

**BEFORE THE STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie Sieben	Commissioner
John A. Tuma	Commissioner

AND

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 55191-2147

**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**

**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**

**OBJECTION OF CERTAIN INTERVENORS TO THE COMMISSION'S
ACCEPTANCE OF NEW MATERIAL FACTS INTO RECORD
AFTER CONCLUSION OF THE CONTESTED CASE HEARING**

I. INTRODUCTION

Intervenors Sierra Club, Northern Water Alliance, Honor the Earth, White Earth, Red Lake, Fond du Lac, and Mille Lacs (hereinafter collectively “Intervenors”) hereby object to Public Utilities Commission’s (“Commission”) acceptance of new material facts pertaining to into the record for the above cited dockets after the conclusion of the contested case hearing for these proceedings before the Office of Administrative Hearing. The new materials facts that are the subject of this objection are those pertaining to commitments from Enbridge Energy, Limited Partnership’s (“Enbridge” or “Applicant”) that were introduced for the first time by Enbridge during final oral arguments before the Commission on June 18, 2018 and, pursuant to the Commission’s request, more fully developed in a letter by Enbridge that was efiled on June 22, 2018.¹ A significant portion of the first three days of hearing time was also taken up by questions and answers regarding these brand-new proposals. And yesterday and today, the Commission ITSELF has added significant new conditions which, while they may be desirable, have not been vetted or presented in the record.

After the development of one of the most extensive evidentiary records ever before the Commission and at the eleventh hour before a final Commission decision, Enbridge seeks to strengthen its application for a Certificate of Need (“CN”) by introducing into the record new commitments it promises to adopt--although they still remain to be developed in sufficient detail for the Commission and the parties to review. At this point, however, it remains totally unclear how that can be done--not just as a practical matter, but as a legal matter. The findings of an Administrative Law Judge (“ALJ”) were that, based on the evidentiary record, the environmental and socio-economic impacts and risks of Enbridge’s proposed project for a new Line 3 pipeline (“Project”) outweigh its very limited benefits.²

The Intervening parties assert that the legal options available to the Commission are: (1) striking Enbridge’s testimony and written comments on the new commitments from the evidentiary record in these proceedings and omitting the from consideration in the Commission’s permitting decision; or (2) remanding the new facts Enbridge has introduced to the Office of Administrative Hearing for assignment to an ALJ to reopening of the contested case hearing prior to the Commission making a final permitting decisions.

¹ Enbridge Comments on Commitments and Attachments A-D (June 22, 2018) (eDockets Nos. 20186-144118-02 (CN); 20186-144118-01 (R)).

² Findings of Fact, Conclusions of Law, and Recommendation (Apr. 23, 2018) [hereinafter ALJ Report].

II. LEGAL ANALYSIS

Under Minnesota Rule 7829.1000, Referral for Contested Case Proceeding, the following standard applies to these contested-case proceedings

If a proceeding involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission *shall refer* the matter to the Office of Administrative Hearings for contested case proceedings, ...³

The Commission relies upon the Office of Administrative Hearing to assemble and interpret the factual record that the Commission then relies upon in evaluating CN criteria--including the factor requiring the Commission to balance the consequences to society of building versus not building the pipeline.⁴ In other words, the specifics of these conditions need to first go before the ALJ. This is because Minn. R. 1400.8100, ALJ's Report, is very plain regarding the PUC only being able to consider facts that are in the record:

Subp. 1. Based on record. No factual information or evidence which is not a part of the record shall be considered by the judge or the agency in the determination of a contested case.

Moreover, Minnesota Statute 14.62, Decisions, Order, subdivision 1, Writing required, provides that the Commission must start with the written report of the ALJ:

Every decision and order rendered by an agency in a contested case shall be in writing, shall be based on the record and shall include the agency's findings of fact and conclusions on all material issues. A decision or order that rejects or modifies a finding of fact, conclusion, or recommendation contained in the report of the administrative law judge required under sections 14.48 to 14.56, must include the reasons for each rejection or modification.

These new proposals commitments constitute new material facts Enbridge is seeking to enter into the record to influence the Commission's balancing of the consequences to society of granting a CN for Enbridge's proposed pipelines versus denying the CN as required under Minn. R. 7853.0310(C)(2).

³ Emphasis added.

⁴ Minn. R. 7853.0130 (C)

In other words, they go far beyond permissible “modifications” the Commission is allowed to make upon issuing a CN.⁵ Minnesota statutes and rules governing the Commission’s process for issuance of a CN require that all material facts in the evidentiary record be subject to a contested case hearing before an ALJ and that the Commission consider no facts outside the contested case hearing record when making its decision.

II. CONCLUSION

Given the Commission’s clear communication that it will be granting the CN just moments ago, and that it will be adopting the new proposals, whatever they may include, AND issue more of its own that no one has had the opportunity to review, it is imperative that this matter be handled very differently. This must be remanded for further review.

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⁵ Minn. R. 7853.0800, subp. 1.

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