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State of Minnesota
In Court of Appeals

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border.

**RED LAKE BAND OF CHIPPEWA INDIANS, WHITE EARTH BAND OF
OJIBWE, HONOR THE EARTH, AND THE SIERRA CLUB
PETITION FOR REVIEW OF DECISION
OF THE COURT OF APPEALS**

Date of Filing of Court of Appeals Decision: June 14, 2021

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To: The Supreme Court of the State of Minnesota

Petitioners Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and The Sierra Club, respectfully request review of the above-entitled decision of the Court of Appeals related to the Certificate of Need (“CN”) issued by the Minnesota Public Utilities Commission (“PUC”) for the Line 3 Replacement Project, a new major crude oil pipeline proposed by Enbridge Energy, Limited Partnership (“Enbridge”).

**LEGAL ISSUES SOUGHT TO BE REVIEWED,
AND THE DISPOSITION OF THOSE ISSUES BY THE COURT OF APPEALS**

1. Did the PUC commit an error of law in its approval of a CN for the Project by failing to evaluate “the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based,” and instead rely on factors not intended by the legislature?

The Court of Appeals expressly ruled that “under the plain language of the certificate-of-need statute and the need-criteria rule, the commission was required to evaluate a prediction, provided by Enbridge, of the amount of crude oil that refineries will be willing and able to purchase from replacement Line 3 over the 16-year forecast period.” Then, the court held that the PUC could, as a question of fact, determine that a forecast of crude oil supply by petroleum producers is the equivalent of a forecast of refinery demand.

2. Whether the PUC’s finding that existing Line 3 creates “real, immediate, and potentially catastrophic risks” and is in urgent need of replacement for safety reasons is unsupported by substantial evidence.

The Court of Appeals held that the PUC may consider the safety of existing Line 3 in deciding whether to grant a CN. However, the court did not determine whether substantial evidence supported the PUC’s finding that existing Line 3 posed a real and immediate safety risk.

CRITERIA FOR REVIEW

Review is appropriate under Minn. R. Civ. App. P. 117, subd. 2(a), (c) and (d) (2020). Review of the PUC’s failure to evaluate the accuracy of a forecast of crude oil demand by refineries will clarify the scope of discretion and required process when agencies exempt permit applicants from compliance with statutory information requirements and instead allow substitution using different types of information. The Court of Appeals decision departs from justice in that it allowed the PUC to exempt a CN applicant from compliance with a clear statutory policy requirement, thereby frustrating legislative intent to consider such policy.

Review of the PUC’s finding that an existing crude oil pipeline is dangerous when no substantial evidence supports such finding is important because it would clarify that PUC decisions must be based on substantial evidence in light of applicable standards rather than on well-intentioned but uninformed fears.

STATEMENT OF THE CASE

Enbridge seeks to build a new Line 3 pipeline to transport Canadian crude oil across Minnesota to Superior, Wisconsin, from where the oil would be transferred to other pipelines for delivery to customers in the Midwest, Gulf Coast, and overseas. (CNRI 39 at 0001494).¹ The PUC must grant a CN to Enbridge before it begins construction. Minn. Stat. § 216B.243 (2021). The PUC is required to consider a set of factors when determining whether to grant a CN, including a “long-range energy demand forecast” showing the pipeline is needed. Minn. Stat. § 216B.243, subd. 3(1); Minn. R. 7853.0130(A)(1) (2021). In addition, the PUC may consider other benefits of a proposed project relative to not building it. Minn. Stat. § 216B.243, subd. 3(5); Minn. R. 7853.0130(C)(2).

In response to the demand forecast requirement, Enbridge submitted an estimate of the crude oil that Canadian petroleum producers hope will be available for export. (CNRI 1306 at 48223.) Enbridge then used this “supply” forecast in a model that predicted future utilization of the proposed pipeline, which model assumed global oil demand would in all future years be sufficient to demand such oil. (CNRI 1306 at 048882, 902-03.)

On May 1, 2020, the PUC voted, over dissent, to grant a CN. (CNRI 3724.) In reaching its decision, the PUC found that Enbridge’s supply forecast met the demand forecast requirement. (CNRI 3724 at 144197-98.) In addition, the PUC considered evidence related to the safety of the existing Line 3 pipeline and found that its continued

¹ Citations are to the Certificate of Need Record Index number (CNRI) identifying the document and the bates stamp number identifying the page.

operation posed an immediate threat of a catastrophic oil spill such that a new pipeline is needed. (CNRI 3724 at 144200.)

On August 19, 2020, Petitioners and other relators obtained a writ of certiorari challenging the PUC's failure to consider a forecast of demand and its finding related to the safety of existing Line 3. On June 14, 2021, a divided court affirmed the PUC.

ARGUMENT

I. The PUC May Not Exempt Enbridge from the Minn. Stat. § 216B.243, subd. 3(1) “Demand Forecast” Requirement.

Minnesota law requires that CN applicants provide “long-range energy demand forecasts on which the necessity for the facility is based,” and that the Commission evaluate the “accuracy” of such forecasts. Minn. Stat. § 216B.243, subd. 3(1), *see also* Minn. R. 7853.0130(A)(1).

In response to this requirement, Enbridge provided a forecast of Canadian crude oil “supply,” meaning the amount of crude oil that the Canadian oil industry hopes may be available for export from Canada in future years. (CNRI No. 2834 at 102320; CNRI No. 1716 at 056952; CNRI No. 1292 at 048209-10.) Enbridge did not then nor has it ever claimed that it is unable to provide a forecast of refinery demand for crude oil. Enbridge's supply forecast was prepared by the Canadian Association of Petroleum Producers (“CAPP”). It is based on CAPP's crude oil production forecast, which is the Canadian oil industry's forecast of the volume of crude oil that it hopes to extract from the ground in future years. (CNRI No. 1292 at 048222-23.) This production forecast is based on a survey of CAPP's oil producing members with regard to their internal and

confidential oil extraction plans. (CNRI No. 1292 at 048222-23; CNRI No. 1571 at 054177; CNRI No. 1713 at 056767; CNRI 1743 at 057173-74.)

Petitioners agree with the Court of Appeals that the PUC is required by law to evaluate a forecast of refinery demand for crude oil, but argue that the court erred because the PUC has no authority to waive this statutory requirement, and in the alternative argue that even if the PUC may waive such requirement, a forecast of the Canadian oil industry's anticipated future crude oil available for export is not the equivalent of a forecast of refinery demand for crude oil.

The court also stepped beyond the scope of judicial review when it determined that a combination of (a) Enbridge's oil supply forecast; (b) evidence of historical demand for crude oil; and (c) a forecast of demand for Enbridge's transportation services (called an apportionment forecast), may substitute for a forecast of future refinery demand, which equivalency analysis the PUC itself did not undertake. Petitioners request that the Supreme Court remand for PUC evaluation of the required refinery demand forecast, or in the alternative remand for PUC determination of whether a combination of an oil supply forecast, historical crude oil demand, and an apportionment forecast may substitute for a forecast of refinery demand for crude oil.

II. The PUC's Determination that Existing Line 3 Is Unsafe Is Unsupported by Substantial Evidence.

The Minnesota legislature has not enacted pipeline safety standards because such standards are preempted by federal law. 49 U.S.C. § 60104(c) (2021). Accordingly, the only written standards against which the PUC could determine that existing Line 3 is unsafe

due to corrosion are in 49 C.F.R. Part 195 (2021). These regulations incorporate by reference a wide variety of technical and detailed industry standards. There is no evidence in the record that any party attempted to brief the PUC on the application of these federal standards to its determination of existing Line 3's safety, or that any of the PUC commissioners or their staff have any expertise in pipeline safety.

During the PUC's deliberations, a majority of the commissioners stated that a critical factor in their affirmative votes was a belief that existing Line 3 posed an immediate and serious risk of rupture. For example, Commissioner Lipschultz stated:

it's unrefuted in this record that that pipeline is an accident waiting to happen. . . it feels like a gun to our head that . . . compels us to approve a new line. . . . And that then again leaves us with a highly corroded, very dangerous existing line in the ground . . . posing a real danger to . . . Minnesota. (CNRI 3154 at 10815051.)

Commissioner Sieben stated:

“[T]hat safety issue is really, really important” “So then when the -- we can hear Enbridge say it's not safe. . . . But my point . . . saying it's not just Enbridge saying this line is horrible. (CNRI No. 3157 at 109176-77.)

As a consequence, the PUC's May 2020 orders granting the CN focus overwhelmingly on safety, calling the risk of an oil spill from existing Line 3 the “central issue.” (CNRI No. 3723 at 144174.) They described existing Line 3 as “deteriorating at an alarming rate” (CNRI No. 3724 at 144200) and concluded that existing Line 3 creates “real, immediate, and potentially catastrophic risks.” *Id.* Neither the individual commissioners nor the May 2020 orders referenced applicable pipeline safety standards.

Contrary to the PUC’s finding, the record shows that Enbridge’s experts and attorneys repeatedly and uniformly stated that Enbridge was then operating and was fully capable of operating existing Line 3 safely indefinitely. (*E.g.*, CNRI No. 434 at 013406; CNRI No. 3157 at 109053-55, CNRI No. 3155 at 108454.) Although Enbridge presented evidence of ongoing corrosion in existing Line 3 (*e.g.*, CNRI No. 434 at 013413-422), this evidence related to the potential costs and impacts of ongoing maintenance efforts and was not offered by Enbridge as proof that existing Line 3 was or would become unsafe. The only non-Enbridge pipeline safety expert who testified in the PUC hearing focused exclusively on the risks posed by the new pipeline and did not offer an opinion on the safety of existing Line 3. (*See* CNRI No. 1319, CNRI No. 1733.) Thus, the hearing record contains no evidence or expert opinion to support the PUC’s finding that existing Line 3 posed a “real, immediate, and potentially catastrophic risk[.]” of rupturing. (CNRI 3724 at 144200.)

The commissioners, without reference to or apparent understanding of applicable pipeline safety standards, interpreted Enbridge’s existing Line 3 corrosion data to be evidence that existing Line 3 was dangerous – in direct contradiction of Enbridge’s undisputed evidence that existing Line 3 was then safe and could be operated safely indefinitely.

Petitioners seek reversal because the PUC’s determination that existing Line 3 was or would become unsafe is unsupported by substantial evidence yet the PUC gave great weight to this factor. The Court should remand to the PUC so that it may evaluate

Enbridge's CN Application absent its unsupported fears that Line 3 posed an immediate risk of catastrophic rupture.

For these reasons, the petitioner seeks an order granting review of the decision of the Court of Appeals.

Dated: July 14, 2021

HONOR THE EARTH

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this petition conforms to the requirements of Minn. R. Civ. App. P. 117, subd. 3, for a petition produced with a proportional 13-point font. The length of this brief, exclusive of the caption, signature block, and addendum, is 1,865 words. This brief was prepared using Microsoft Word 2010.

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