



Minnesota Center for Environmental Advocacy

Using law, science, and research to protect Minnesota's environment, its natural resources, and the health of its people.

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June 6, 2016

The Honorable James E. LaFave
Administrative Law Judge
Office of Administrative Hearings
600 Robert St. North
PO Box 64620
St. Paul, MN 55164-0620
James.Lafave@state.mn.us

VIA ELECTRONIC SERVICE

Re: *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 Routing Permit for the Sandpiper Pipeline Project in Minnesota*

*MPUC Docket Nos. PL-6668/CN-13-473; PL-6668/PPL-13-474
OAH Docket Nos. 60-2500-31259; 60-2500-31260*

Dear Judge LaFave:

In anticipation of the upcoming prehearing conference in the above-referenced dockets, Minnesota Center for Environmental Advocacy (MCEA) and Friends of the Headwaters (FOH) write to present some materials that we believe will be relevant based on a recent hearing in the related Line 3 matter. The Prehearing Order states that "parties should be prepared to discuss how they believe the proceedings in the 'Line 3' dockets will affect these matters . . . [and whether there should be] any coordination in the scheduling of Line 3 and the Sandpiper dockets?" At the most recent Prehearing Conference in the Line 3 Replacement Project ("L3R") docket, the Applicant presented materials reflecting its belief that the contested case should begin after the issuance of the *draft* Environmental Impact Statement (EIS), not the final EIS as ordered by the PUC. FOH and MCEA anticipate that the Applicant intends to use similar arguments and materials in the upcoming Prehearing Conference for the Sandpiper docket, and so we submit these materials in advance as a courtesy.

To date there has been an extraordinary amount of attention given to the statutory deadlines for environmental review under Minn. Stat. § 116D.04 and § 216B.243. These laws provide three separate deadlines that have been extensively discussed in these proceedings. Those deadlines are:

- 1) an adequacy determination on an environmental impact statement (EIS) shall be made within 280 days after notice of its preparation;¹
- 2) a final decision on permitting shall be made within 30 days after final approval of an environmental impact statement;² and
- 3) the Public Utilities Commission shall approve or deny a certificate of need within 12 months of receiving the application.³

All of these deadlines may be waived. Indeed, the 12-month deadline in this case passed in 2014. The 280-day and 30-day deadlines were discussed at great length at PUC hearings on December 17, 2015 and March 24, 2016. At the conclusion of the December 2015 hearing, the PUC considered how best to integrate the environmental review and contested case processes, and concluded that intervenor direct testimony in the contested case proceedings shall commence after issuance of the final EIS for the Sandpiper Pipeline Project.⁴ The Applicant petitioned for reconsideration of that decision, and the Commission again heard argument on the matter at its meeting of March 24, 2016. At that hearing, the Commission denied that petition and again confirmed that intervenor direct testimony shall be filed after issuance of the final EIS.⁵

At the prehearing conference for the L3R proceedings before the OAH, the Applicant again continued to press its twice-rejected argument that the contested case proceedings should commence after issuance of the draft EIS. Their insistence is based on a footnote in the Commission's most recent order, in which the Commission noted that:

At hearing, there was extensive discussion of the various issues impacting the coordination of the contested case proceedings with the EIS process in this case, and whether it was premature to set a schedule prior to receiving the Department's recommendations concerning the scope of the EIS and its proposed timeline. Parties to the discussion indicated they would work together to identify the most

¹ Minn. Stat. § 116D.04, subd. 2a(h).

² Minn. Stat. § 116D.04, subd. 3a.

³ Minn. Stat. § 216B.243, subd. 5.

⁴ Docket Nos. PL-6668-CN-13-473; PL-6668/PPL-13-474, *ORDER LIFTING STAY, REJOINING NEED AND ROUTING DOCKETS, AND REFERRING FOR CONTESTED CASE PROCEEDINGS*, January 11, 2016, at 7. This requirement was incorporated into the Line 3 Replacement Docket by a separate order, *see* Docket No. PL-9/CN-14-916, PL-9/PPL-15-137, *ORDER JOINING NEED AND ROUTING DOCKETS*, February 1, 2016 at 9.

⁵ Docket Nos. PL-9/CN-14-916; PL-9/PPL-15-137, *ORDER DENYING PETITIONS FOR RECONSIDERATION AND MOTION TO AMEND MEMORANDUM, AND REFERRING PETITIONS FOR INTERVENTION TO OAH*, March 31, 2016, at 3; Docket Nos. PL-6668-CN-13-473; PL-6668/PPL-13-474, *ORDER DENYING MOTIONS AND REFERRING INTERVENTION PETITION TO OAH*, March 31, 2016, at 4.

expeditious contested-case schedule consistent with full record development and applicable statutory requirements.⁶

The Applicant appears to believe this footnote indicates that the Commission desires the parties to propose or agree to schedules for the contested case process, *including schedules that are contrary to their prior Order*. FOH and MCEA disagree that this footnote indicates an interest in proceeding contrary to the Commission's Order in this matter. We note that if the Commission desired the parties to propose schedules contrary to its stated Order, the Open Meetings Law requires that it do so in a written Order. No such Order has been issued.⁷

FOH and MCEA believe that there are two critical things to note about these deadlines that continue to receive a wildly disproportionate degree of briefing and argument, relative to their importance in these matters:

1. The statutory deadlines **do not significantly constrain** the Commission's and OAH's ability to schedule the contested case proceedings after the final EIS. Although Enbridge/NDPC has indicated their unwillingness to consent to the extension of any statutory deadlines, such a declaration is mere posturing. Preparing an EIS is a highly idiosyncratic process, and no two documents are exactly alike. If DOC needs more time to conduct adequate environmental review and Enbridge declines to extend the deadline, the result is that the RGU is forced to declare the EIS inadequate, and the entire process starts all over again.⁸ It is inconceivable that the Applicant would take such an action. Indeed, extension of the 280-day deadline for complex projects is commonplace.
2. **There is no possible schedule** that would enable compliance with both the 280-day and the 30-day deadlines for these two projects. It is possible to meet one of these deadlines, but not both. The 30-day deadline might be workable for a small project before an agency with a single Commissioner, and not subject to the open meetings law. For a matter like Sandpiper or Line 3, however, this deadline is fundamentally unworkable. These deadlines are aspirations and touchstones – they are not rigid time limitations. Continued focus on these deadlines in these proceedings is a somewhat baffling distraction that comes at the expense of progress on more substantive issues.

⁶ *Id.* at 3 n. 3.

⁷ See, e.g., *St. Cloud Newspapers, Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983) (holding that the open meetings law applies to deliberations as well as formal actions, and noting that the law is designed to “prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies'] decisions or to detect improper influences.”).

⁸ Minn. R. 4410.2800.

IMPOSSIBILITY OF MEETING BOTH THE 280-DAY and the 30-DAY DEADLINES

In its Petition for Reconsideration of February 1, 2016, NDPC used the previous contested case process to illustrate how many days it takes to conduct the process from intervenor direct to the Commission's final order. That table is reproduced below.

Table 3: Example Contested Case Schedule from Sandpiper CN

| Contested Case Milestone | Date |
|---------------------------------|--------------------|
| Intervenor Direct Testimony | November 19, 2014 |
| Rebuttal Testimony | January 5, 2015 |
| Sur-Rebuttal Testimony | January 21, 2015 |
| Public Hearings | January 5-12, 2015 |
| Initial Post-Hearing Briefs | February 27, 2015 |
| Reply Post-Hearing Briefs | March 13, 2015 |
| ALJ Decision | April 13, 2015 |
| Exceptions to ALJ Decision | April 28, 2015 |
| Commission Meeting | June 3 & 5, 2015 |
| Commission Written Order | August 3, 2015 |
| TOTAL | 258 days |

Using this table as a reference and including parallel EIS milestones, it is clear that there is no schedule that would meet both deadlines. The attached Exhibits demonstrate this point visually. Because waiver of these deadlines is inevitable and routine, FOH and MCEA urge OAH to put the issue to rest by clarifying that it will only consider proposed schedules that abide by the PUC's order that intervenor direct testimony shall be filed after issuance of the final EIS.

COORDINATION OF LINE 3 AND SANDPIPER DOCKETS

FOH and MCEA previously argued that both the Sandpiper and Line 3 dockets should be addressed jointly.⁹ The two projects are connected and phased actions, and conducting separate contested case proceedings unnecessarily isolates two decisions that are in fact inextricably linked. Nevertheless, the PUC rejected FOH/MCEA's arguments and declined to combine contested case proceedings for the two projects.¹⁰

FOH and MCEA believe that OAH retains the authority to consolidate the two contested cases under Minn. R. 1400.6350, and we continue to support consolidation to avoid inconsistent outcomes and to conserve limited resources of both OAH and intervenors. Should that path not be taken, the separation of dockets unfortunately creates a need to delay the contested case for Line 3. FOH and MCEA believe the Line 3 Docket should not occur concurrently with the Sandpiper docket, because a critical component of the Line 3 Replacement Project is to follow the corridor of

⁹ See Docket No. PL-9/CN-14-916, PL-9/PPL-15-137, *ORDER JOINING NEED AND ROUTING DOCKETS*, February 1, 2016 at 6.

¹⁰ *Id.* at 8.

the Sandpiper Pipeline from Clearbrook to Superior. An integral purpose of the Line 3 project, then, is predicated on successfully obtaining a Certificate of Need and Route Permit on the Sandpiper Pipeline. If the two dockets are conducted concurrently but in separate dockets, it could result in inconsistent decisions, such as a denial of the Sandpiper CON and a granting of the Line 3 CON. This would be an absurd result. Line 3 would be decommissioned and a completely new pipeline would be built in a completely new location, over pristine greenfields and under rivers, even though its entire reason for being, routing-wise, was no longer on the table.

To prevent this result, FOH and MCEA recommend that the Line 3 contested case proceedings be conducted at a schedule that lags the schedule for the Sandpiper docket. The extent of that lag will assuredly be vigorously contested, but FOH and MCEA recommend that, at a minimum, the public hearings on Line 3 take place after the Commission's written order in the Sandpiper docket, which would be a lag of approximately 30 weeks.

Anything less would jeopardize the integrity of the Line 3 contested case proceedings. It is simply not feasible to attempt to draft an ALJ decision on whether Line 3 should be constructed along the Sandpiper corridor unless it has been definitely established that the Sandpiper corridor will indeed be in the Applicant's preferred location, if it is constructed at all.

Sincerely,

/s/ Kevin P. Lee

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EXHIBIT _____

EIS Milestones and Contested Case Process when Intervenor Direct is Filed after the FINAL EIS

(Timing of the EIS milestones is taken from Section 8.0 of the Sandpiper Draft Scoping Decision Document, providing a “tentative schedule for development and issuance of the EIS” (emphasis in original))

Under this schedule, both the 280-day and the 30-day deadlines would need to be waived.

| EIS Milestone | Contested Case Milestone | Date |
|---|---------------------------------|----------------|
| Scoping EAW and Draft Scoping Decision Document Issued | | April 11, 2016 |
| Public Scoping Meeting(s) | | April-May 2016 |
| Close of Public Comment Period | | May 26, 2016 |
| Final Scoping Decision Document | | June 2016 |
| EIS Preparation Notice Published (Start of 280-day EIS process) | | August 2016 |
| Draft EIS Issued for Public Review and Comment | | January 2017 |
| Final EIS Issued | | May 2017 |
| EIS Adequacy Determination | Intervenor Direct Testimony | June 2017 |
| | Rebuttal Testimony | |
| | Sur-Rebuttal Testimony | |
| | Public Hearings | |
| | Initial Post-Hearing Briefs | |
| | Reply Post-Hearing Briefs | |
| | ALJ Decision | |
| | Exceptions to ALJ Decision | |
| | Commission Meeting | |
| | Commission Written Order | February 2018 |

30-day deadline interval

Approx. 300 days (280-day deadline interval)

258 days, per NDPC Petition

EXHIBIT _____

EIS Milestones and Contested Case Process when Intervenor Direct is Filed after the DRAFT EIS

(Timing of the EIS milestones is taken from Section 8.0 of the Sandpiper Draft Scoping Decision Document, providing a “tentative schedule for development and issuance of the EIS” (emphasis in original))

| EIS Milestone | Contested Case Milestone | Date |
|---|---------------------------------|----------------------|
| Scoping EAW and Draft Scoping Decision Document Issued | | April 11, 2016 |
| Public Scoping Meeting(s) | | April-May 2016 |
| Close of Public Comment Period | | May 26, 2016 |
| Final Scoping Decision Document | | June 2016 |
| EIS Preparation Notice Published (Start of 280-day EIS process) | | August 2016 |
| Draft EIS Issued for Public Review and Comment | | January 2017 |
| | Intervenor Direct Testimony | <i>February 2017</i> |
| | Rebuttal Testimony | <i>April 2017</i> |
| Final EIS Issued | Sur-Rebuttal Testimony | May 2017 |
| EIS Adequacy Determination | Public Hearings | June 2017 |
| | Initial Post-Hearing Briefs | |
| | Reply Post-Hearing Briefs | |
| | ALJ Decision | |
| | Exceptions to ALJ Decision | |
| | Commission Meeting | |
| | Commission Written Order | <i>October 2017</i> |

30-day deadline interval

Approx. 300 days (280-day deadline interval)

258 days, per NDPC petition

Under this schedule, in which Intervenor Direct is filed after the Draft EIS, both the 280-day and 30-day deadlines are still not met. The 280 day deadline is not accommodated by the DOC’s tentative EIS preparation schedule itself. Even if that process is somehow accelerated and finishes within 280 days, the 30 day deadline (from EIS adequacy determination to Commission Written Order) would still be violated. If the adequacy determination is delayed to September 2017 to meet the 30 day deadline, then the 280 day deadline would again be violated. One of these deadlines can be accommodated by scheduling, but not both.