

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
St. Paul, MN 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matt Schuenger	Commissioner
John Tuma	Commissioner
Katie Sieben	Commissioner

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

MPUC PL-9/CN-14-916;
OAH 65-2500-32764;
OAH Sub-Docket No. 8-2500-34602

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

MPUC PL-9/PPL-15-137;
OAH 65-2500-33377;
OAH Sub-Docket No. 8-2500-34602

**MEMORANDUM OF INTERVENOR FRIENDS OF THE HEADWATERS IN SUPPORT
OF MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

This is the case involving Enbridge Energy’s applications for a certificate of need (CON) and a routing permit (RP) for its proposed Line 3 crude oil pipeline.

On August 17, 2017, the department of commerce’s energy and environmental review and analysis section (DOC-EERA) published a “final environmental impact statement” (FEIS) for the Line 3 project. Under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, subd. 2a(h), the Minnesota Public Utilities Commission (PUC) must determine

whether the FEIS meets MEPA’s “adequacy” requirements before it can decide on either the CON or RP applications. *Id.*, subd. 2b.

The PUC decided to ask for the appointment of a second ALJ¹ to take submissions, prepare a report, and make recommendations on whether the FEIS meets MEPA’s requirements. Judge Eric Lipman was appointed to complete the task.

In 2015, however, Judge Lipman took evidence, and made findings and conclusions and a recommendation on another proposed Enbridge pipeline—the “Sandpiper” pipeline—which would have followed the same route and involved the same socioeconomic and environmental considerations as the proposed Line 3. Judge Lipman concluded, among other things, that none of the environmental concerns raised about Sandpiper or its proposed route were persuasive and none of them should stand in the way of the PUC granting the requested CON and RP. Intervenor Friends of the Headwaters, and other aligned intervenors, are therefore put in the position of trying to convince Judge Lipman that his previous findings and conclusions on this identical pipeline route in 2015 were wrong.

Because of his previous decision on nearly identical facts and environmental concerns, Judge Lipman cannot be impartial in this case. Intervenor Friends of the Headwaters therefore requests that he be disqualified, and a new administrative law judge appointed to continue these proceedings.

¹ The CON and RP dockets have been assigned to Judge Ann O’Reilly.

II. ARGUMENT

BECAUSE OF HIS PREVIOUS FINDINGS, CONCLUSIONS AND RECOMMENDATION INVOLVING THE SAME OIL PIPELINE ROUTE, JUDGE LIPMAN CANNOT BE IMPARTIAL IN THIS CASE AND SHOULD BE DISQUALIFIED.

Minn. Rules pt.1400.6400 provides that:

The judge shall withdraw from participation in a contested case at any time if he or she deems himself or herself disqualified for any reason. Upon the filing in good faith by a party of an affidavit of prejudice, the chief judge shall determine the matter as a part of the record provided the affidavit shall be filed no later than five days prior to the date set for hearing. A judge must be removed upon an affirmative showing of prejudice or bias. A judge may not be removed merely because of rulings on prior cases.

See also Minn. Rules of Judicial Conduct 2.11(A)(“ A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . . .”)

In this case, Judge Lipman has been appointed to review the “adequacy” of an environmental impact statement under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, subd. 2a(h), of a proposed crude oil pipeline, Enbridge Line 3. That will require him to evaluate the credibility and significance of the environmental concerns that have been raised about the project, and determine whether DOC-EERA (and the PUC) have taken the required “hard look” at those concerns before the PUC can consider whether to issue a certificate of need or a routing permit.

The problem is that Judge Lipman has already decided that those environmental concerns should *not* impede any PUC decision to grant a CON or a RP. In a prior proceeding, involving Enbridge’s then-proposed Sandpiper pipeline, which would run along the same route, Judge Lipman minimized the concerns about oil spills and damages to natural resources along that route. *See* Lipman order, attached to the Affidavit of Prejudice. Objectively, there is very little

likelihood that Judge Lipman will reverse himself and make the opposite findings now, no matter what evidence or commentary is submitted.

The standard for disqualification is an objective one. No one need inquire into Judge Lipman's state of mind. The test for "prejudice or bias" in Minn. R. 1400.6400 is the same as in the federal recusal statute, 28 U.S.C. § 455(a), and in the Supreme Court's due process jurisprudence. As the Court just reaffirmed this past Term, the test is not "whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2017). Judge Lipman is not "likely" to be neutral in this docket.

Minn. R. 1400.6400 does, of course, say that "a judge may not be removed merely because of rulings on prior cases." And, if FOH was arguing that Judge Lipman should be disqualified merely because of previous decisions on environmental issues in other cases, that caution would apply. But here, the judge has previously ruled on the environmental issues raised by this particular set of facts, this particular geography, and this particular material to be transported. That, objectively, gives him a personal stake in the outcome. It is difficult to conclude anything but that the result is preordained.

This is a highly unusual set of circumstances. That is why there should be little concern a decision to disqualify in this case will open the floodgates to disqualification requests whenever an ALJ issues an adverse prehearing ruling in a case, or whenever an ALJ has previously disagreed with a party's position on a legal question. This is the rare case where, in a prior adjudication, an ALJ has already made findings on many of the central factual issues in the new case, but no party had the opportunity for a court appeal in the prior case. That unique set of

circumstances is what casts doubt on the credibility of this process, and justifies disqualification, and assignment of a new judge who can evaluate the facts and arguments fairly.

III. CONCLUSION

For the reasons stated above, Intervenor Friends of the Headwaters requests that its motion to disqualify Administrative Law Judge Lipman from this docket, and to appoint a new administrative law judge for this “sub-docket” be granted.

Respectfully Submitted,

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/s/ Scott Strand
Scott Strand
Environmental Law & Policy Center
15 South 5th Street, Suite 500
Minneapolis, MN 55402
(612) 386-6409