

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

**ORDER DENYING  
MOTION TO AMEND  
SCHEDULING ORDER  
OR CERTIFY ISSUE  
TO COMMISSION**

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

This matter comes before Administrative Law Judge Ann C. O'Reilly on a Motion by Friends of the Headwaters to Reconsider and Amend the August 7, 2017 Fifth Prehearing Order or, in the Alternative, to Certify Scheduling Issues to Public Utilities Commission. The Motion was filed on August 22 and 23, 2017.<sup>1</sup> The Motion is supported by the White Earth Band of Ojibwe, Fond Du Lac Band of Lake Superior Chippewa, Honor the Earth, the Sierra Club, Youth Climate Intervenors, and Northern Water Alliance of Minnesota.

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

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

---

<sup>1</sup> The Motion was filed in the Route Permit docket (PPL-15-137) on August 22, 2017, and filed in the Certificate of Need docket (CN-14-916) on August 23, 2017.

Peter Madsen, Assistant Attorney General, appears on behalf of the Department of Commerce - Division of Energy Resources (DOC-DER).

Brian Meloy, Stinson, Leonard Street, appears on behalf of Kennecott Exploration Company (Kennecott).

Kevin Pranis appears on behalf of Laborers' District Council of Minnesota and North Dakota (Laborers' Council).

Anna Friedlander and Ellen Boardman, O'Donoghue & O'Donoghue, LLP, appear 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, appears on behalf of Shippers for Secure, Reliable and Economical Petroleum Transportation (Shippers).

Leili Fatehi, Advocate, PLLC, appears on behalf of the Sierra Club (Sierra Club).

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

Akilah Sanders-Reed appears on behalf of Youth Climate Intervenors (Youth Climate).

Frank Bibeau and Paul Blackburn appear on behalf of Honor the Earth.

David Zoll, Lockridge, Grindal, Nauen, PLLP, appears on behalf of the Mille Lacs Band of Ojibwe (Mille Lacs Band).

Joseph Plumer, Plumer Law Office, appears on behalf of the White Earth Band of Ojibwe (White Earth Band) and Red Lake Band of Chippewa Indians (Red Lake Band).

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

Chris Allery, Esq. appears on behalf of the Leech Lake Band of Ojibwe (Leech Lake Band).

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

Donovan and Anna Dyrdal (Dyrdals) appear on their own behalf and without legal counsel.

Bret Eknes and Scott Ek are representatives for the Minnesota Public Utilities Commission (Commission).

Based on the record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### ORDER

1. Friends of the Headwaters' Motion to Reconsider Fifth Prehearing Order is **DENIED**.
2. Friends of the Headwaters' Motion to Certify Scheduling Issues to the Commission is **DENIED**.

Date: September 8, 2017



---

ANN C. O'REILLY  
Administrative Law Judge

### MEMORANDUM

#### FACTUAL AND PROCEDURAL BACKGROUND

This matter involves applications for a Certificate of Need (CON) and a Route Permit filed by Enbridge for the construction and siting of an oil pipeline (Line 3) and related facilities extending from the North Dakota-Minnesota border in Kittson County to the Minnesota-Wisconsin border near Superior, Wisconsin (Line 3 Project or Project).<sup>2</sup> The proposed pipeline would replace Enbridge's existing Line 3 pipeline, but would be two inches greater in diameter (36 inches) and provide an increased pumping capacity of up to 760,000 barrels of crude oil per day.<sup>3</sup>

#### Certificate of Need Application

Enbridge filed its application for a CON on October 24, 2014.<sup>4</sup> On August 12, 2015, the Commission issued an order finding the CON application substantially complete and referred the matter to the Office of Administrative Hearings

---

<sup>2</sup> Order Joining Need and Routing Dockets at 1 (Feb. 1, 2016) (eDocket Nos. 20162-117877-02 (CN); 20162-117889-01 (R)). ["R" denotes Route Permit docket and "CN" denotes Certificate of Need docket.]

<sup>3</sup> Order Denying Motions, Approving Scoping Decision as Modified, and Requiring Expanded Notice at 3-4 (Nov. 30, 2016) (eDocket Nos. 201611-126917-02 (CN); 201611-126917-01 (R)).

<sup>4</sup> Petition for a Certificate of Need (Oct. 24, 2014) (eDocket No. 201410-104138-02).

(OAH) for a contested case proceeding on the CON.<sup>5</sup> In its Order, the Commission noted that its rules for pipelines, Minn. R. ch. 7853, “do not call for the preparation of a separate environmental document within that [CON] process.”<sup>6</sup> Nonetheless, the Commission authorized the DOC-EERA to prepare “an environmental analysis of the Line 3 proposal.”<sup>7</sup>

The Order also directed the administrative law judge (ALJ) to: (1) convene at least one public hearing on the application; (2) work with Commission staff in developing hearing notices; (3) emphasize the one-year statutory timeframe for the Commission to make a final decision on the application and encourage the parties/participant to adhere to that schedule; (4) prepare a report consisting of findings of fact, conclusions, and recommendations on the merits of the proposed Project and alternatives; and (5) in her report, provide comments and recommendations on the conditions and provisions of the CON.<sup>8</sup> The Commission did not order the ALJ to make recommendations on or determine the adequacy of the DOC-EERA’s environmental review.

### **Route Permit Application**

On April 24, 2015, Enbridge filed an application for a Route Permit for the Line 3 Project.<sup>9</sup> At the time it filed its application for a Route Permit, a related pipeline project was also being considered by the Commission -- the Sandpiper Pipeline Project.<sup>10</sup>

On September 14, 2015, the Minnesota Court of Appeals issued a decision in the Sandpiper Pipeline Project case, which would ultimately impact the proceedings in this matter.<sup>11</sup> In the *Sandpiper* case, the appeals court ruled that the Minnesota Environmental Policy Act (MEPA or Act), Minn. Stat. ch. 116D, requires the completion of an environmental impact statement (EIS) before the Commission can make a final decision on a certificate of need for a large oil pipeline.<sup>12</sup> Consequently, in the Line 3 matter, the Commission is required to complete an EIS prior to deciding on either Enbridge’s CON or Route Permit applications. Based upon the court’s order in *Sandpiper*, the Line 3 Project cannot be started and no permits can be issued by the Commission until the EIS is completed and determined adequate under MEPA.<sup>13</sup>

---

<sup>5</sup> Order Finding Application Substantially Complete and Varying Timelines; Notice and Order for Hearing (Aug. 12, 2015) (eDocket No. 20158-113180-01).

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 11-12.

<sup>9</sup> Application for a Route Permit (Apr. 24, 2015) (eDocket No. 20154-109660-02).

<sup>10</sup> *In re Application of North Dakota Pipeline Co. LLC for a Certificate of Need for the Sandpiper Pipeline Project*, MPUC Docket No. PL-6668/CN-13-473; *In re Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, MPUC Docket No. PL-6668/PPL-13-474.

<sup>11</sup> *In re Application of North Dakota Pipeline Company LLC*, 869 N.W.2d 693 (Minn. Ct. App. 2015), *review denied* (Dec. 15, 2015) (referred to herein as the “*Sandpiper* case”).

<sup>12</sup> *Id.* at 699.

<sup>13</sup> *Id.* at 697.

According to Minn. Stat. § 116D.04, subd. 2a(j) (2017),<sup>14</sup> the “responsible governmental authority” (RGU) shall determine the adequacy of the EIS within 280 days after notice of its preparation “unless the time is extended by consent of the parties or by the governor for good cause.” The Commission is the RGU for determining the adequacy of the EIS for pipeline routing projects.<sup>15</sup>

### **Joinder of CON and Route Dockets**

On February 1, 2016, the Commission joined the Line 3 CON and Route Permit dockets.<sup>16</sup> Based upon the court’s decision in the *Sandpiper* case, the Commission authorized the DOC-EERA to prepare a combined EIS, to review both the need and the routes for the Project.<sup>17</sup> In addition, the Commission’s Order required “completion of the final EIS prior to the filing of intervenor direct testimony.”<sup>18</sup> 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.”<sup>19</sup>

At the same time that the Commission issued its order joining the CON and Route Permit dockets, the Commission issued a Notice of Hearing referring both the CON and Route Permit matters to the OAH for a combined contested case proceeding.<sup>20</sup> The Commission’s Order directed the ALJ to: (1) emphasize the statutory timeframe for the Commission to make final decisions on the applications and encourage parties to adhere to that schedule; (2) prepare a report containing findings of fact, conclusions, and recommendations on the merits of the Project and routes, applying the legal routing criteria; and (3) in her report, provide comments and recommendations on the conditions and provisions of the routing permit requested.<sup>21</sup> The Commission did not request or authorize the ALJ to review or provide recommendations on the adequacy of the EIS for the Commission.

### **Third Prehearing Conference (Sept. 27, 2016)**

On September 27, 2016, the ALJ held a Third Prehearing Conference to discuss the scheduling of the combined contested case proceedings. The DOC-EERA, White Earth Band, FOH, Honor the Earth, Sierra Club, as well as staff and legal counsel for the Commission, were present at the conference, along with various other parties.<sup>22</sup> The DOC-EERA advised that it anticipated issuing a Draft Environmental Impact Statement

---

<sup>14</sup> Formerly Minn. Stat. § 116D.04, subd. 2a(h), see 2017 Minn. Laws ch. 93, art. 2, § 137.

<sup>15</sup> Minn. R. 4410.2800, subp. 1, .4400, subp. 24 (2017).

<sup>16</sup> Order Joining Need and Routing Dockets at 1 (Feb. 1, 2016) (eDocket Nos. 20162-117877-02 (CN); 20162-117889-01 (R)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> Notice of Hearing (Feb. 1, 2016) (eDocket No. 20162-117889-01).

<sup>21</sup> *Id.* at 10.

<sup>22</sup> Second Amended Third Prehearing Order (Oct. 31, 2017) (eDocket Nos. 201610-126100-01 (CN); 201610-126100-02(R)).

(DEIS) by April 3, 2017, and a Final Environmental Impact Statement (FEIS) by August 10, 2017.<sup>23</sup> Based upon the dates proposed by the DOC-EERA, the parties discussed the timing of the public hearings, evidentiary hearings, and briefing schedule. The DOC-EERA did not address the 280-day timeframe for EIS adequacy determination when it advised the ALJ of the anticipated DEIS and FEIS completion dates.

In light of the DOC-EERA's anticipated DEIS and FEIS issuance dates, Enbridge submitted to the ALJ and circulated among the parties two proposed hearing schedules.<sup>24</sup> The first schedule proposed the filing of the intervenors' direct testimony after the issuance of the DEIS.<sup>25</sup> The other schedule proposed the filing of the intervenors' direct testimony before the issuance of either the DEIS or FEIS, to expedite the hearings.<sup>26</sup> Both of Enbridge's proposals identified a 280-day deadline for the EIS adequacy determination, as approximately September 7, 2017.<sup>27</sup> Due to the amount of time required for the DOC-EERA to prepare the DEIS and FEIS, the 280-day deadline left little time for the Commission to determine the adequacy of the EIS.

During the Third Prehearing Conference, the Judge advised the parties that she intended to comply with the Commission's instructions in its February 1, 2016 Order Joining the Need and Route Dockets and schedule the intervenor direct testimony filing deadline after the issuance of the FEIS.<sup>28</sup> At no time during the prehearing conference did FOH or any intervening party request that the ALJ include the 280-day EIS adequacy determination deadline in the scheduling order.<sup>29</sup> Moreover, no party requested that the public and evidentiary hearings -- or the deadline for intervenor direct testimony -- be scheduled after the EIS adequacy determination.<sup>30</sup> Rather, FOH and the intervening parties were primarily concerned that the intervenor direct testimony filing deadline follow the issuance of the FEIS, not the Commission's EIS adequacy determination.<sup>31</sup>

The ALJ specifically noted that she would include Enbridge's proposed schedules as attachments to her prehearing order and that if the Commission requested a different schedule, the ALJ would schedule another prehearing conference to amend her scheduling order to address any modifications requested by the Commission.<sup>32</sup> The Third

---

<sup>23</sup> Prehearing Conference Transcript (Tr.) at 12 (Sept. 27, 2016). As is the practice in cases like this, the ALJ deferred to the DOC-EERA for the selection of DEIS and FEIS completion dates because the DOC-EERA is in the best position to know how long the review will take to complete. The DOC-EERA was no doubt aware of the 280-day adequacy determination deadline required by law. As a result, the DOC-EERA must complete the review as soon as possible to allow the Commission sufficient time to complete its adequacy determination within 280 days.

<sup>24</sup> Amended Third Prehearing Order, Exhibit (Ex.) A-B (Oct. 14, 2017) (eDocket Nos. 201610-125715-02 (CN); 201610-125715-01 (R)). Notably, no other party submitted a proposed schedule.

<sup>25</sup> *Id.*, Ex. A.

<sup>26</sup> *Id.*, Ex. B.

<sup>27</sup> *Id.* The EIS adequacy determination deadline assumed an EIS preparation notice of December 5, 2016.

<sup>28</sup> Prehearing Conference Tr. at 9-12 (Sept. 27, 2016).

<sup>29</sup> See *generally id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 12; see also Second Amended Third Prehearing Order (Oct. 31, 2017) (eDocket Nos. 201610-126100-01 (CN); 201610-126100-02(R)).

Prehearing Order set the deadline to file intervenor direct testimony as September 11, 2017; set a proposed timeframe for the public hearings between August 15 and October 31, 2017; and scheduled an evidentiary hearing from November 6-10, 2017.<sup>33</sup> No party requested any changes to the ALJ's Third Prehearing Order or the amendments to that Order.

### **Extension of DEIS Due Date and Fourth Prehearing Conference**

On April 3, 2017, the DOC-EERA notified the ALJ that it would not be issuing the DEIS until May 15, 2017, approximately 42 days later than originally anticipated.<sup>34</sup>

A Fourth Prehearing Conference was held on May 15, 2017, at which time the ALJ extended the intervenor deadline to June 30, 2017, to accommodate the extended time the DOC-EERA needed to complete the DEIS.<sup>35</sup> The DOC-EERA noted that it still intended to meet its August 10, 2017 deadline for completion of the FEIS.<sup>36</sup> Based upon this representation, the ALJ did not extend the date for filing intervenor direct testimony, the dates for the public and evidentiary hearings, or the briefing schedule.<sup>37</sup>

### **Fifth Prehearing Conference (July 12, 2017)**

A Fifth Prehearing Conference was held on July 12, 2017. At that time, the parties discussed the exact dates and locations of the public and evidentiary hearings. Based upon the input of the parties, the ALJ issued a Fifth Prehearing Order scheduling 18 public hearings,<sup>38</sup> occurring from September 26, 2017, to October 26, 2017.<sup>39</sup> By way of an Amended Fifth Prehearing Order, the evidentiary hearing schedule was extended to provide for nine days of hearing between November 1 and 15, 2017.<sup>40</sup> These dates were consistent with the dates originally proposed in the Third Prehearing Order issued on October 12, 2016.

### **Extension of FEIS Due Date**

On August 9, 2017, the Governor directed the Commissioner of Commerce to extend the deadline for publishing the FEIS to August 7, 2017, one week later than

---

<sup>33</sup> Third Prehearing Order at 7 (Oct. 12, 2017) (eDocket Nos. 201610-125629-02 (CN); 201610-125629-01(R)); see *also* Second Amended Third Prehearing Order at 7 (Oct. 31, 2017) (eDocket Nos. 201610-126100-01 (CN); 201610-126100-02(R)).

<sup>34</sup> Letter to Administrative Law Judge from DOC-EERA (Apr. 3, 2017) (eDocket No. 20174-130453-01 (CN); 20174-130454-01 (R)).

<sup>35</sup> Fourth Prehearing Order (May 31, 2017) (eDocket Nos. 20175-132405-01(CN); 20174-132405(R)).

<sup>36</sup> Fourth Prehearing Conference Tr. at 24 (May 15, 2017).

<sup>37</sup> *Id.*

<sup>38</sup> Two hearings per day at nine locations.

<sup>39</sup> Fifth Prehearing Order (Aug. 7, 2017) (eDocket Nos. 20178-134538-01 (CN); 20178-134538-02 (R)).

<sup>40</sup> Amended Fifth Prehearing Order (Aug. 29, 2017) (eDocket Nos. 20178-135071-01 (CN); 20178-135071-02 (R)).

anticipated in the previous scheduling orders.<sup>41</sup> The DOC-EERA issued the FEIS on August 17, 2017.<sup>42</sup>

### **Extension of Adequacy Determination**

Based on the date of issuance of the Notice of Preparation of the EIS (December 5, 2017), a determination on the adequacy of the EIS was due by September 11, 2017 (i.e., 280 days from the date of issuance of the Notice).<sup>43</sup> On June 6, 2017, the Commission issued a Notice Requesting Comments from the Parties on the schedule for the EIS adequacy determination.<sup>44</sup> Various parties filed comments.

The Commission met on August 3, 2017, to discuss its action with respect to the EIS adequacy determination. With “the consent of the parties,”<sup>45</sup> the Commission ultimately extended the 280-day statutory deadline for EIS adequacy determination to December 11, 2017.<sup>46</sup> In extending the adequacy determination date, the Commission also referred the issue of the adequacy of the EIS to a second ALJ at the OAH.<sup>47</sup>

By way of an Order Extending Deadline and Setting Procedural Schedule, the Commission directed ALJ Eric Lipman to develop a record and issue a report and recommendation to the Commission on the adequacy of the EIS.<sup>48</sup> The revised schedule for the EIS adequacy determination is as follows:

Comments on EIS adequacy due	September 25, 2017
ALJ’s Report on EIS adequacy due	October 25, 2017
Exceptions to ALJ’s Report due	November 16, 2017
Commission meeting/decision due	Nov. 30, 2017/Dec. 11, 2017

### **Motions to Extend Scheduling Order Deadlines**

On August 22 and 23, 2017,<sup>49</sup> FOH filed a Motion to Reconsider and Amend the August 7, 2017 Fifth Prehearing Order or, in the alternative, to Certify Scheduling Issues

---

<sup>41</sup> Statement from Governor Mark Dayton on Proposed Enbridge Line 3 Pipeline (Aug. 9, 2017) (eDocket - Nos. 20178-134861-02 (CN); 20178-134861-01 (R)).

<sup>42</sup> Abstract of Final Environmental Impact Statement (Aug. 17, 2017) (eDocket Nos. 20178-134773-01).

<sup>43</sup> Order Extending Deadline and Setting Procedural Schedule (Aug. 14, 2017) (eDocket Nos. 20178-134670-01 (CN); 20178-134670-02 (R)).

<sup>44</sup> Notice Requesting Comments from the Parties (June 6, 2017) (eDocket Nos. 20176-132608-02 (CN); 20176-132608-01 (R)).

<sup>45</sup> Presumably this includes FOH, the White Earth Band, the Fond Du Lac Band, Honor the Earth, the Sierra Club, Youth Climate Intervenor, and NWAM.

<sup>46</sup> Order Extending Deadline and Setting Procedural Schedule (Aug. 14, 2017) (eDocket Nos. 20178-134670-01 (CN); 20178-134670-02 (R)); Order Modifying Procedural Schedule (Aug. 25, 2017) (eDocket Nos. 20178-135021-01 (CN); 20178-135021-02 (R)).

<sup>47</sup> Order Extending Deadline and Setting Procedural Schedule (Aug. 14, 2017) (eDocket Nos. 20178-134670-01 (CN); 20178-134670-02 (R)).

<sup>48</sup> *Id.*

<sup>49</sup> As set forth above, FOH’s Motion was filed in the Route Permit docket (PPL-15-137) on August 22, 2017, and filed in the Certificate of Need docket (CN-14-916) on August 23, 2017.

to the Public Utilities Commission (Motion). Contemporaneously, FOH filed a Petition with the Commission for Reconsideration and Amendment of Commission's Orders Extending Deadline and Setting Procedural Schedule (Petition).<sup>50</sup>

The following parties filed memoranda in support of FOH's Motion: Honor the Earth, Sierra Club, Youth Intervenors, Fond Du Lac Band, and White Earth Band.<sup>51</sup>

On September 1, 2017, Enbridge filed a Reply to FOH's Motion and Petition.

## **ANALYSIS**

In its Motion, FOH makes three arguments for the continuance of all remaining hearing and prehearing deadlines until after a final EIS adequacy determination is made by the Commission. First, FOH argues that allowing a hearing to proceed on Enbridge's applications before a final adequacy determination would be inconsistent with Minnesota law or the original direction of the Commission. Second, FOH asserts that that MEPA requires the completion of the EIS process prior to the consideration of Enbridge's CON and Route Permit Applications (collectively referred to herein as Applications). And third, FOH contends that proceeding contemporaneously with both the EIS adequacy determination and the Applications would impose an undue burden on the intervening parties. The ALJ rejects each of these arguments.

### **Contemporaneous Procedures**

FOH's first two arguments shall be taken together, as they are essentially related. FOH contends that Minnesota law, including MEPA, suggest that environmental review shall be completed in full and an EIS adequacy determination made prior to a hearing on any permit or other application. According to FOH, the Commission intended this result in ordering that intervenor direct testimony be filed after the "completion of the final EIS."<sup>52</sup>

FOH argues that this case presents an opportunity for the Commission and ALJ to clarify the procedural interactions of the statutes and rules applicable to CON and Route Permit Applications and the MEPA environmental review process. In short, FOH urges the Commission and the ALJ to conclude that the environmental review process must be completed and adequacy of the EIS determined prior to a CON or Route Permit application hearing – or at least the filing of intervenor direct testimony. However, FOH's

---

<sup>50</sup> The ALJ only has jurisdiction to address FOH's Motion to Amend the Fifth Prehearing Order or Certify Scheduling Issues to the Commission. FOH's Petition to the Commission is a matter addressed to the Commission related to the adequacy determination portion of the proceedings.

<sup>51</sup> The White Earth Band filed a Petition in Support of Intervenor Friends of the Headwaters' Petition for Reconsideration of Commission's August 14, 2017, Order Extending Deadline and Setting Procedural Schedule (Sept. 1, 2017) (eDocket No. 20178-135169-01). In the Petition, White Earth states that it is "simultaneously serving and filing a motion" with the ALJ requesting that the Fifth Prehearing Order be amended. However, no such motion was ever filed in eDockets.

<sup>52</sup> Order Joining Need and Routing Dockets at 1 (Feb. 1, 2016) (eDocket Nos. 20162-117877-02 (CN); 20162-117889-01 (R)).

argument is not what was contemplated by the parties or the Commission at the start of these proceedings and is not consistent with the current state of law.

The procedures established for CON and Route Permit proceedings, and the environmental review required under MEPA for these types of projects, involve separate, albeit, interacting provisions. Permitting proceedings and environmental review have separate functions and foci, and each have separate deadlines for completion under the law.

For example, Minn. Stat. § 216B.243, subd. 5 directs the Commission to either approve or deny a CON for a “large energy facility” within 12 months of submission of the application. A “large energy facility” includes “any pipeline greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of coal, crude petroleum or petroleum fuels or oil, or their derivatives.”<sup>53</sup> Thus, Line 3 qualifies as a “large energy facility.”

The Commission’s administrative rules, however, reduce the time for consideration of CONs in pipeline cases to “no later than six months from the receipt of a substantially complete application.”<sup>54</sup> With respect to route permit applications for pipelines, the statute and rules provide that the Commission shall issue the permit within nine months from acceptance of the application.<sup>55</sup>

While each of these deadlines is directory (in that they are not accompanied by a consequence for lack of compliance); and while each of these deadlines may be extended by the Commission for good cause, they are, nonetheless, timelines that the Commission is expected to recognize and observe.

At the same time, MEPA contains its own deadlines for the completion of the environmental review of a “major governmental action” that creates the “potential for significant environmental effects.”<sup>56</sup> The Court of Appeals as determined that a CON for a large petroleum pipeline is a “major governmental action” that qualifies for such environmental review.<sup>57</sup>

According to MEPA, an EIS “shall be prepared and its adequacy determined within 280 days after notice of its preparation” unless the time is extended by consent of the parties or by the governor for good cause.<sup>58</sup> To ensure compliance, the Act provides that the project cannot be started and no final governmental decision can be made to grant a permit or approve the project until the EIS “has been determined to be adequate.”<sup>59</sup> Thus,

---

<sup>53</sup> Minn. Stat. § 216B.2421, subd. 2(4) (2016).

<sup>54</sup> Minn. R. 7853.0200, subd. 6 (2017).

<sup>55</sup> Minn. Stat. § 216G.02, subd. 3(b)(5) (2016); Minn. R. 7852.0800 (2017).

<sup>56</sup> Minn. Stat. § 116D.04, subd. 2a (2016).

<sup>57</sup> *In re North Dakota Pipeline Co. LLC*, 869 N.W.2d at 698.

<sup>58</sup> Minn. Stat. § 116D.04, subd. 2(a)(j), formerly Minn. Stat. § 116D.04, subd. 2a(h), see 2017 Minn. Laws ch. 93, art. 2, § 137.

<sup>59</sup> Minn. Stat. § 116D.04, subd. 2b(3) (2016).

for purposes of this case, the Commission cannot issue a CON or grant a route permit unless and until the EIS is determined to be adequate.

The requirement for an EIS is not triggered until a CON or route application is filed with the Commission. Therefore, an EIS will not be prepared prior to the submission of a permit or application, which then begins the time that the Commission has for considering the applications. Given the competing timeframes prescribed by rule and law for the three processes (CON, route permit, and EIS review), it is apparent that the Commission (in drafting its rules) and the legislature (in passing the statutes) intended that the MEPA environmental review process progress concurrently with the application approval process.

If the Commission or legislature intended the EIS adequacy to be determined before the Commission can begin its application hearing process, there would be more time built into the statutes and rules for considering CON and route permit applications. After all, an EIS review can take up to 280 days and a CON must be decided in one year. If the Commission and the ALJ have to defer testimony filing deadlines and the contested case hearing until accuracy is determined, there would be little time in the year period to complete the hearing process. Moreover, under the Administrative Procedures Act, the Commission has to allow time for exceptions prior to making a final decision on the CON and the route permit once the contested case hearing is complete and the ALJ has issued her report and recommendations. Accordingly, it is apparent that both the Commission and the legislature anticipated the environmental review process continue contemporaneously with the permitting/application process.

Moreover, there is nothing in rule or law that requires that the EIS adequacy determination be made before an agency can begin considering a route permit or CON application. The only dictate in law is that a permit or application cannot be *granted* and a project cannot be *started* until the EIS is determined to be adequate. However, there is no prohibition on permitting proceedings beginning prior to the adequacy determination.

MEPA, itself, states that permitting proceedings and environmental review shall proceed contemporaneously. Minnesota Statutes, section 116D.04, subdivision 2a(i),<sup>60</sup> specifically directs:

The responsible governmental unit shall, to the extent practicable, avoid duplication and ensure coordination...between environmental review and environmental permitting. Whenever practical, information needed by a government unit for making final decisions on permits...for a proposed project shall be developed *in conjunction with* the preparation of an environmental impact statement.<sup>61</sup>

Therefore, the legislature has specifically acknowledged that permitting and environmental review shall proceed at the same time.

---

<sup>60</sup> Formerly Minn. Stat. § 116.04, subd. 2a(g) (2016).

<sup>61</sup> Emphasis added.

In this case, the ALJ complied with the directive of the Commission by setting intervenor's direct testimony deadline after the completion of the FEIS, as opposed to requiring the filing of testimony when only a DEIS was available. As a result, the parties have the benefit of an FEIS in preparation for the hearing. The parties are not left with a "moving target" like a DEIS. The FEIS is the final version of the EIS that the DOC-EERA is putting forward for adequacy review. It is what the DOC-EERA believes is an adequate review of the Project; and that document can only be changed if found "inadequate" by the Commission.

At the time that the Commission ordered that intervenor direct testimony be filed "after the completion of the EIS," the intent was that intervenor direct testimony follow the issuance of the FEIS, not the determination of EIS adequacy. Indeed, the Commission did not address EIS adequacy in any of its orders referring the CON and Route Permit matter to this ALJ.

If it is determined that the FEIS is inadequate in some way, the Commission has 60 days in which to prepare an adequate EIS or the Project cannot be approved.<sup>62</sup> In that situation, the ALJ would entertain motions by the parties to reopen the public and evidentiary hearings once an adequate EIS is prepared to address the changes. But there is no need to delay the hearings -- hearings that have been scheduled for nearly a year -- on the possibility that the FEIS may be found inadequate.

Use of the FEIS at the hearings does not mean that the FEIS will be "rubber stamped" as adequate. Quite the contrary. The Commission has referred the review of the EIS to a separate ALJ and established a rigorous schedule (including a comment period) to ensure a thorough review of the FEIS for adequacy. Moreover, neither the CON nor the Route Permit can be approved until the FEIS is determined adequate by the Commission. Thus, if it is found inadequate, the approval process is essentially halted until an adequate EIS is prepared or the Project is disapproved.

Because the laws intend the environmental review process to proceed contemporaneously with permitting processes, and because an FEIS was issued approximately one month prior to the intervenor direct testimony filing deadline, the Judge finds no reason to extend the prehearing and hearing deadlines to after the EIS adequacy determination. Should the EIS adequacy determination find defects, these issues can be addressed by reopening the hearing record to allow additional evidence once an adequate EIS is issued.

### **Undue Burden**

FOH next argues that requiring the parties to prepare for hearing at the same time that the EIS adequacy determination is proceeding would impose an undue hardship for the intervening parties who lack the resources and manpower to address both processes at once. The ALJ rejects this argument.

---

<sup>62</sup> Minn. R. 4110.2800, subp. 4 (2017).

Enbridge filed its CON Application in 2014 and its Route Permit Application in 2015. Interested parties have, thus, had years to prepare their cases. As set forth above, the law intends that environmental review and application approvals proceed contemporaneously. Therefore, the parties were no doubt aware of the fact that they would be required to address both the adequacy of the EIS and the substance of the applications at the same time during these proceedings.

At the Third Prehearing Conference on September 27, 2016, all parties, including FOH, had an opportunity to request that the Judge include the EIS adequacy determination date in the scheduling order or request that the Judge schedule the filing of intervenor direct testimony after the Commission's EIS adequacy determination. However, none of the intervening parties made such requests. Indeed, no party (other than Enbridge) even submitted proposed schedules for the ALJ to review.

The issue discussed at length at the Third Prehearing Conference was whether intervenor direct testimony should be filed after the issuance of the FEIS or after the issuance of the DEIS but before the issuance of the FEIS. The Judge explained that she would follow the directive of the Commission and schedule the filing of intervenor direct testimony after the issuance of the FEIS to ensure that the parties had a final environmental document upon which to rely. At no time during the prehearing conference (or thereafter) did any party insist that intervenor direct testimony follow the EIS adequacy determination.

After the Third Prehearing Conference on September 27, 2016, the ALJ issued the Third Prehearing Order, dated October 12, 2016. The Third Prehearing Order scheduled the filing of intervenor direct testimony on September 11, 2017, a month after the anticipated completion date of the FEIS.<sup>63</sup> The Order also tentatively scheduled public hearings to occur between August 15 and October 31, 2017, and evidentiary hearings from November 6-10, 2017.

Thus, the parties have been aware of the prehearing and hearing schedule since the Third Prehearing Order was issued on October 12, 2016. The date for filing of intervenor direct testimony has not changed since the Third Prehearing Order and the general dates for hearing also remain the same.

The parties have had two additional prehearing conferences since September 2016, to discuss scheduling and still no party made a request to delay the hearing until after the EIS adequacy determination. Instead, FOH waited until one month before the scheduled hearings, and just three weeks before the intervenor direct testimony filing deadline, to assert this issue – an issue the parties should have anticipated as far back as October 2016.

FOH knew or should have known that the EIS adequacy determination would proceed contemporaneously with the CON and routing dockets. If they believed differently, they should have made their motion as far back as October 2016 to schedule

---

<sup>63</sup> At the time, the anticipated FEIS completion date was August 10, 2017.

the hearings after the adequacy determination. Given the amount of time that the Applications have been pending, as well as the amount of time the parties have had to prepare their cases, the Judge finds no reason to delay the hearings or the deadline to file intervenor direct testimony. Accordingly, FOH's Motion is **DENIED**.

### **Certification**

Finally, FOH requests that the ALJ certify its Motion for a Continuance to the Commission for its determination. FOH, however, has presented no facts or arguments in support of certification.

In deciding whether a motion should be certified to the agency, the Judge must consider the following factors:

- A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or
- B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or
- C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or
- D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- E. whether it is necessary to promote the development of the full record and avoid remanding; or
- F. whether the issues are solely within the expertise of the agency.<sup>64</sup>

FOH has failed to argue or establish any of the bases for certification in its Motion and the ALJ finds none that apply. If the EIS is determined to be inadequate and is revised after the hearings, the parties may move to reopen the hearings to address those new issues. At this juncture, however, there is no need to certify the issue to the Commission. FOH's Motion for certification is **DENIED**.

**A. C. O.**

---

<sup>64</sup> Minn. R. 1400.7600 (2017); *see also* Minn. R. 1405.2200 (2017).