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota; In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Route Permit for the Sandpiper Pipeline Project in Minnesota*, 869 N.W.2d 693 (Min. Ct. App. 2015), review denied (Minn. Dec. 15, 2015).

⁹ *Id.*

¹⁰ FIRST PREHEARING ORDER (Sept. 15, 2015).

¹¹ PETITION FOR REFERRAL OF ROUTE PERMIT PROCEEDINGS TO THE OAH AND REQUEST FOR COMMENTS (Sept. 25, 2015).

¹² NOTICE OF HEARING (Feb. 1, 2016).

¹³ ORDER JOINING NEED AND ROUTING DOCKETS (Feb. 1, 2016).

¹⁴ NOTICE OF HEARING at Attachment B (Feb. 1, 2016).

On February 5, 2016, Enbridge, the Laborers' Council, the Department, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO petitioned the Commission for reconsideration of its February 1, 2016 Order Joining the Certificate of Need and Route Permit Dockets.¹⁵

On March 31, 2016, the Commission issued an Order Denying the Petitions for Reconsideration and Motion to Amend Memorandum, and Referring Petitions for Intervention to OAH. The Order referred the White Earth Band and MCEA's Petitions for Intervention of the White Earth Band and of MCEA to the Office of Administrative Hearings for decision. The Order did not address the Petition to Intervene filed by the Friends of the Headwater.

Intervention

Once a utility proceeding before the Commission is referred to the Office of Administrative Hearings, intervention is governed by the contested case rules.¹⁶ Thus, in this proceeding, the standard for intervention as a party is set forth in Minnesota Rule 1400.6200, subpart 1 (2015)¹⁷:

Petition. Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely written petition to intervene to the judge and shall serve the petition upon all existing parties and the agency. Timeliness will be determined by the judge in each case based on circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participating is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.

The administrative law judge shall allow intervention "unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case."¹⁸ An order allowing intervention shall specify the extent of participation permitted, which may be limited to specific issues.¹⁹

¹⁵ PETITIONS FOR RECONSIDERATION (Feb. 5, 2016).

¹⁶ Minn. R. 7829.0800, subp. 6 (2015).

¹⁷ The Commission's Notice of Hearing cites the intervention standard set forth in Minn. R. 1405.0900 (2015). See NOTICE OF HEARING at 8 (Feb. 1, 2016). However, Chapter 1405 of the Minnesota Rules governs "proceedings" on "any application by a utility for the siting of a power plant, the routing of a transmission line, or exemptions." Minn. R. 1405.0200, subp. 5 (2015). This proceeding involves an application by a utility for replacement of an oil pipeline and does not fall into any of the categories defined by Chapter 1405. Therefore, Rule 1405.0900 does not apply. Instead, the general rule for intervention in contested cases, Minnesota Rule 1400.6200, applies here. Notably, the language of both rules is similar and not in conflict.

¹⁸ Minn. R. 1400.6200, subp. 3 (2015).

¹⁹ *Id.*

White Earth Band's Petition to Intervene

On January 19, 2016, the White Earth Band filed a Petition to Intervene, seeking “to protect the interests of the White Earth Nation and its membership with regard to the continued health and production of on and off reservation resources.”²⁰ The White Earth Band asserts that the proposed corridor for the replacement Line 3 pipeline “traverses a significant portion of the 1855 Treaty-ceded territory and goes through the northeast townships of the original White Earth Reservation,” and “both construction and operation [of the pipeline] may have a significant impact on the health and availability of resources necessary to subsistence and use activities.”²¹ The White Earth Band claims intervention in this proceeding is necessary to engage in “meaningful consultation with the State of Minnesota for the preservation and protection of on and off reservation resources necessary to continued use by the members of the White Earth Band.”²² The White Earth Band points to its status as a party in the Sandpiper pipeline proceeding currently pending at the Office of Administrative Hearings, and argues its interest in the Sandpiper proceeding “is substantially similar” to its interest in this proceeding “given the proposed co-location of the projects.”²³ Therefore, the White Earth Band requests intervention as a party in this case.

On January 29, 2016, Enbridge filed a response to the White Earth Band's intervention petition. As set forth in that response, Enbridge “does not oppose” the intervention petition filed by the White Earth Band, but argues that certain statements and claims made in the petition “lack merit.”²⁴ Specifically, Enbridge denies that: (1) the White Earth Band has a compensable property interest in any of the property along the proposed route for Line 3; (2) the replacement Line 3 pipeline will have any of the impacts asserted by the White Earth Band; and (3) the White Earth Band has any “regulatory authority” over Line 3.²⁵ Thus, while Enbridge does not oppose the White Earth Band's Petition, it “reserves the right to later contest” the assertions raised in the White Earth Band's Petition.²⁶

On February 11, 2016, the White Earth Band filed a response to the objection, arguing “it is unequivocal that the White Earth Band has an interest, protected by no other party to these proceedings, in the recourse within the 1855 Treaty-ceded territory and its reservation which may be impacted by the project as proposed.”²⁷ The White Earth Band asserts that it is not seeking “a legal conclusion regarding the existence of off reservation retained and reserved usufructuary use rights” because jurisdiction to make any determination “lies exclusively with the parties to the treaty and with the federal courts.”²⁸

²⁰ WHITE EARTH BAND PETITION TO INTERVENE at 5 (Jan. 19, 2016).

²¹ *Id.* at 1, 2.

²² *Id.* at 4.

²³ *Id.* at 1-2.

²⁴ Enbridge Response to White Earth Band Petition to Intervene at 1 (Jan. 29, 2016).

²⁵ *Id.*

²⁶ *Id.*

²⁷ White Earth Band Reply to Enbridge Response at 2 (Feb. 10, 2016).

²⁸ *Id.*

Instead, the White Earth Band seeks to protect individual rights related to this proceeding, similar to its participation in the Sandpiper pipeline proceeding.²⁹

On March 10, 2016, the Administrative Law Judge issued an Order granting the White Earth Band's Petition to Intervene in the Certificate of Need proceeding.³⁰ On March 17, 2016, the Judge amended the Order to include the White Earth Band as an intervenor in the Route Permit proceeding as well.³¹ The Judge issued the orders allowing the White Earth Band to intervene in the proceedings, despite the fact that the White Earth Band's Petition was filed with the Commission and not the Office of Administrative Hearings.

As explained in the March 10, 2016 and March 17, 2016 Amended Order Granting the White Earth Band's Petition to Intervene, the Administrative Law Judge concludes that the White Earth Band's Petition to Intervene should be granted. The White Earth Band has identified interests not already represented in this matter, and admitting the White Earth Band as a party will ensure its interests are adequately represented here. Enbridge did not object to the intervention request and has reserved the right to oppose any legal positions taken by the White Earth Band as a party to this proceeding. Accordingly, to the extent that the Administrative Law Judge did not have formal jurisdiction to decide the White Earth Band's Petition in March 2016, the Judge hereby reiterates and **GRANTS** the White Earth Band's Petition to Intervene in both the Certificate of Need and Route Permit proceedings. The White Earth Band is hereby granted full party status.

Friends of the Headwaters' Petition to Intervene

On February 9, 2016, Friends of the Headwaters filed a Petition to Intervene.³² Friends of the Headwaters is a 501(c)(3) nonprofit organized to "protect key resources of the headwaters of the Mississippi River" and claims the "resources are being threatened by the proposed construction" of the replacement Line 3 pipeline.³³ Friends of the Headwaters has successfully intervened in the Sandpiper proceeding currently pending at the Office of Administrative Hearings and argues "the fates of the proposed Sandpiper and Line 3 pipelines are closely aligned" because "the formal EIS process links [Line 3] to Sandpiper."³⁴ Friends of the Headwaters is represented by the MCEA and seeks "to contribute as an intervenor to the development of the factual and legal record in the Line 3 docket."³⁵

No objections to Friends of the Headwaters' intervention request were filed.

²⁹ *Id.*

³⁰ ORDER GRANTING WHITE EARTH BAND OF OJIBWE'S PETITION TO INTERVENE (Mar. 10, 2016).

³¹ AMENDED ORDER GRANTING WHITE EARTH BAND OF OJIBWE'S PETITION TO INTERVENE (Mar. 17, 2016).

³² Friends of the Headwaters Petition to Intervene (Feb. 9, 2016).

³³ Friends of the Headwaters Petition to Intervene at 1 (Feb. 9, 2016).

³⁴ *Id.* at 1-2.

³⁵ *Id.* at 2.

The Administrative Law Judge concludes that the Friends of the Headwaters' Petition to Intervene should be granted. Friends of the Headwaters has identified interests, related specifically to resources associated with the headwaters of the Mississippi River, not already represented in this matter. Admitting Friends of the Headwaters as a party will ensure the interests are adequately represented here. Accordingly, the Friends of the Headwaters' Petition to Intervene is **GRANTED** and it shall be given full party status in both the Certificate of Need and Route Permit proceedings.

MCEA's Petition to Intervene

On February 22, 2016, the Minnesota Center for Environmental Advocacy (MCEA) filed a Petition to Intervene.³⁶ The MCEA is a Minnesota-based nonprofit organization working in the courts, the legislature, and state agencies to protect Minnesota's wildlife, natural resources, and the health of its people.³⁷ The MCEA acknowledges that it represents Friends of the Headwaters in both this docket and the Sandpiper proceeding, but asks to join as a separately named party in these proceedings.³⁸ The MCEA argues its interests in Enbridge's Proposal Line 3 include the increased "risk and potential impact of oil spills in the State, presenting serious risks of degradation of water, land, and air quality."³⁹ The MCEA further argues that construction of a new Line 3 poses "direct obstacles to the State's Greenhouse Gas (GHG) Reduction goals, which are predicated on widespread adoption of clean energy generation."⁴⁰ The MCEA takes the position that the Proposed Line 3 is a "significant investment in energy technolog[y] that [is] not in Minnesota's long term interests."⁴¹ Therefore, MCEA seeks to "jointly contribute as [an] intervenor with Friends of the Headwaters [to develop] the factual and legal record" in this proceeding.⁴²

On February 29, 2016, Enbridge filed an objection to the MCEA's intervention petition, arguing that "allowing MCEA to be both a party and legal counsel for another party in these proceedings would be needlessly duplicative."⁴³ Enbridge cites to Minnesota Rule 1400.6200, subpart 3 (2015), which permits denial of an intervention petition if the petitioner's interest is adequately represented by one or more parties already participating in the case.⁴⁴ Enbridge argues that the MCEA's representation of Friends of the Headwaters in this case is direct evidence that the MCEA's interests are "already adequately represented" here.⁴⁵ In the alternative, Enbridge suggests that the MCEA's participation be limited to issues not already represented by Friends of the Headwaters.⁴⁶

³⁶ MCEA Petition to Intervene (Feb. 22, 2016).

³⁷ MCEA Petition to Intervene at 1 (Feb. 22, 2016).

³⁸ *Id.*

³⁹ *Id.* at 3-4.

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 4.

⁴² *Id.*

⁴³ Enbridge Response in Opposition to MCEA Petition to Intervene at 1 (Feb. 29, 2016).

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

On March 7, 2016, the MCEA filed a response to Enbridge's objections.⁴⁷ The MCEA argues that its interest in this proceeding, like in the Sandpiper proceeding, are "aligned" with Friends of the Headwaters, but are not necessarily the same.⁴⁸ MCEA explains that it is a statewide organization representing thousands of members in relation to major environmental actions throughout the state.⁴⁹ In contrast, Friends of the Headwaters is a much smaller citizens group organized to specifically oppose the Sandpiper and Proposed Line 3 Projects.⁵⁰ As a result, the focus of the MCEA and Friends of the Headwaters are sufficiently different.⁵¹

The MCEA further notes that it does not intend to file separate comments or briefs from Friends of the Headwaters.⁵² Therefore, any concerns related to duplicity and additional burden are without basis.⁵³

The Administrative Law Judge concludes that the MCEA has identified how the rights, duties, and privileges of its members may be directly affected by the outcome of these proceedings. The Judge further concludes that MCEA's interests are not adequately represented by the Friends of the Headwaters, despite the fact that the entities shall the same legal counsel. MCEA's members are located throughout the State of Minnesota, and its interests are broader in scope and policy than the interests of members of Friends of the Headwaters. While these organizations' interests may align in many issues, their scope and purpose for intervening are sufficiently different so as not to cause duplication.

Accordingly, the MCEA's Petition to Intervene is **GRANTED** and it is given full party status in both the Certificate of Need and Route Permit proceedings.

A.C.O.

⁴⁷ Letter from MCEA to Dan Wolf, MPUC (Mar. 7, 2016).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*