

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

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

**ORDER GRANTING MOTION
FOR ADJUSTMENT OF
THE BRIEFING SCHEDULE**

The above-entitled matter comes before Administrative Law Judge Ann O'Reilly upon a Motion to for Adjustment of Briefing Schedule filed on December 14, 2017.

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

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

Peter Madsen and Julia Anderson, Assistant Attorneys 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 Laborers' District Council of Minnesota and North Dakota (Laborers' Council).

Anna Friedlander, O'Donoghue & O'Donoghue, LLP, and Sam Jackson, Cummins & Cummins, 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 (United Association).

Michael Ahern, Dorsey & Whitney, LLP, appeared on behalf of Shippers for Secure, Reliable and Economical Petroleum Transportation (Shippers).

Leili Fatehi and Hudson Kingston, Advocate, PLLC, appeared on behalf of the Sierra Club (Sierra Club).

Scott Strand, Environmental Law and Policy Center, and Richard Smith appeared on behalf of Friends of the Headwaters (FOH).

Akilah Sanders-Reed and Brent Murcia appeared on behalf of Youth Climate Intervenors (Youth Climate).

Frank Bibeau and Paul Blackburn appeared on behalf of Honor the Earth (HTE).

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

Sara Van Norman, Davis Law Firm, Philip Mahowald, the Jacobson Law Firm, and Seth Bichler appeared on behalf of the Fond Du Lac Band of Lake Superior Chippewa (Fond Du Lac).

Joseph Plumer appeared on behalf of the White Earth Band of Ojibwe (White Earth) and Red Lake Band of Chippewa Indians (Red Lake).

Chris Allery appeared on behalf of the Leech Lake Band of Ojibwe (Leech Lake).

James Reents appeared on behalf of the Northern Water Alliance of Minnesota (NWAM).

Stuart Alger, Malkerson, Gunn, Martin, LLP, appeared on behalf of Donovan and Anna Dyrdal (Dyrdals).

Bret Eknes and Scott Ek appeared as representatives of the Minnesota Public Utilities Commission (Commission).

BACKGROUND

An evidentiary hearing in this matter was held on November 1, 2, 3, 6, 8, 9, 13, 14, 15, 16, 17, and 20, 2017. At the close of the hearing, the Administrative Law Judge established a briefing schedule for the parties. That briefing schedule was articulated in a First Post-Hearing Order issued on November 22, 2017.¹ The Order set forth the following deadlines:

¹ First Post-Hearing Order (Nov. 22, 2017) (eDocket Nos. 201711-137610-01 (CN); 201711-137609 (R)).

Enbridge's Proposed Procedural Findings	Nov. 20, 2017
Redlined Proposed Procedural Findings (all other parties)	Nov. 30, 2017
Motions and arguments related to procedural defects	Nov. 30, 2017
Reponses to procedural motions or arguments	Dec. 7, 2017
Post-hearing Briefs (substantive issues, all parties)	Dec. 31, 2017
Enbridge's Proposed Findings of Fact (substantive)	Dec. 31, 2017
DOC-EERA Proposed Findings regarding EIS	Dec. 31, 2017
Reply Briefs (substantive issues, all parties)	Jan. 26, 2018
Proposed Findings (all other parties)	Jan. 26, 2018
ALJ Report Due	March 30, 2018

On December 7, 2017, the Commission met to consider the adequacy of the Final Environmental Impact Statement (EIS).² The Commission issued a Notice of Final Environmental Impact Statement Adequacy Determination on December 13, 2017.³ On December 14, 2017, the Commission issued an Order Finding the Environmental Impact Statement Inadequate.⁴ The Commission found the final EIS inadequate on the following four grounds:

- The EIS needs to (i) indicate how far and where SA-04 would need to be moved to avoid the karst topography it would otherwise traverse and (ii) provide a revised environmental-impact analysis of SA-04 specifically to reflect the resulting relocation of that alternative.
- The EIS needs to clarify that quantitative representations of route and system alternatives do not necessarily reflect the actual qualitative impacts of those alternatives
- The EIS needs to clearly identify the extent to which resource impacts of route alternatives in the existing Line 3 corridor are or are not additive – i.e., the extent to which that route alternative would introduce new or additional impacts beyond the impacts of the existing pipelines in that corridor.

² Order Finding Environmental Impact Statement Inadequate (Dec. 14, 2017) (eDocket Nos. 201712-138168-02 (CN); 201712-138168-01(R)).

³ Notice of Final Environmental Impact Statement Adequacy Determination (Dec. 13, 2017) (eDocket Nos. 201712-138116-01 (CN); 201712-138116-02(R)).

⁴ Order Finding Environmental Impact Statement Inadequate (Dec. 14, 2017) (eDocket Nos. 201712-138168-02 (CN); 201712-138168-01(R)).

- The EIS needs to clarify that the traditional cultural properties survey must be completed before the start of any construction pursuant to any permit granted in this proceeding.⁵

The Order gave the DOC-EERA 60 days from the date of the Notice (December 13, 2017) to supplement the EIS to include the information set forth above.⁶ Consequently, the DOC-EERA's revised EIS is due February 12, 2018.

On December 14, 2017, Sierra Club, FOH, HTE, Fond du Lac, White Earth, Leech Lake, Mille Lacs, NWAM, and Youth Climate filed a Motion for Adjustment of the Briefing Schedule (Motion).⁷ The Dyrdals filed a response in support of the Motion.⁸

The Motion requests that, in light of the Commission's Order finding the EIS inadequate and requiring supplementation, the post-hearing briefing schedule should be either stayed or adjusted. The moving parties request that the briefing schedule be suspended pending a Commission determination that the EIS is adequate. In the alternative, the moving parties request that the Judge suspend the briefing schedule and convene a post-hearing conference in early January 2018 to devise a new briefing schedule. Because the current schedule requires the parties to file their initial briefs on December 31, 2017, the movants request an expedited motion process.

On December 15, 2017, the Administrative Law Judge issued a Third Prehearing Order setting an expedited briefing schedule with respect to the Motion.⁹ Pursuant to that Order, Enbridge, Shippers, Laborer's Council, and United Association filed timely responses in opposition to the Motion.¹⁰ Fond du Lac, Mille Lacs, FOH, HTE, Youth Climate, and Sierra Club each filed individual reply briefs in support of the Motion.¹¹

Based upon the arguments of the parties and the hearing record, the Administrative Law Judge makes the following:

⁵ *Id.*

⁶ *Id.*

⁷ Joint Motion for Adjustment of Briefing Schedule (Dec. 14, 2017) (eDocket Nos. 201712-138191-01(CN); 201712-138191-01(R)).

⁸ Dyrdal Memorandum in Support of Joint Motion for Adjustment of the Briefing Schedule (eDocket No. 201712-138262-01 (R)).

⁹ Third Post-Hearing Order (Dec. 15, 2017) (eDocket No.) (eDocket No. 201712-138197-01 (CN). Note: for ease of reference, eDocket citations may be to the CN Docket only.

¹⁰ Enbridge Response in Opposition (Dec. 18, 2017) (eDocket No. 201712-138263-03 (CN)); Shipper's Letter in Opposition (Dec. 18, 2017) (eDocket No. 201712-138266-01 (CN)); Laborer's Council Response in Opposition (Dec. 18, 2017) (eDocket No. 201712-138264-01 (CN)); United Association Response in Opposition (Dec. 18, 2017) (eDocket No. 201712-138267-01 (CN)).

¹¹ Fond du Lac Reply Brief (Dec. 19, 2017) (eDocket No. 201712-138298-01 (CN)); Mille Lacs Reply Brief (Dec. 19, 2017) (eDocket No. 201712-138290-01); FOH Reply Brief and Attachments (Dec. 19, 2017) (eDocket Nos. 20172-138295-02, 201712-139286-06); HTE Reply Brief (Dec. 19, 2017) (eDocket No. 201712-138297-01); Youth Climate Reply Brief (Dec. 19, 2017) (eDocket No. 201712-138299-04); Sierra Club Reply Brief (Dec. 19, 2017) (eDocket No. 201712-138294-01).

ORDER

1. Due to the Commission's Order Finding the Environmental Impact Statement inadequate, a new briefing schedule is warranted to allow all parties the opportunity to respond to the revised EIS once it is issued.

2. Because Enbridge has asserted that a revised EIS is not necessary for it to proceed with briefing, Enbridge shall file its Proposed Findings of Fact (excluding procedural findings) by **January 12, 2018**. This filing will assist the Administrative Law Judge to proceed forward so as to be able to release her Report as soon as possible once an adequate EIS is approved by the Commission and all parties have had an opportunity to be heard through post-hearing briefs.

3. The DOC-EERA shall provide its Proposed Findings (or redline changes to the Enbridge Proposed Findings) related to matters addressed in the EIS, as revised pursuant to the Commission's December 14, 2017 Order, by **February 28, 2017**, approximately two weeks after the deadline for revising the EIS.

4. Due to notice requirements, it is anticipated that the Commission will meet in mid-to-late March 2018 to decide whether the revised EIS is adequate. **All parties' Initial Briefs and Proposed Findings¹² shall be due 14 calendar days after the Commission's Order Finding the EIS Adequate.** *Parties should, therefore, be working on their briefs and proposed findings during the time that the EIS is being revised so as to be ready to file their briefs and proposed findings two weeks after the final adequacy determination.* Pursuant to Minn. Stat. § 116D.04, subd. 2b(3) (2016) and Minn. R. 4410.3100, subp. 1 (2017), the Project cannot be started, a Certificate of Need or Route Permit cannot be granted, and the Project cannot begin until the EIS is determined adequate by the Commission.

5. Reply Briefs shall be filed **21 calendar days** after the date for service and filing of the Initial Briefs. A Post-Hearing Order will be issued after the Commission's Order Finding the EIS Adequate, assuming one is issued. That Post-Hearing Order will set forth the exact dates for service and filing the Initial Briefs, Proposed Findings, and Reply Briefs.

6. The Administrative Law Judge's Report is anticipated to be released within **60 days** of the close of the briefing period. A Commission meeting to grant or deny the Certificate of Need (CN) and Route Permit (RP) Applications will follow after receipt of the Administrative Law Judge's Report.

¹² Enbridge and the DOC-EERA may submit revised Proposed Findings, if necessary, on this date.

7. If the Commission finds the revised EIS inadequate, a post-hearing conference will be convened to discuss the case and devise a new briefing schedule, if necessary.

Date: December 22, 2017



ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

Enbridge, Shippers, Laborer's Council, and United Association argue that an extension of the briefing schedule is not necessary because the parties can prepare their hearing briefs, and the Administrative Law Judge can prepare her Report, using an inadequate EIS. Under their argument, only the Commission is entitled to an adequate EIS before a decision can be made. The Administrative Law Judge rejects this argument.

The Minnesota Environmental Policy Act (MEPA) requires that an EIS be prepared "[w]here there is potential for significant environmental effects resulting from any major governmental action."¹³ The Minnesota Court of Appeals in *Sandpiper* ruled that a certificate of need for a large petroleum pipeline is a "major governmental action" with "potential for significance environmental effects," thus requiring an EIS.¹⁴ Accordingly, an EIS is required to be completed for the Project.

In addition to requiring the preparation of an EIS, MEPA mandates that the EIS be determined "adequate."¹⁵ The criteria for adequacy is set forth in Minn. R. 4410.2800, subp. 4 (2017). Until an EIS is declared adequate by the Responsible Governmental Unit (RGU) – in this case, the Commission -- "a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project."¹⁶

As the Administrative Law Judge explained in her September 4, 2017 Order Denying the Motion to Amend Scheduling Order or Certify Issue to the Commission, the rules and laws related to environmental review, certificates of need, and route permit applications require that environmental review and the permitting processes proceed

¹³ Minn. Stat. § 116D.04, subd. 2a(a) (2017).

¹⁴ *In re Application of North Dakota Pipeline Company LLC*, 869 N.W.2d 693, 698 (Minn. Ct. App. 2015), review denied (Dec. 15, 2015).

¹⁵ Minn. Stat. § 116D.04, subd. 2a(j).

¹⁶ Minn. Stat. § 116D.04, subd. 2b.

concurrently.¹⁷ While the three processes may proceed contemporaneously, environmental review must be completed before the others can conclude. Under MEPA, the EIS must be declared adequate before a CN or RP is granted or the Project is started.¹⁸

The reason that an EIS must be found adequate before a governmental agency can issue permits for a major project is related to the purpose of the EIS, itself. According to the rules:

The purpose of an EIS is to provide information for governmental units, the proposer of the project, and *other persons* to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.¹⁹

In other words, the objective of an EIS is to provide information not just to the governmental agency making the final permitting decision, but to all other parties involved in that decision-making process.²⁰ In certificate of need and route permit proceedings, the “other persons” involved in the decision-making process include the Administrative Law Judge and all parties to the action.

The Commission recognized the importance of the EIS for all parties in its February 1, 2016 Order Joining the Need and Routing Docket, which referred the CN and RP matters to the Office of Administrative Hearings for a contested case proceeding.²¹ In that Order, the Commission directed the Administrative Law Judge to schedule the filing of intervenor direct testimony after the issuance of “the final EIS.”²² The Commission reasoned, “[a] final EIS, identifying the alternative route and route segments under consideration and their respective environmental consequences, will provide a common basis for parties to develop and defend their recommendations to the Commission.”²³ In this passage, the Commission recognizes that the objective of the EIS is not just to inform the Commission, but to be used by all parties, including the intervenors and the Judge, in developing their recommendations to the Commission.

In the Order Denying the Motion to Amend the Scheduling Order or Certify the Issue to the Commission, the Administrative Law Judge ruled that the parties could proceed with the public and evidentiary hearings using the information provided in the final EIS (as opposed to the draft EIS), despite the fact that the final EIS had not yet been

¹⁷ See Order Denying Motion to Amend Scheduling Order or Certify Issue to the Commission (Sept. 7, 2017) (eDocket No. 20179-135435-02 (CN)). The Order goes into greater detail about the respective deadlines for completion of the EIS (280 days), CN application (12 months), and RP applications (nine months); and how these deadlines require that the CN/RP contested case hearing process advance concurrently with environmental review.

¹⁸ Minn. Stat. § 116D.04, subd. 2b (2016).

¹⁹ Minn. R. 4410.2000, subp. 1 (2017) (emphasis added).

²⁰ See *also* Minn. R. 4410.0300, subp. 4 (2017).

²¹ Order Joining Need and Routing Dockets at 9 (Feb. 1, 2016) (eDocket No. 20162-117877-02 (R)).

²² *Id.*

²³ *Id.*

determined adequate.²⁴ The rationale behind that decision was to facilitate the progression of the permitting action concurrently with the environmental review process, as intended by law and rule. The Judge cautioned, however, that if the final EIS were declared inadequate, she would entertain motions to reopen the record to address the changes to the EIS.²⁵

Here, there is no need to reopen the hearing record because the record has not yet closed. The briefing period has not concluded, Leech Lake has not yet provided the documents they were ordered to produce in the Second Post-Hearing Order, and the Administrative Law Judge has ruled that she will accept the revised EIS into the evidentiary hearing record as Exhibit 29A.²⁶ The parties are, therefore, entitled to make argument on the contents of the revised EIS in their post-hearing briefs. To accomplish this result, however, the briefing schedule must be amended to allow the parties time to review the changes to the EIS (due on February 12, 2018) and incorporate those changes into their briefs and proposed findings.

The revised schedule set forth above gives the parties two weeks from the date that the Commission issues an order finding the EIS adequate to file their initial briefs. Therefore, the parties will not be required to base their arguments on an inadequate EIS.

Given the narrow scope of deficiencies identified by the Commission in its Order Finding the EIS Inadequate, the parties should be able to write a majority of their briefs and proposed findings before the release of the revised EIS, and should be able to finish their arguments and proposed findings in the weeks after the EIS is revised and reviewed by the Commission.²⁷ In this way, the Judge is promoting a steady progression toward completion of these proceedings, while allowing the parties the benefit of a final, adequate EIS in the presentation of their cases.

If the parties were required to make their final arguments and the Administrative Law Judge were forced to prepare her Report based upon an inadequate EIS, the resulting arguments and recommendations to the Commission could be flawed, incomplete, or inconsistent with the new information set forth in the revised EIS. In turn, the Commission's decision-making process could be impacted.

Notably, if the deficiencies in the EIS required only "minor revisions," the Commission could have ordered an addendum of the EIS,²⁸ and the parties could have argued those issues in reply briefs during the original briefing schedule. Instead, the Commission determined the EIS was inadequate. This determination necessitated a change to the briefing schedule to allow the parties an opportunity to address the changes

²⁴ Order Denying Motion to Amend Scheduling Order or Certify Issue to the Commission (Sept. 7, 2017) (eDocket No. 20179-135435-02 (CN)).

²⁵ *Id.* at 12.

²⁶ Third Post-Hearing Order (Dec. 15, 2017) (eDocket No. 201712-138197-01 (CN)).

²⁷ If the Commission finds the revised EIS inadequate, the future of the Project itself would be rendered uncertain and a new briefing schedule (if needed) would likely be warranted.

²⁸ Minn. R. 4410.3000, subp. 2 (2017).

in the EIS before the Administrative Law Judge makes her recommendation and before the Commission makes its final decision.²⁹

The purpose of these proceedings is to fully inform the Commission and assist it in rendering the best possible decision on important matters affecting the State. A material aspect of the CN and RP processes is the involvement of technical advisors (like the DOC-EERA and DOC-DER), state agencies, the parties, the public, and the Administrative Law Judge to assist the Commission in thoroughly reviewing a project so as to reach a well-reasoned and legally-sound final decision. This process is hindered if the parties and the Judge are obliged to rely on incomplete or, in this case, “inadequate” information regarding material issues in the case (specifically, System Alternative 04 and the “in-trench” replacement route alternative).

There has been much argument and finger-pointing about the causes of the length of time it has taken this Project to proceed through the permitting process. This is a very complex and highly controversial Project, which has the potential to impact the waters, natural environment, and people of the State of Minnesota. It requires thorough and careful analysis that should not be performed in haste.

Enbridge has not identified any prejudice that it will suffer as a result of an extended briefing schedule. If existing Line 3’s known risks³⁰ make it unsafe to operate during the pendency of this proceeding, then Enbridge should address those issues immediately. That is not a basis to rush a permitting process for a Project that will have long-term effects on the land, natural resources, and people of the State. Ultimately, the State of Minnesota and all parties (including Enbridge) are best served by investing a few extra weeks now to ensure that the law is followed and a comprehensive review of the Project is conducted before a final decision is rendered in this important case.

A. C. O.

²⁹ None of the moving parties have requested the reopening of the record to offer additional testimony or evidence. This Order does not invite, and, in fact, discourages such requests. Given the narrow scope of the cited deficiencies, the parties should be able to effectively incorporate the additional information from the revised EIS into their final arguments without the need for any additional testimony or evidence.

³⁰ Enbridge Response in Opposition at 2 (Dec. 18, 2017) (eDocket No. 201712-138263-03).

December 22, 2017

See Attached Service List

Re: *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Line 3 Replacement Project*

and

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project

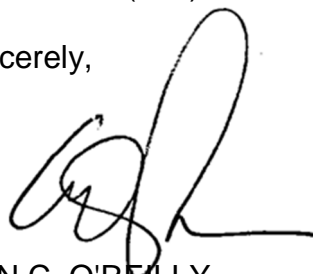
**OAH 65-2500-32764 and 65-2500-33377
MPUC PL-9/CN-14-916 and PL-9/PPL-15-137**

To All Persons on the Attached Service List:

Enclosed and served upon you is the Administrative Law Judge's **ORDER GRANTING MOTION FOR ADJUSTMENT OF THE BRIEFING SCHEDULE** in the above-entitled matter.

If you have any questions, please contact my legal assistant Cari Snaza at (651) 361-7906 or cari.snaza@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



ANN C. O'REILLY
Administrative Law Judge

ACO:kl
Enclosure
cc: Docket Coordinator

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

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	OAH Docket No.: 65-2500-32764 65-2500-33377
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	

Kendra Schmit certifies that on December 22, 2017 she served the true and correct **ORDER GRANTING MOTION FOR ADJUSTMENT OF THE BRIEFING SCHEDULE** by eService, and U.S. Mail, (in the manner indicated below) to the following individuals:

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Bibeau	Frank	frankbibeau@gmail.com	Honor the Earth	Electronic Service	No
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