

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
St. Paul, Minnesota 55164

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

In the Matter of the Application of Enbridge Energy Limited Partnership for a Certificate of Need for the Line 67 Station Upgrade Project – Phase 2 – In Marshall, Clearwater, Itasca, Kittson, Red Lake, Cass and St. Louis Counties MPUC Docket No. PL9/CN-13-153
OAH Docket No. 8-2500-30952

Reply to the Dyrdal Motion For Determination of Federal Preemption

INTRODUCTION

Enbridge Energy, Limited Partnership (“Enbridge”) hereby submits its Reply to the Motion for Determination of Federal Preemption (the “Motion”) filed by Donovan and Anna Dyrdal (the “Dyrdals”). In their Motion, the Dyrdals ask the Administrative Law Judge (“ALJ”) to determine that the Minnesota Public Utilities Commission (“MPUC”) must dismiss Enbridge’s Application for a Certificate of Need (the “Application”) for the Line 67, Phase 2 Station Upgrade Project (the “Project”). For all of the reasons stated herein, the Motion must be denied.

The Dyrdals became parties to the contested case proceeding for Enbridge’s Application on November 18, 2013.¹ The Dyrdals, however, failed to file testimony, failed to present a witness, and failed to advance any viable claims. The only participation in the process by the Dyrdals was to have counsel appear at the evidentiary hearing held on April 8-10, 2014,

¹ Second Prehearing Order, MPUC Docket No. CN-13-153, OAH Docket No. 8-2500-30952 ([E-Dockets Document No. 201311-93779-01](#)).

apparently for the purpose of attempting to gather support for their Motion. It is unclear if the Dyrdals intend for the Motion to also function as a post-hearing brief under the above-captioned docket,² but as the Dyrdals failed to participate in the hearing process as required by Minn. R. 1400.7100, Subp. 1-4, Enbridge treats the Dyrdals' submission as a motion. To the extent that the Dyrdals assert that the Motion is also a post-hearing brief, any relief requested should be denied because: (1) Enbridge has satisfied all requirements of Minn. R. 7853.0130; (2) The Dyrdals' submission was received after the 4:30 p.m. deadline on April 29, 2014; and (3) The claims made in the Motion are irrelevant and/or unsupported by the record.³

The Dyrdals also request that the ALJ revoke prior permits for Enbridge's Line 67 pipeline, including the CN issued in 2008, the Pipeline Routing Permit issued in 2008, and the CN issued in 2013 (together, the "Prior Permits").⁴ The Dyrdals base the Motion on their view that the Interstate Commerce Act of 1887 preempts the MPUC's authority to issue a Certificate of Need ("CN"), and that Minn. R. 7853.0130 somehow violates the Sherman Anti-Trust Act. These claims are meritless, and such determinations are outside of the MPUC's jurisdiction. As such, the Motion should be denied.

² The Dyrdals spend numerous pages of the Motion discussing the record in the contested case hearing, and circulated unsupported proposed findings of fact in this matter by email on April 29, 2014.

³ See Enbridge Energy Limited Partnership's Post Hearing Brief In Support of Granting a Certificate of Need for the Line 67, Phase II Project, April 29, 2014 ([E-Dockets Document No. 20144-98917-02](#)).

⁴ Motion, p. 2.

LAW AND ARGUMENT

I. The MPUC lacks authority to dismiss the Application or the Prior Permits because it cannot overrule the requirements of Minnesota Law.

A. The Motion must be denied because the MPUC does not have authority to determine questions of constitutional law.

The Dyrdals ask the MPUC, through the authority delegated to the ALJ, to interpret and apply federal law. The Motion, however, fails to cite any authority permitting the Commission to grant the requested relief. The MPUC is a creature of statute and has only the authority granted to it by the Legislature. *In re Petition of Minn. Power*, 545 N.W.2d 49, 51 (Minn. Ct. App. 1996) (citing *Great N. Ry. V. Pub. Serv. Comm'n*, 169 N.W.2d 732, 735 (Minn. 1969)). “[A]ny enlargement of [the MPUC’s] express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature.” *In re Investigation into Comm’n Juris*, 707 N.W.2d 223 at 226 (Minn.Ct.App. 2005) (citing *Peoples Natural Gas Co. v. Pub. Utils. Comm’n*, 369 N.W.2d 530, 534 (Minn. 1985)). “[R]easonable doubts as to the question of jurisdiction should be resolved in favor of finding a lack of jurisdiction.” *In re Appeal of the Selection Process for the Position of Electrician*, 674 N.W.2d 242, 248 (Minn. Ct. App. 2004) (citing *Essling v. St. Louis Cnty. Civil Serv. Comm’n*, 168 N.W.2d 663, 665 (Minn. 1969)). Pursuant to Minn. Stat. § 14.69, the Court of Appeals will reverse or modify any MPUC decision that is “in excess of [its] statutory authority or jurisdiction.”

The Dyrdal Motion is based on questions of federal law, specifically whether federal statutes preempt Minn. Stat. § 216B.243, Subd. 2 and Minn. R. Ch. 7853, which give the MPUC authority to issue a CN. The MPUC lacks jurisdiction to decide constitutional issues. *See Neeland v. Clearwater Mem’l Hosp.*, 257 N.W.2d 366, 368 (Minn.1977) (stating that

administrative agencies lack subject-matter jurisdiction to decide constitutional issues, which are within the exclusive province of the judicial branch). Accordingly, the Motion must be denied.

B. The claims regarding the Prior Permits are barred by Minnesota Law.

The Motion also requests that the MPUC revoke the Prior Permits. The original CN for Line 67 was issued in 2008.⁵ The route of Line 67 was also approved in 2008 when the MPUC issued a pipeline routing permit to Enbridge.⁶ Enbridge's Phase 1 capacity expansion of Line 67 was approved on August 12, 2013.⁷ The issues now raised by the Dyrdals were not presented to the MPUC in petitions for reconsideration following those orders as allowed by Minn. R. 7829.3000, Subp. 1, and the Dyrdals cannot now assert new arguments against the Prior Permits. Minn. Stat. § 216B.27. Minnesota law requires that the Motion be denied as it relates to the Prior Permits. *Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Com'n.*, 2010 WL 5071389 at 9 (Minn. Ct. App. 2010).

II. The Motion must be denied because there is no violation of the Sherman Anti-Trust Act.

The Motion should also be denied because it has no legal or factual support for the anti-trust claims advanced by the Dyrdals. The Sherman Act in relevant part provides that: “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .” 15 U.S.C. § 1. Application of the Sherman Act, however, to a state statute such as Minn. Stat. § 216B.243 is limited.

⁵ Order Granting Certificate of Need, MPUC Docket No. PL-9/CN-07-465, December 29, 2008 ([E-Dockets Document No. 5674505](#)).

⁶ Order Granting Pipeline Routing Permit, MPUC Docket No. PL-9/PPL-07-361, December 29, 2008 ([E-Dockets Document No. 5679135](#)).

⁷ Order Granting Certificate of Need, MPUC Docket No. PL-9/CN-12-590, August 12, 2013 ([E-Dockets Document No. 20138-90205-01](#)).

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

Intercontinental Packaging Co. v. Novak, 348 N.W.2d 330, 334 (Minn. 1984) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)). With that framework in mind, Enbridge briefly addresses the Dyrdals' various arguments below. All suffer fatal flaws.

A. Providing forecast information as required by Minn. R. Ch. 7853 does not violate the Sherman Act.

The Dyrdals first assert that Minn. R. Ch. 7853 “necessarily authorizes conduct which necessarily constitutes a violation of the antitrust laws to comply. . .” Motion, p. 13. The Dyrdals go on to claim that “Minn. R. Ch. 7853 authorizes, if not virtually compels, a pipeline and its shipper supporters to combine in exchanging production and refining capacity forecast information, to provide substantial evidence of historical and then forecasted demand and to limit competition in interstate and foreign commerce.” Motion, p. 14. There is no support for this claim, as there is no evidence in the record that any such information sharing in violation of the antitrust laws has occurred.

Moreover, there is no support for the Dyrdals' assertion that sharing forecast information or obtaining a CN can somehow “limit competition in interstate and foreign commerce” or divide markets for petroleum transportation and refining, as claimed in the Motion. Motion, p. 14, 16. The record simply does not support these claims. Minnesota does not place a limit on the number of petroleum pipelines allowed in the state. There is no evidence that Enbridge and other pipeline companies, petroleum shippers, or refiners have engaged in any price fixing or activity to divide up petroleum transportation and refining markets. All of the information about

refinery capacity and Canadian crude oil production projects provided by Enbridge in the contested case proceeding can be found publicly.⁸

Because there is no violation of the Sherman Act, it is unnecessary to address the Dyrdals' misguided claims regarding the State Action Immunity Doctrine.⁹

B. The Federal Energy Regulatory Commission has control over the terms of Enbridge's tariff, not the MPUC.

The Dyrdals next present an argument that the MPUC should choose to find that Minn. Stat. § 216B.243 is preempted as an alternative to the Project. Motion, p. 18. In this section of the Motion, the Dyrdals argue that Enbridge could use an alternative method to calculate apportionment, and that such alternative method would somehow make the need for the Project disappear. Motion, p. 18-20. There is no factual basis provided by the Dyrdals, just speculation in the instant motion. Moreover, Enbridge has provided evidence that the apportionment methodology is spelled out in the tariff filed and approved by the applicable regulator. This argument, like all others advanced in the Motion, is based on a logical leap over a lack of factual support.

The Dyrdals do not explain how use of a different method to calculate apportionment would somehow create new pipeline capacity or eliminate the demand for heavy crude oil demonstrated in the record. The Project is needed because demand for crude oil transported through Line 67 exceeds pipeline capacity.¹⁰ That results in apportionment, where shippers are unable to receive all of the crude oil that they nominate for shipment.¹¹ Changing the method by

⁸ Evid. Transcript, Vol. 1, p. 125-126.

⁹ Motion, p. 16-17.

¹⁰ See for example: Ex. 15, p.4, lines 65-67; and Ex. 13, Exhibit F, Enbridge Response to Department IR21B, Attachment 21B, Schedule 1.

¹¹ Evid. Transcript, Vol. 1, p. 185, lines 17-25, p. 186 Lines 1-4, Ex. 29, Ex. 26, p. 8, § 14(a).

which apportionment is calculated will not alter the physical constraints on the Enbridge Mainline System. Physical construction of the Project, on the other hand, will.

The Dyrdals also defeat their own argument, correctly noting that the MPUC “has no jurisdiction or authority to modify or alter [Enbridge’s] tariff or the understanding upon which it was filed . . . Denial of the certificate of need on that basis is outside of the Commission’s jurisdiction.” Motion, p. 21. The FERC has exclusive jurisdiction over Enbridge’s tariff. Accordingly, the MPUC cannot force a change to the tariff as an alternative to the Project.

C. The Dyrdals argument that Minn. Stat. § 216B.243 is preempted by federal law would, if accurate, allow Enbridge to construct pipelines without obtaining a determination of need.

The Dyrdals’ final argument is perplexing. As previously discussed, the MPUC lacks authority to determine that state statutes and rules are preempted by federal law, making it unnecessary for Enbridge to address this argument on the merits, yet the oddity of this argument must be confronted. The Dyrdals plainly oppose the Project, yet claim that the FERC does not have the authority to determine whether a pipeline, such as the Project, is needed. Motion, p. 22. At the same time, they argue that the MPUC also lacks authority to make that determination. If the Dyrdals’ argument was accepted, there would be no regulatory review of the need for new pipeline infrastructure. As a result, Enbridge and other pipeline operators could install new infrastructure as desired, including on the Dyrdal property, subject only to Minnesota’s requirement to obtain a pipeline routing permit under Minn. Stat. Ch. 216G, if that requirement was applicable. The Dyrdals are arguing for the exact opposite result of what they desire.

CONCLUSION

The Dyrdals failed to participate in the contested case proceeding, and have not advanced any coherent or supported argument in the Motion. The MPUC lacks authority to determine questions of federal law or to waive the requirements of Minnesota statutes. Accordingly, there is no basis for the relief requested by the Dyrdals. The Motion should be denied.

Dated: May 13, 2014

Respectfully submitted,

FRYBERGER, BUCHANAN, SMITH & FREDERICK, P.A.
Attorneys for Enbridge Energy, Limited Partnership

/s/ John R. Gasele

John R. Gasele

Kevin T. Walli, Attorney Reg. No. 183866

John R. Gasele, Attorney Reg. No. 386700

332 Minnesota Street, Suite West 1260

St. Paul, Minnesota, 55101

Arshia Javaherian

Attorney for Enbridge Energy, Limited Partnership

29 East Superior Street

Duluth, Minnesota 55802