

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 CERTIFYING MOTIONS
TO COMMISSION
FOR DETERMINATION**

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:

The above-captioned matters came before Administrative Law Judge Ann C. O'Reilly based upon a Motion to Extend or Reopen the Environmental Impact Statement Scoping Period, and a Motion and Amended Motion for Supplemental Scoping Comment.

Christina Brusven, Fredrikson & Byron, P.A., James Watts, and Eric Swenson, Winthrop & Weinstine, P.A., appeared on behalf of Applicant Enbridge Energy, LP (Applicant or Enbridge).

Linda Jensen appeared on behalf of the Minnesota Department of Commerce (DOC) Energy Environmental Review and Analysis (DOC-EERA).

Julia Anderson, Assistant Attorney General, appeared on behalf of the Department of Commerce Division of Energy Resources (DOC-DER).

Brian Meloy, Stinson, Leonard Street, appeared on behalf of Kennecott Exploration Company (Kennecott).

Kevin Pranis, appeared on behalf of the Laborers' District Council of Minnesota and North Dakota (Laborers' Council).

David Zoll, Lockridge, Grindal, Nauen, PLLP, appeared on behalf of the Mille Lacs Band of Ojibwe (Mille Lacs Band).

Paul Blackburn appeared on behalf of the Sierra Club (Sierra Club). Joseph Plumer appeared on behalf of the White Earth Band of Ojibwe (White Earth Band).

Kevin Lee appeared on behalf of the Friends of the Headwaters (FOH) and the Minnesota Center for Environmental Advocacy (MCEA).

Anna Friedlander appeared on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA).

Frank Bibeau appeared on behalf of Honor the Earth organization.

Scott Ek appeared as a representative of the Minnesota Public Utilities Commission (Commission).

Based upon the submission of the parties and the hearing record, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED THAT:

1. The Motion to Extend or Reopen the Environmental Impact Statement Scoping Period filed by Friends of the Headwaters and the Minnesota Center for Environmental Advocacy is hereby **CERTIFIED** to the Commission for decision.

2. The Motion and Amended Motion for Supplemental Scoping Comment Period filed by the Sierra Club is hereby **CERTIFIED** to the Commission for decision.

Date: October 14, 2016



ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Factual Background

Enbridge commenced these actions on April 24, 2015, with the filing of an Application for a Certificate of Need and an Application for a Route Permit for the Line 3 Replacement Project (Line 3 Project). The project involves the replacement of Enbridge's current Line 3 pipeline with a new Line 3 pipeline running from the North Dakota border to the Wisconsin border in Minnesota. As part of the Line 3 Project, Enbridge proposed to install part of the Line 3 pipeline in a new right of way paralleling the route proposed in the Sandpiper Pipeline Project, a larger, separate pipeline project then pending before the Commission.¹

Because of the common proposed routes for the Sandpiper Pipeline Project and Line 3 Project, the Commission authorized the Department of Commerce to combine the environmental review of the Line 3 Project and the Sandpiper Pipeline Project.²

Between April 25 and May 11, 2016, twelve combined Scoping Meetings occurred for the Sandpiper Pipeline Project and Line 3 Project.³ The comment period for the scoping decision on both projects closed on May 26, 2016.⁴

On July 21, 2016, Enbridge filed a copy of a Proposed Consent Decree⁵ between the United States Environmental Protection Agency and United States Coast Guard in an action entitled, *U.S. v. Enbridge Energy, L.P., et al.*⁶ The Proposed Consent Decree involves two oil spills from Enbridge-operated pipelines that occurred in 2010.⁷ As part of the settlement, the Proposed Consent Decree addresses the repair, operation, and decommissioning of Enbridge's existing Line 3 pipeline in Minnesota.⁸

On September 1, 2016, the North Dakota Pipeline Company LLC filed a Petition to Withdraw the Certificate of Need and Pipeline Route Permit Applications, Motion to Suspend Contested Case and Certify Issues and Notice to Terminate Preparation of the

¹ *In the Matter of the Application of North Dakota Pipeline Co. LLC for a Certificate of Need for the Sandpiper Pipeline Project*, MPUC Docket No. PL-6668/CN-13-473; *In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, MPUC Docket No. PL-6668/PPL-13-474.

² ORDER JOINING NEED AND ROUTING DOCKETS (Feb. 1, 2016) (eDocket Nos. 20162-117877-02, 20162-117877-01).

³ Notice of Availability of Scoping EAW and Draft Scope for Sandpiper Pipeline and Line 3 Replacement Projects and Schedule for EIS Scoping Meetings (Apr. 12, 2016) (eDocket Nos. 20164-119968-02, 20164-11968-01).

⁴ *Id.*

⁵ Consent Decree (July 21, 2016) (eDocket Nos. 20167-123488-03, 20167-123488-04).

⁶ *U.S. v. Enbridge Energy, L.P., et al.*, 1:16-CV-914 (W.D. Mich.).

⁷ Consent Decree (July 21, 2016) (eDocket Nos. 20167-123488-03, 20167-123488-04).

⁸ *Id.*

EIS for the Sandpiper Pipeline Project.⁹ This Petition essentially terminated the Sandpiper Pipeline Project.

While the withdrawal of the Sandpiper Certificate of Need and Route Permit Applications halted the DOC-EERA's work on the scoping decision and environmental review for the Sandpiper Pipeline Project, the DOC-EERA continued its work on the scoping decision for the Line 3 Project.

On September 22, 2016, the DOC-EERA issued an Environmental Impact Statement (EIS) Scoping Decision for the Line 3 Project.¹⁰

On September 26, 2016, FOH and MCEA filed a Motion to Extend or Reopen the Environmental Impact Statement Scoping Period in the above-entitled dockets (FOH/MCEA Motion). The FOH/MCEA Motion requests that the Commission order the DOC-EERA to initiate a new scoping period for the Line 3 Project. The FOH/MCEA Motion is based upon two events that occurred after the close of the scoping comment period for the Line 3 Project: (1) the withdrawal of the Certificate of Need and Route Permit Applications for the Sandpiper Pipeline Project; and (2) the Proposed Consent Decree in *U.S. v. Enbridge Energy, L.P., et al.*

The next day, on September 27, 2016, the Sierra Club filed a Motion for Supplemental Scoping Comment Period (Sierra Club Motion). The Sierra Club Motion seeks to establish a supplemental scoping period for the Line 3 Project to allow intervenors and the public to supplement and revise their scoping comments based on the same reasoning set forth in the FOH/MCEA Motion. The Sierra Club filed an Amended Motion on September 30, 2016. (The FOH/MCEA Motion and the Sierra Club Motion are collectively referred to herein as the "Motions".)

Enbridge filed a response and objection to the Motions on October 7, 2016. Enbridge asserts that the scope of the Line 3 Project was not altered by the Proposed Consent Decree or termination of the Sandpiper Pipeline Project. Enbridge further argues that the scoping process completed on the Line 3 Project meets all legal requirements and generated broad public participation, thereby negating any need for reopening or extending the scoping process in this matter.

The Minnesota Chamber of Commerce¹¹, the Laborer's Counsel, and the UA also filed responses to the Motions, urging the Commission to deny the reopening of the scoping process. These parties warn that reopening the scoping process would cause unnecessarily delay and serve no valid purpose.

⁹ Petition to Withdraw Certificate of Need and Pipeline Routing Permit Applications, Motion to Suspend Contested Case and Certify Issues, and Notice to Terminate Environmental Impact Statement Preparation (Sept. 1, 2016) (eDocket Nos. 20169-124579-02, 20169-124579-01).

¹⁰ Proposed Final Scoping Decision Document for Line 3 Replacement Project (Sept. 22, 2016) (eDocket Nos. 20169-125058-05, 20169-125058).

¹¹ The Minnesota Chamber of Commerce is not a party or intervenor in this action.

Honor the Earth filed a response in support of the Motions. Honor the Earth argued that the Commission should extend or reopen the scoping period to address tribal concerns and jurisdictional matters involving the wild rice watershed on the White Earth Reservation.

The DOC-EERA filed a letter response to the Motions providing information on the scoping meetings, comment process, and notice period that occurred in the Line 3 Project. The DOC-EERA, however, took no position on the Motions.

Analysis

Minnesota Rule 1400.7600 (2015) provides that no motions shall be made directly to, or be decided by, an agency after the assignment of an administrative law judge and prior to the completion of the judge's report unless the motion is certified to the agency by the judge for determination. The administrative law judge may certify a motion to the agency for decision after considering the following factors:

- A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion;
- B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing;
- C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party;
- D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning;
- E. whether it is necessary to promote the development of the full record and avoid remanding; or
- F. whether the issues are solely within the expertise of the agency.¹²

Here, the issues presented by Motions are whether to reopen the EIS scoping process or extend the EIS scoping comment period in these proceedings. The EIS scoping process is a process conducted by the Department of Commerce, at the direction and delegation of the Commission, under legal authority set forth in Minn. Stat. ch. 116D and Minn. R. ch. 4410.¹³ Therefore, the Office of Administrative Hearings and, hence, the administrative law judge, do not have authority or jurisdiction to order the DOC to reopen or extend the DOC's scoping process.¹⁴ Moreover, the Commission did not refer

¹² Minn. R. 1400.7600 (2015).

¹³ ORDER JOINING NEED AND ROUTING DOCKETS (Feb. 1, 2016) at 8-9 (eDocket Nos. 20162-117877-02, 20162-117877-01).

¹⁴ See Minn. Stat. § 14.58 (2016) (providing that the agency's notice defines the issues to be addressed in a contested case hearing.) See *also*, Minn. R. 1400.5600, subp. 2D (2015).

issues relating to the scope of the EIS to the Office of Administrative Hearings.¹⁵ This matter is, thus, in the province of the Commission.

Given the Administrative Law Judge's lack of jurisdiction or authority over the EIS scoping process, the Administrative Law Judge hereby certifies the Motions of the FOH, MCEA, and Sierra Club to the Commission for determination.

A. C. O.

¹⁵ ORDER JOINING NEED AND ROUTING DOCKETS (Feb. 1, 2016) at 7-9 (eDocket Nos. 20162-117877-02, 20162-117877-01).