

**STATE OF MICHIGAN  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

**IN THE MATTER OF:**

**Docket No.: 21-008197**

**Petition of Bay Mills Indian  
Community on the permit issued to  
Enbridge Energy, Limited  
Partnership**

**Agency No.: HNY-NHX4-FSR2Q**

**Part(s): 303, Wetlands Protection  
325, Great Lakes  
Submerged Lands**

**Agency: Department of Environment,  
Great Lakes, and Energy**

**Case Type: Water Resources Division**

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**Issued and entered  
this 18th day of February 2022  
by Daniel L. Pulter  
Administrative Law Judge**

**ORDER DISMISSING CONTESTED CASE**

This contested case concerns an Application for a permit filed by Enbridge Energy, Limited Partnership (Permittee), under Part 303, Wetlands Protection, and Part 325, Great Lakes Submerged Land, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.30301, *et seq.*; MCL 324.32501, *et seq.* The Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) issued a permit on February 25, 2021. That agency action was challenged by the Bay Mills Indian Community (Petitioner) by filing a Petition for Contested Case Hearing.

On November 12, 2021, both the Permittee and the WRD filed a Motion for Summary Disposition. The Petitioner filed a Response to such Motions on December 13, 2021. The WRD filed a Reply on December 20, 2021, and the Permittee filed a Reply on December 22, 2021. The Permittee's Motion raises 4 grounds for summary disposition, one of which is dispositive of this contested case.

As its first ground for summary disposition, the Permittee contends that the Petition for Contested Case Hearing was not timely filed with this agency. As a result, the Permittee

contends that this Tribunal lacks subject matter jurisdiction. The right to a contested case hearing arises in one of two manners. The first implicates fundamental due process protections. See US Const, Am XIV; Const 1963 art 1, § 17. See also *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed 2d 287 (1970); *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976). This right arises when an agency seeks to modify or terminate an existing license because “there is a deprivation of a due process property interest....” D LeDuc, Michigan Administrative Law § 7.10 (2014). This action does not involve the termination of an existing license or other fundamental due process interest.

The second manner in which the right to a contested case hearing arises is by grant in a statute or rule. See *Delly v Bureau of State Lottery*, 183 Mich App 258, 263; 454 NW2d 141 (1990); *McBride v Pontiac School District*, 218 Mich App 113, 122; 553 NW2d 646 (1996). See also LeDuc, supra, § 6:02. Controlling this inquiry is a basic tenant of administrative law: an agency has only those powers provided to it by statute. See *York v Detroit*, 438 Mich 744; 475 NW2d 346 (1991); *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951). In general, this Tribunal is charged with conducting a de novo review of an application for a permit. See *National Wildlife Federation v Department of Environmental Quality*, 306 Mich App 369, 378; 856 NW2d 394 (2014). In performing this function, the Tribunal must operate under the authority of a statute or administrative rule because “doubtful power does not exist.” See *In Re Quality Service Standard*, 204 Mich App 607, 611; 516 NW2d 142 (1994). Absent that lawful authority to perform its function, this Tribunal lacks subject matter jurisdiction and “any action with respect to such a cause, other than to dismiss it, is absolutely void.” *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965). This Tribunal has previously set forth the predicates of performing a de novo review as follows: (1) the filing of an application by a proper applicant, (2) the proper processing of the application by the WRD, (3) an action or inaction by the WRD on the application, and (4) the timely filing of a petition. See *Petition of CCMS Associates, Inc.*, 2000 WL 1597733, \*7 (Mich.Dept.Nat.Res.). Hence, the timely filing of a petition is, in fact, jurisdictional.

The Permittee correctly notes that a contested case under Parts 303 and 325 must be filed within 60 days from the date of the department’s decision. R 792.10303(2). The permit was issued in this case on February 25, 2021. Exhibit 1 to the Petition. Therefore, under the Administrative Rule, the Petition for Contested Case Hearing must be filed by April 26, 2021. In this case, the Petition was filed by April 26, 2021. However, Rule 109(2) of the Administrative Rules provides that “[d]ocuments received by the hearing system after 5 p.m. eastern standard time are considered filed on the following business day.” R 792.10109(2). Because the Petition was received by the Michigan Office of Administrative Hearings and Rules (MOAHR) after 5:00 p.m., it was file-stamped received on April 27, 2021. As a result, the Permittee contends that the Petition was not timely filed.

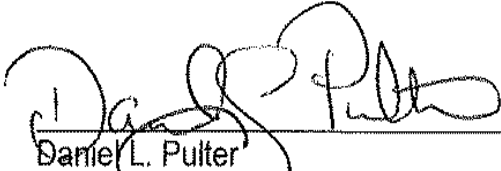
The Petition was filed from the Petitioner's offices in Chicago, at 4:36 p.m., central time. Exhibit 12 to Permittee's Motion. There is no dispute that the Petition was received by this Tribunal at 5:36 p.m., eastern time. *Id.* The Petitioner argues:

If the Tribunal looked further, it would see that the Michigan Legislature has recognized the difference between eastern standard time and daylight savings time in other statutes, which means that the specific use of "eastern standard time" in Mich. Admin. Code R 792.10109(2) should be given effect. *People v Pickney*, 501 Mich 259, 268, 912 N.W.2d 535, 539 (2018) (focus first on the statute's plain language). Even though Michigan was observing eastern daylight time on April 26, eastern standard time still controlled for the filing. Therefore, Petitioners filed at 4:36 PM eastern standard time, which was prior to the 5 PM eastern standard time requirement.

Petitioner's Response at p 9 (footnotes omitted). In its Reply, the Permittee cites to the Federal Uniform Time Act (UTA), 15 USC 260, *et seq.* It contends that "daylight saving time" is still "standard time" by operation of the UTA. Citing *Empire Fire & Marine Ins Co v Continental Cas Co*, 426 F Supp 2d 329 (D Md 2006).

The Petitioner's arguments miss the mark. Specifically, the Administrative Rule does not focus on the time of filing; rather, it focuses on receipt by the agency. R 792.10109(2) ("Documents **received** by the hearing system after 5 p.m. eastern standard time are considered filed on the following business day"). Because the Petition was received by MOAHR after 5:00 p.m., the Petition was correctly marked as received on April 27, 2021, and was untimely. Therefore, summary disposition is appropriate and this contested case is **DISMISSED**.

This is a final order that resolves the last pending matter and closes the contested case.

  
Daniel L. Pulter  
Administrative Law Judge

### **REVIEW OF THIS DECISION**

In light of the 2018 amendments to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1301, *et seq.*, the right to seek review of this decision may vary based on the particular Part of the NREPA under which this contested case was brought. To ascertain the correct manner to seek review of this decision, and the correct time frame for review, the parties and/or their legal counsel should examine the applicable statutes and administrative rules. See Section 1317 of the NREPA, being MCL 324.1317;

Sections 301-306 of the APA, being MCL 24.301-306; and the Department of EGLE website information regarding petitions for review at: [www.michigan.gov/egle](http://www.michigan.gov/egle).

**PROOF OF SERVICE**

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated otherwise, this 18th day of February 2022.



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