

FILED

August 18, 2020

**STATE OF MINNESOTA
IN COURT OF APPEALS**

**OFFICE OF
APPELLATE COURTS**

CASE TITLE:

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

**PETITIONERS' STATEMENT
OF THE CASE**

**APPELLATE COURT
CASE NUMBER: _____**

Friends of the Headwaters,

Petitioner,

**MN PUBLIC UTILITIES
COMMISSION NUMBERS:**
PL-9/CN-14-916 and
PL-9/PPL-15-137

vs.

**DATE OF NOTICE OF
DECISION:**
July 20, 2020

Minnesota Public Utilities Commission,

Respondent.

1. Court or agency of case origination and name of presiding judge or hearing officer:

Minnesota Public Utilities Commission (PUC), Katie Sieben, Commission Chair

2. Jurisdictional statement:

Certiorari appeal under the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.63-.68. MAPA requires that a petition for writ of certiorari be served and filed not more than 30 days after notice of the agency's final decision. The date of the PUC's final decision is not clear. Under Minn. Stat. § 216B.27, a PUC decision becomes final and appealable when the Commission denies a petition for rehearing and reconsideration. That occurred on July 20, 2020.

Under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §

116D.04, subd. 10, however, the time for appealing a responsible government unit's decision on the adequacy of an environmental impact statement (EIS) is 30 days after notice of the decision is published in the Environmental Quality Board's *EQB Monitor*. The PUC has not published notice of its EIS adequacy decision in the *EQB Monitor*.

3. State type of litigation and designate any statutes at issue:

Environmental review—Minnesota Environmental Policy Act (MEPA),
Minn. Stat. § 116D.04, subds. 2a-5b

Environment—prohibition of state action likely to cause pollution,
impairment, or destruction of Minnesota natural resources if feasible and prudent
alternative available—MEPA, Minn. Stat. § 116D.04, subd. 6

Utility regulation—certificate of need for large energy facility—Minn. Stat. §
216B.243.

Pipeline regulation—routing permit—Minn. Stat. § 216G.02

4. Brief description of claims, defenses, issues litigated, and result below:

On April 24, 2015, Enbridge Energy, Limited Partnership (“Enbridge”) applied to the Minnesota Public Utilities Commission (“PUC”) for a certificate of need (“CN”) and a route permit (“RP”) for a new pipeline to carry crude oil from the Canadian tar sands region across Minnesota to Enbridge’s terminal and tank farm in Superior, Wisconsin.

The PUC directed the energy environmental review and analysis division of the Minnesota department of commerce (DOC-EERA) to prepare an environmental impact

statement (EIS) for the project, as required by the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, and sent the CN and RP application to the Office of Administrative Hearings (“OAH”) for a contested case hearing under the Minnesota Administrative Procedure Act.

The PUC received a draft EIS from DOC-EERA on August 17, 2017 and initially rejected it as not “adequate” under MEPA. DOC-EERA prepared a “first revised” draft EIS and submitted it to the PUC on February 12, 2018. This time, however, the PUC found it “adequate,” with its decision becoming final on May 1, 2018.

While the original EIS was still being prepared, the PUC went ahead with the contested case process for the certificate of need and the route permit. Administrative Law Judge Ann O’Reilly conducted a hearing on November 1, 2017, and then issued findings of fact, conclusions of law, and a recommendation that Enbridge’s application for a CN and an RP be denied. The ALJ concluded that Enbridge had not proven that demand justified building a new pipeline, which had been the central contention of the commerce department’s division of energy resources, which opposed granting the certificate of need.

The ALJ found that opening up a new pipeline corridor through Minnesota lake country would damage those water resources, and that a spill could be catastrophic. The ALJ also found that, if construction of the pipeline led to the extraction and consumption of more Canadian tar sands oil, the climate costs would run into the billions of dollars.

On September 5, 2018, however, the PUC rejected the ALJ's recommendation and granted Enbridge's application for a certificate of need for the project. Then, on October 26, 2018, the PUC granted Enbridge's application for a routing permit to Enbridge on September 5, 2018. The Certificate of Need became final on November 21, 2018, and the Routing Permit became final on January 18, 2019.

Those three decisions—the EIS adequacy finding, which was published in the *EQB Monitor*, the certificate of need, and the routing permit—were all appealed to this Court. The Court took up the EIS adequacy finding first. On June 3, 2019, after briefing and oral argument, this Court reversed the PUC's EIS adequacy finding on the grounds that the EIS failed to evaluate the potential impact of a catastrophic oil spill that might reach Lake Superior. *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d 12 (Minn. Ct. App. 2019). In light of that decision, this Court dismissed the certiorari appeals of the Certificate of Need and Routing Permit, without prejudice, as well, and the cases were all remanded to the PUC.

On remand, the PUC again directed the DOC-EERA to revise the EIS in light of this Court's decision. DOC-EERA did not consult with any of the intervening parties, but decided to have its consultants do a study of how far a crude oil spill would travel if a breach occurred where the proposed pipeline crossed Little Otter Creek. The Little Otter Creek crossing is over 30 miles from Lake Superior, although there are several other river crossings much closer to the Lake. DOC-EERA concluded that, while a significant spill at Little Otter Creek likely would do considerable damage to the immediate surrounding area, it would be diluted downstream and would not likely

reach the Lake. DOC-EERA submitted that as its “second revised” EIS on December 9, 2019.

Petitioner and several other parties objected on the grounds that DOC-EERA ignored several water crossing locations much closer to Lake Superior, including the Pokegama, Little Pokegama, and Nemadji River crossings in Wisconsin. DOC-EERA’s response was that it could not consider those crossings because they were not in Minnesota, because the Wisconsin leg of Line 3 had already been constructed, and because the Little Otter Creek crossing involved faster moving water and a downstream dam, which was not typical of the water crossings along the Line 3 route. Petitioner and others also objected to the assumptions DOC-EERA made—immediate detection of any spill, total shutdown within minutes—to minimize the potential reach of a major spill.

The PUC nevertheless found the “second revised” EIS to be adequate under MEPA at its hearing on January 31, 2020. On that same day, the PUC voted to reissue the original Certificate of Need and Routing Permit from 2018. This time, however, Commissioner Schuerger dissented, on the grounds that continued flattening and declines in demand for oil had greatly weakened any economic case for the project, and could no longer justify the substantial environmental and climate risks. Commissioner Schuerger noted that changed circumstances in the oil industry and in Enbridge’s business justified a new contested case.

Several weeks after the PUC’s vote at the end of January, the covid-19 pandemic led to a collapse in demand for oil around the world, and refineries cut their

production. Oil industry analysts questioned whether demand for refined petroleum products would ever return to 2019 levels. Nevertheless, the PUC issued its written order finding the second revised EIS adequate, and regranting the certificate of need and routing permit on May 1, 2020.

Petitioner and several other parties petitioned the PUC to reconsider its decisions in light of the new facts and changed circumstances, but the PUC, again over Commissioner Schuerger's dissent, denied the petitions and issued their final order on July 20, 2020. The PUC did not, however, publish its final decision on the adequacy of the EIS in the *EQB Monitor*, as required by Minn. Stat. § 116D.04, subd. 10.

5. Specific issues proposed to be raised on appeal

- a. Whether the PUC's "second revised" environmental impact statement for the Line 3 project meets the requirements spelled out by this Court when it reversed the PUC's EIS adequacy finding in *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d 12 (Minn. Ct. App. 2019)?
- b. Whether the PUC could lawfully grant a certificate of need for the Line 3 project when: (i) there is no demand for petroleum products sufficient to justify the project; (ii) the construction and operation of the project poses a significant risk to Minnesota's natural resources; (iii) there are feasible and prudent alternatives; and (iv) the additional extraction and consumption of oil that would be facilitated by this project poses unacceptable climate costs?
- c. Whether the PUC could lawfully grant a routing permit for Enbridge's

proposed route when there are feasible and prudent alternative routes that would pose much less risk to Minnesota's natural resources?

Those issues must be considered in that order. Without an adequate environmental impact statement, the certificate of need and routing permit are invalid. The court may wish to consider bifurcating this appeal to consider the environmental review issue first, since a reversal on that issue will make briefing, argument, and judicial consideration of the certificate of need and routing permit issues unnecessary.

6. Related appeals/cases

There were three prior appeals of previous PUC decisions involving the line 3 project. On June 3, 2019, this Court reversed the PUC's decision and found the "first revised" environmental impact statement did not meet the requirements of MEPS. The Court then dismissed the certificate of need and routing permit appeals in light of its ruling on the EIS.

There is also a contested case pending before the Minnesota Pollution Control Agency (MPCA) involving the MPCA's draft certification under section 401 of the Clean Water Act that the line 3 project will not violate state water quality standards. The final agency decision is targeted for November 15, 2020, and appeals are likely.

7. Contents of record.

Is a transcript necessary to review the issues on appeal?

Yes (X) No ()

If yes, full (X) or partial () transcript?

If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary?

Yes () No (X)

8. Is oral argument requested?

Yes (X) No ()

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2?

Yes () No (X)

9. Identify the type of brief to be filed:

Formal brief under Rule 128.02

10. Names, addresses, and telephone numbers of attorney for petitioner and respondent.

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DATED: August 18, 2020

/s/ Scott Strand

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