BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Enbridge Energy, Limited Partnership Pursuant to Wis. Stat. § 32.02(13) for Approval to Acquire by Condemnation Permanent and Temporary Easements on Properties Located in Rock County for the Stage 2 Construction of Two Liquid Petroleum and Hydrocarbon Pipelines if Determined to be in the Public Interest

FINAL DECISION

This is the Final Decision in the June 19, 2007, application of Enbridge Energy, Limited Partnership ("Enbridge") for a determination by the Commission that it is in the public interest to allow it to use eminent domain authority under Wis. Stat. § 32.02(13) to acquire easements on properties in Rock County, Wisconsin, for the purpose of constructing liquid petroleum pipelines. Enbridge filed to amend its application on September 18, 2007, to include Enbridge Pipelines (Lakehead) L.L.C. ("Lakehead") and Enbridge Pipelines (Wisconsin) Inc. ("Enbridge Wisconsin") as co-applicants. For purposes of this application, Enbridge, Lakehead and Enbridge Wisconsin are collectively referred to as the applicant.

The application is GRANTED subject to conditions.

Background

The applicant owns and operates liquid petroleum pipelines in Wisconsin. The pipelines enter Wisconsin in Douglas County near the city of Superior. One set of two parallel pipelines heads southeast from Superior to Walworth County, then continues into northern Illinois. A second pipeline heads eastward from Superior, crossing Douglas, Bayfield, Ashland, and Iron Counties before entering the Upper Peninsula of Michigan. The pipelines in Wisconsin are part
of a larger pipeline system that transports crude oil and related petroleum liquids from western Canada to refineries in Superior, Wisconsin, northern Illinois and Indiana, and eastern Canada. Lakehead and Enbridge Wisconsin are the general partners of Enbridge and have ownership interests in Enbridge.

The applicant plans to construct two new parallel pipelines for a distance of about 22 miles in eastern Rock County and desires the ability to use state eminent domain authority to acquire easements for the new pipelines if easements cannot be obtained through voluntary negotiations with the landowners. The applicant will be able to use eminent domain procedures if the Commission finds under Wis. Stat. § 32.02(13) that the “proposed real estate interests sought to be acquired are in the public interest.” The applicant requests that the Commission make such a finding.

On August 30, 2007, the Commission issued a Notice of Proceeding and Prehearing Conference in the docket. No person filed a timely request to intervene. The Commission’s Administrative Law Judge reclassified the docket as an investigation at the September 21, 2007, Prehearing Conference.

Public hearings were held in the village of Clinton on October 16, 2007. Potentially affected landowners testified at the public hearings and filed written comments.

The Commission considered the application at its open meeting on March 13, 2008.

Findings of Fact

1. Enbridge is a Delaware limited partnership licensed to do business in Wisconsin.

2. Lakehead and Enbridge Wisconsin are the general partners of Enbridge. The general partners have ownership interests in Enbridge’s existing pipeline assets in Wisconsin, and would have ownership interests in the new pipelines.
3. Lakehead is a Delaware limited liability company licensed to do business in Wisconsin.

4. Enbridge Wisconsin is a Wisconsin corporation licensed to do business in Wisconsin.

5. The applicant transmits oil and related products, including all hydrocarbons which are in a liquid form at the temperature and pressure under which they are transported in pipelines in Wisconsin, maintains terminal or product delivery facilities in Wisconsin, and engages in interstate or international commerce.

6. The expansion of the applicant’s pipeline system would allow increased deliveries of western Canadian crude oil supplies to refineries in Illinois, Indiana, and other Midwestern states.

7. It is in the public interest to allow the applicant to use Wisconsin’s eminent domain procedures under Wis. Stat. ch. 32 to acquire easements in Rock County, Wisconsin, for two new liquid petroleum pipelines.

Conclusions of Law

1. The Commission has the authority under Wis. Stat. § 32.02(13) to make a finding that it is in the public interest to allow the applicant to use Wisconsin’s eminent domain procedures to acquire easements for two new liquid petroleum pipelines in Rock County, Wisconsin.

Discussion

The applicant’s existing pipeline system includes pipelines entering Douglas County from Minnesota and continuing to a storage and delivery terminal in the city of Superior. From the Superior terminal, a single pipeline heads eastward to the upper peninsula of Michigan and
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continues eastward into the Canadian province of Ontario. Two other pipelines head southeast together through Wisconsin from Superior to Walworth County and then continue into the state of Illinois.

The existing pipeline system between Superior and Walworth County carries crude oil and other liquid petroleum products originating from supply basins in western Canada to oil refineries in Illinois, Indiana and other Midwestern states. The pipeline system operates as a common carrier transportation system and its transportation rates and terms of shipment are regulated by the Federal Energy Regulatory Commission. The applicant’s pipeline system is operationally integrated with pipelines in Canada that are owned and operated by affiliated companies. Based on information provided by the applicant, the applicant transmits oil and related products, including all hydrocarbons which are in a liquid form at the temperature and pressure under which they are transported in pipelines in Wisconsin, maintains terminal or product delivery facilities in Wisconsin, and engages in interstate or international commerce.

The applicant and its Canadian affiliates have begun an extensive staged expansion of their pipeline systems to provide additional capacity to transport Canadian crude oil to Midwest refineries.

Stage 1, which is under construction, involves adding two new pipelines along the route of the existing two pipelines between the Superior terminal and the existing Delevan pumping station in northeastern Rock County. Stage 1 of the expansion is the subject of a separate Commission docket, docket 9300-GF-181.

Stage 2 of the expansion involves constructing two new pipelines through eastern Rock County southward from the existing Delavan pumping station to the Wisconsin-Illinois border. In Illinois, the pipelines will continue on to refineries in the greater Chicago area and other
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locations in the Midwest. One will be a 42-inch diameter crude oil pipeline and the second will be a 20-inch diameter light liquid hydrocarbon (diluents) pipeline. The Rock County sections of the pipelines will each be 22 miles in length. The applicant proposes to construct the two pipelines adjacent to each other within the same easements. The adjacent pipelines would generally require a 60-foot permanent easement and an additional 90-foot temporary easement during the construction period, though additional space may be necessary in certain locations.

The applicant states that it has begun easement negotiations with landowners along the Stage 2 project route in Rock County. The applicant is seeking a public interest determination from the Commission which would allow the use of eminent domain procedures to acquire any of the necessary easements that cannot be acquired through voluntary negotiations.

The Commission considered whether the applicant qualifies as “any corporation” as contemplated by Wis. Stat. § 32.02(13). Because the term “any corporation” is defined in many other chapters of the statutes, but undefined in Wis. Stat. ch. 32, its meaning is open to interpretation. The Commission concludes that the applicant qualifies as a “corporation” under this section of the statutes because the term can be reasonably construed to mean any form of business entity. Consequently, the applicant may apply for eminent domain authority under Wis. Stat. § 32.02(13).

The Commission considered whether there is a substantial public interest to support granting the applicant the right to use eminent domain for its Stage 2 project. The Commission does not evaluate or approve the construction or route of the pipelines. The Commission does not have any role in determining conditions of or compensation for easements. The construction, operation and maintenance of interstate liquid petroleum pipelines are subject to Federal safety
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regulations implemented by the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration.

The applicant states that the expansion is a response to demand by petroleum producers and users. Stage 2 would help meet the identified rising demand for additional pipeline capacity to transport Canadian crude oil to Midwestern refineries. The applicant states that Stage 2 of the expansion would allow about 254,000 barrels per day of additional crude oil supplies to reach Midwest refineries. The applicant also states that Wisconsin will benefit from this additional pipeline capacity because Wisconsin obtains much of its refined petroleum products, including gasoline, from refineries in Illinois, Indiana, and other Midwestern states.

The public interest is advanced by the increase in capacity to deliver crude oil to Midwestern refineries that would result from the Stage 2 expansion.

Some landowners potentially affected by the Stage 2 expansion expressed concern about granting eminent domain authority to the applicant, including concerns about how the easement negotiations have been conducted to date and concerns about compensation for the easements. The Commission notes that the state’s eminent domain process includes specific procedures for conducting a condemnation, which the applicant would have to follow. That process includes steps to establish compensation to be paid to landowners. The Commission’s practice is to defer compensation questions to the established eminent domain process.

The proposed action is not identified as a specific Type I, II, or III action according to Wis. Admin. Code § PSC 4.10. It is consequently presumed under Wis. Admin. Code PSC § 4.10(3m) to require neither an environmental impact statement under Wis. Stat. § 1.11 nor an environmental assessment. No unusual circumstances have come to the Commission’s attention which would disturb this presumption.
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Order

1. The applicant may use Wisconsin's eminent domain procedures under Wis. Stat. ch. 32 to acquire easements for two new liquid petroleum pipelines, as described in the application, in Rock County, Wisconsin.

2. This Final Decision is effective on the date of mailing.

3. The public interest finding in this Final Decision applies only to the Stage 2 pipeline expansion project in Rock County as described in the application.

4. The authority to use eminent domain as described in this Final Decision shall lapse if no legal proceedings are initiated within one year of the effective date of this Final Decision.

5. Jurisdiction is retained.

Dated at Madison, Wisconsin, __________ April 3, 2008 __________

By the Commission:

[Sandra J. Paske]

Sandra J. Paske
Secretary to the Commission

See attached Notice of Appeal Rights
Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98
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COMMISSIONER AZAR'S CONCURRENCE WITH THE FINAL DECISION

Though I agree with the majority that both the Stages 1 and 2 are in the public interest, I find that only Enbridge Pipelines (Wisconsin) Inc., (“Enbridge Wisconsin”) is entitled to that public interest finding, not Enbridge Energy, Limited Partnership (“Enbridge LP”) nor Enbridge Pipelines (Lakehead) LLC (“Lakehead”) (collectively “Applicants”). I find the term “corporation” in Wis. Stat. § 32.02(13) to be ambiguous and, therefore, extrinsic evidence may

1 Applicants erroneously argue that the Commission does not have the authority to determine who is entitled to a public interest determination. The statute specifies that corporations may obtain condemnation authority via Wis. Stat. § 32.02(13) only after receiving approval from the PSC. Specifically, the statute says their condemnation authority is:

    subject to the approval of the public service commission upon a finding by it that the proposed real estate interests sought to be acquired are in the public interest.

Any Commission approval under this subsection 13 must include a public interest finding, but the statute does not limit the Commission’s approval to that issue.

Enbridge compares this subsection to the condemnation subsection requiring a CPCN. However, the statutory language concerning CPCNs is markedly different. Whereas the subsection at issue here specifies that condemnation powers are “subject to the approval of” the PSC, the CPCN section says the powers do not accrue until the Commission issues a CPCN. While the former section is general, the latter section is specific to issuing a CPCN.

Applicants also argue that Wis. Stat. § 32.06(5) specifies the exclusive means for challenging the Applicants’ right to condemn. However, that provision prescribes the venues available to the “owner” of the property, not to the Commission.

In conclusion, I believe the Commission’s approval authority under Wis. Stat. § 32.02(13) is broader than just the public interest determination and the Commission may render a decision on whether someone is entitled to that determination.
be applied in our interpretation of that subsection. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 48, 271 Wis. 2d 633, 681 N.W.2d 110. Applicants presented the Legislative history of the LLC statute. The drafter explained as follows:

This draft covers changes to the statutes to account for the creation of limited liability companies (LLCs) . . .

1. I have tried to be conservative in amending the statutes; if I felt that the current wording covered LLCs, I did not add the term. For example, I did not amend s. 990.01(26), the definition of “person”. That term should be interpreted broadly . . . I have also liberally construed the term “body corporate” and other terms referring to business entities to cover LLCs. The drafting file for this draft includes sections I looked at but determined did not need to be amended.

2. Similarly, I did not amend numerous sections that referred to corporations and not to other forms of business entities. In these situations, I felt that the current reference was too narrow. I did not want to create ambiguity or confusion by adding references to LLCs but not to partnerships or other business entities. Again, [this] drafting file includes sections I did not amend for this reason.

3. Generally, if the current statute refers to corporations or partnerships differently, I included LLC reference modeled on the corporate treatment . . .

6. I do not know how to treat the following sections included in this draft (some I have amended in this preliminary draft, others I have not made any changes to); please advise: [nothing in ch. 32 is referenced]

(PSC REF#: 82037, Ex. 1.) (Emphasis added.) The margins in the drafting document near Wis. Stat. § 32.02(13) contained a question mark. (2/5/08 Staff Memorandum to Commission, p. 8, fn 3.)

I also find this Legislative history to be ambiguous. Applicants read the drafter’s notes to support their position. However, I find that the Legislative History could be read as follows: the drafter considered the term “corporation” to be “narrowly” defined intentionally by the
Legislature; if the Legislature wanted LLCs to be encompassed by this provision, then the
Legislature would need to insert “LLCs” where the question mark was placed in the margin.
Also, if the Legislature decided to insert “LLC,” it could also consider inserting other business
entities, such as partnerships. Or, in the alternative, the Legislature could have chosen to change
the word “corporation” to something more generic like “body corporate” or “person.”

Since I do not believe the drafter’s notes on this issue are dispositive, I look to public
policy. Eminent domain is one of the state’s most dramatic powers and it must be applied
solemly. The Wisconsin Supreme Court has instructed us to strictly construe condemnation
statutes. See Herro v. DNR, 53 Wis. 2d 157, 171, 192 N.W.2d 104 (1971). As a consequence, I
believe the Commission must interpret this eminent domain statute narrowly by limiting the
application of the term “corporation” to business entities that are actually corporations under the
law.

In the end, I conclude that limited partnerships and LLCs are not “corporations” under
Wis. Stat. § 32.02(13) and, therefore, Lakehead and Enbridge LP are not entitled to seek the
public interest determination set forth in that statute. In turn, the Commission should not provide
an “approval” under Wis. Stat. § 32.02(13) to these two entities. Though I believe this is the
proper holding, I am mindful that such a holding could have an impact on the condemnation
authority invoked by our regulated entities under other provisions of Wis. Stat. § 32.02. If
necessary, we may have to address statutory changes for those entities.
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Because only Enbridge Wisconsin qualifies as a "corporation" under Wis. Stat. § 32.02(13), we need to determine if it meets the following three standards by itself, or as the general partner of Enbridge LP:

[1.] transmit oil or related products, including all hydrocarbons which are in a liquid form at the temperature and pressure under which they are transported in pipelines in Wisconsin;

[2.] maintain terminal or product delivery facilities in Wisconsin; and

[3.] engaged in interstate or international commerce . . . .

Wis. Stat. § 32.02(13). Enbridge Wisconsin has an ownership interest in the physical assets of the Lakehead System. Though it owns a *de minimus* interest, I find that sheer ownership of the pipeline qualifies Enbridge Wisconsin for being involved with interstate commerce.

As to the other two standards—transmitting oil and maintaining facilities—Enbridge Wisconsin certainly could be involved in those activities as one of the general partners of Enbridge LP; however, it is not automatically so. We must look to the facts, which are found in Applicants' February 27, 2008, response to data requests. (PSC REF#: 90418.) The facts are mixed.

Enbridge Wisconsin does not hold any of the permits necessary for transmitting oil and maintaining facilities. Those permits are either held by Lakehead or Enbridge LP. However, Enbridge Wisconsin does pay its *pro rata* share of all costs relating to transmission and maintenance in Wisconsin for services rendered by a separate company called Enbridge Services. Because Enbridge Wisconsin pays for these services, I find that Enbridge Wisconsin

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2 I consider Enbridge Wisconsin to be an applicant in this case. (PSC REF #: 82527.) In other words, I reject the former intervenors' argument that Enbridge Wisconsin is not an applicant.
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does transmit oil and maintain facilities in Wisconsin and therefore is entitled to receive a public
interest determination from the PSCW under Wis. Stat. § 32.02(13).

As an aside, Enbridge Wisconsin may want to consider holding some operational permits
in Wisconsin, which would have made my determination easier.

Dated at Madison, Wisconsin, 4/3/08

By Commissioner Lauren L. Azar

Lauren Azar
Commissioner

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