

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 Schuerger	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

AFFIDAVIT OF PREJUDICE

Scott Strand, being duly sworn, states as follows:

1. I am a senior attorney at the Environmental Law and Policy Center (ELPC) and represent Intervenor Friends of the Headwaters in this matter.
2. This case involves the Minnesota portion of Line 3, a crude oil pipeline proposed by Enbridge Energy, Limited Partnership (“Enbridge”).
3. The Line 3 project is currently before the Public Utilities Commission (PUC) on Enbridge’s application for a Certificate of Need (CON) and a Route Permit (RP). *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 65-2500-32764, MPUC PL-9/CN-14-916, and 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, OAH 65-2500-33377, MPUC PL-9/PPL-15-137. Administrative Law Judge Ann O'Reilly has been assigned to those dockets.

4. The certificate of need and routing permit applications for the Line 3 project have also been the subject of environmental review under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, conducted by the Department of Commerce energy environmental review and analysis section (DOC-EERA) for the PUC. Since shortly after Enbridge's applications were filed, DOC-EERA has been preparing a full environmental impact statement (EIS) for the project.
5. As the responsible government unit, the PUC is obligated to determine whether the EIS prepared by DOC-EERA meets the "adequacy" requirement of MEPA. Minn. Stat. § 116D.04, subd. 2a(h).
6. On August 4, 2017, the PUC issued an order seeking appointment of a second Administrative Law Judge (ALJ) to take comments and prepare a report and recommendation to the PUC on whether the anticipated "final environmental impact statement (FEIS)" from DOC-EERA met MEPA's adequacy requirements.
7. Shortly thereafter, Administrative Law Judge Eric Lipman was appointed to be that second ALJ responsible for recommending to the PUC whether it should find the FEIS adequate or not. On August 14, 2017, Judge Lipman issued a "First FEIS Scheduling Order", scheduling an August 28, 2017 Status and Scheduling Conference.
8. DOC-EERA published what they labelled a "final" EIS on August 17, 2017, and a public comment period is currently underway.
9. This is not the first time Judge Lipman has been asked to rule on the environmental issues involved in this particular pipeline route. Judge Lipman was previously the Administrative Law Judge assigned to *In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota*, OAH Docket No. 8-2500-31259, PUC Docket No. PL-6668/CN-13-473 and *In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, OAH Docket No. 8-2500-31260, PUC Docket No. PL-6668/PPL-13-474.
10. Those dockets involved Enbridge's Certificate of Need and Routing Permit applications for its proposed "Sandpiper" pipeline, which would have carried crude oil from the Bakken shale formation in North Dakota across Minnesota to Enbridge's terminal in Superior, Wisconsin.
11. The Sandpiper pipeline would have followed a nearly identical path through the state as Enbridge has proposed for its Line 3 project, and involved many of the same potential environmental impacts. Both the Sandpiper and Line 3 routes run near the Mississippi Headwaters, through the central sands area with its vulnerable

groundwater, and across a new corridor with many lakes and wetland complexes, along with other important natural resources.

12. Judge Lipman conducted hearings and, on April 13, 2015, issued a report and recommendation that the PUC approve Enbridge's CON request and approve Enbridge's proposed route. Judge Lipman's Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendation are attached as Exhibit A.
13. Judge Lipman's report and recommendation on the Sandpiper pipeline addressed many of the same environmental concerns over the proposed pipeline route that are currently before the OAH and the PUC in the Line 3 case. Judge Lipman resolved all of those issues in Enbridge's favor, crediting many of the same witnesses whose testimony Enbridge has submitted in favor of its Line 3 applications.
14. Judge Lipman has already concluded once, among other things, that:
 - a. Lifecycle issues related to crude oil, greenhouse gas emissions, and climate change are outside the scope of what the PUC may consider. *Id.*, para. 530.
 - b. Enbridge's emergency response plans and compliance with federal pipeline safety regulations assure that Enbridge can operate a crude oil pipeline in this corridor safely. *Id.*, paras. 244-255.
 - c. New pipeline technology will substantially reduce spill risks. *Id.*, para. 252.
 - d. Not putting the new pipeline in place means that the same amount of crude oil will be transported by rail. *Id.*, para. 259.
 - e. Enbridge's proposed route will pose fewer environmental risks than all other proposed routes. *Id.*, paras. 263-279, 342-487.
 - f. The extensive concerns raised by the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency about the proposed route need not be analyzed or evaluated. *Id.*, para. 618.
15. All of these issues are discussed in the August 17, 2015, FEIS for Line 3, and all of these issues are directly before Judge Lipman again in this "sub-docket" to evaluate the adequacy of the FEIS under the Minnesota Environmental Policy Act (MEPA). Judge Lipman is unlikely to, in effect, reverse himself on any of these points.
16. The appointment of Judge Lipman to handle this part of the Line 3 matter has cast doubt on the credibility of the entire process. Many of Intervenor FOH's members believe Judge Lipman cannot be impartial because of his previous stated opinions on this crude oil pipeline route, and that his appointment is a signal that the PUC has already decided this case in Enbridge's favor.
17. Appointment of a different ALJ to handle this matter would help restore the public's faith that their concerns are receiving a fair hearing.
18. If Judge Lipman had stated the same views on the environmental issues involved in this proposed oil pipeline route in a magazine article or another public publication, he would have needed to recuse himself or be disqualified. The fact that he stated these

views in a formal ALJ report and recommendations should not insulate him from needing to come off this particular case.

19. The due process clause can require recusal even when a judge has no actual bias. 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 (2016). Objectively, a judge with the same degree of prior involvement in the adjudication of the issues presented by this case as Judge Lipman could not be wholly disinterested in the outcome. Disqualification and appointment of a new administrative law judge is therefore appropriate.

Respectfully submitted,

/s/ Scott Strand
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STATE OF IL)
COUNTY OF Cook) SCT.

The foregoing instrument was subscribed, sworn to and acknowledged before me by

Elizabeth Prakel on this the 1st day of September, 2017.

Elizabeth Prakel
Notary Public
My Commission Expires: 2017

