

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
600 North Robert Street  
St. Paul, Minnesota 55101**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
121 Seventh Place East, Suite 350  
St. Paul, Minnesota 55101**

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

**INITIAL POST HEARING  
BRIEF OF INTERVENOR  
LEECH LAKE BAND OF**

**OAH 65-2500-32764/MPUC PL-9/CN-14-916  
OAH 65-2500-33377/MPUC PL-9/PPL-15-137**

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This case arises from the application of Enbridge Pipelines a/k/a/, d/b/a North Dakota Pipeline Company, LLC (hereinafter “Applicant” or “Enbridge”) for a Certificate of Need and Pipeline Routing Permit for its Line 3 Replacement Project in Minnesota.<sup>1</sup> The Applicant has submitted its preferred route to the Public Utilities Commission for consideration and issuance of a Certificate of Need and Routing Permit.<sup>2</sup> The current Line 3, the line that Enbridge seeks to replace, crosses the entire Leech Lake Reservation.<sup>3</sup> The preferred replacement route goes east across northwestern Minnesota from northeastern North Dakota to Clearbrook, Minnesota, then south past Park Rapids, before going east again to the Duluth/Superior area.<sup>4</sup>

The alternative proposed routes either traverse the Leech Lake Reservation or the 1855 Treaty territory.<sup>5</sup> Many of the members of the Leech Lake Band and its communities support themselves by hunting, fishing, and gathering wild rice both within the Reservation boundaries

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<sup>1</sup> Ex. EN-1 (CN Application).

<sup>2</sup> Ex. EN-1 (CN Application) and Ex. EN-4 (R Application).

<sup>3</sup> Ex. EN-1(CN Application, Appendix A) (eDocket Number 20154-109653-04).

<sup>4</sup> Ex. EN-1(CN Application, Appendix A) (eDocket Number 20154-109653-04).

<sup>5</sup> Ex. EN-1 (CN Application) and Ex. EN-4 (R Application).

and outside the reservation in the 1855 Treaty territory.<sup>6</sup> The Band not only shares a general public interest in ensuring that the PUC has a well-developed factual record for its review regarding these proposed routes, but also maintains a cultural responsibility to ensure the well-being of Band Members and their descendants and to safe guard the natural resources of the Band.<sup>7</sup>

The Leech Lake Band of Ojibwe is a federally recognized Indian tribe and a constituent member of the Minnesota Chippewa Tribe with its Reservation in North central Minnesota.<sup>8</sup> The members of the Leech Lake Band of Ojibwe are amongst the successors in interest to a number of treaties entered into with the Ojibwe Bands between the 1830's and the 1860's.<sup>9</sup> The current Line 3 corridor crosses through the seventh (Cass Lake), fourth (Lake Winnibigoshish) and third (Leech Lake) largest lakes in Minnesota.<sup>10</sup> The Leech Lake Band of Ojibwe is adamantly opposed to any new or replacement pipelines running through the Reservation, whether the route is an in-trench replacement of or alongside the current Line 3.<sup>11</sup>

## LAW AND ARGUMENT

Minnesota law requires that an entity that seeking to construct an oil pipeline within Minnesota must apply for and receive a certificate of need, pursuant to Minn. Stat. § 216B.243 and Minn. R. Ch. 7853, as well as a routing permit, pursuant to Minn. Stat. Ch. 216G and Minn.

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<sup>6</sup> Evid. Hrg. Tr. Vol 5B at 41-59 and 62-66 (November 8, 2017)(Jeff Lee)(economic impact of wild rice generally).

<sup>7</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 71-75 (Levi Brown).

<sup>8</sup> Indian Entities Recognized & Eligible To Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,870 (Aug. 10, 2012).

<sup>9</sup> *See*, Treaty of 1836, 7 Stat. 491 (March 28, 1836); Treaty of 1837, 7 Stat. 536 (July 29, 1837); Treaty of 1842, 7 Stat. 591 (Oct. 4, 1842); Treaty of 1854, 10 Stats. 1109 (Sept. 30, 1854); Treaty of 1855, 10 Stat. 1165 (Feb. 22, 1855); Treaty of 1864, 13 Stat. 693 (May 7, 1864); Treaty of 1867, 16 Stats. 719 (March 19, 1867).

<sup>10</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 72-73 (Levi Brown).

<sup>11</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 84-85 (Levi Brown).

R. Ch. 7852. A certificate of need is required for oil pipeline projects with a diameter of six inches or greater and having 50 or more miles of length in Minnesota.<sup>12</sup>

Enbridge, as the applicant in this matter, bears the burden of proof by a preponderance of the evidence that it has satisfied Minnesota legal criteria for issuance of a certificate of need.<sup>13</sup>

Minn. Stat. § 243B.243, subd. 3, states that “[n]o proposed large energy facility shall be certified for construction . . . unless the applicant has otherwise justified its need.”<sup>14</sup> Minnesota’s

Administrative Rules squarely place the burden of proof on the party proposing an action. “The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.”<sup>15</sup>

If the Commission determines that there is no need for a new pipeline at all, then there is not any need to make a determination of a route location. The Commission must first evaluate whether or not a need for a new pipeline exists, and then consider possible routes only if it finds such need. In regard to the certificate of need determination, and routing, it is important to note that each of these proceedings independently require consideration of environmental and socioeconomic impacts<sup>16</sup>, alternatives<sup>17</sup>, and mitigation.<sup>18</sup> It is appropriate to consider within the certificate of need decision all of the information on impacts, alternatives, and routes provided in both dockets and the MEPA process.

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<sup>12</sup> Minn. Stat. §§ 216B.243, 216B.2421, subd. 2 (2017).

<sup>13</sup> Minn. Stat. § 243B.243, subd. 3 (2017).

<sup>14</sup> Minn. Stat. § 243B.243.

<sup>15</sup> Minn. R. 1400.7300 (2017).

<sup>16</sup> See Minn. R. 7853.0130; Minn. Stat. § 216G.02; Minn. R. 7852.0200, Minn. R. 7852.2000, and Minn. R. 7852.2700.

<sup>17</sup> Minn. Stat. § 216B.243, subd. 3(6), Minn. R. 7853.0130.B (certificate of need alternatives); Minn. Stat. § 216G.02, subd. 3, Minn. R. 7852.1500, Minn. R. 7852.3100 (routing alternatives).

<sup>18</sup> Minn. Stat. § 216B.243, subd. 7(mitigation); Minn. R. 7852.0200, Minn. R. 7852.2000, and Minn. R. 7852.2800. Requirements of mitigation in regard to impacts for MEPA are found in: Minn. Stat. § 116D.04, Minn. R. 4410.1700; Minn. R. 4410.2300.

Minnesota Rule 7853.0130 outlines the criteria for determining whether a Certificate of Need may be granted and requires that all four criteria weigh in the applicant's favor. Minn. R. 7853.0130 states that a certificate of need shall be granted to the applicant if it is determined that:

A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states . . .

B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant . . .

C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate ...

and...

D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rule and regulations of other state and federal agencies and local governments.

The Certificate of Need shall be granted if all four requirements weigh in favor of the applicant. Any other reading ignores the word "and" after subdivision C, and runs contrary to a plain language reading of the rule. As the language of the rule demonstrates, Minnesota Rule 7853.0130 is a list of criteria that must be met. Should the Commission find that any of the four requirements, including the existence of a reasonable and prudent alternative, weigh against the project, it must deny the certificate of need for the Project. The Commission must consider and weigh the factors contained within each of the four criteria identified in Minn. R. 7853.0130. Minn. R. 7853.0130.A states: "[a] certificate of need shall be granted to the applicant if it is determined that: A. the probable result of denial would adversely affect the future adequacy,

reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states.”

The rule should not be read to state that any adverse effect, however minimal, means that a proposed pipeline must be approved. Both Minn. Stat. § 216B.243, subd. 3(1) and Minn. R. Chapter 7853 require that the Commission examine the source material for an applicant’s forecast of its energy supply and demand. The Commission must evaluate an applicant’s forecast numbers for accuracy, and this means evaluating an applicant’s underlying data and methodology, and then the Commission must consider what occurs in the event these variables change. Minn. R. 7853.0130, C, which relates to the consequences of denying a certificate of need. Section C requires that the Commission consider the impacts of what is the “no-action” alternative. The Commission must consider what would happen if it denied a certificate of need. The Commission must consider how the applicant and the market would respond to a denial of Enbridge’s application, including the possibility of an increase of throughput on existing pipelines.

In terms of Enbridge demonstrating that there is a need for a new pipeline, the applicant already has the capacity to move 2.6 million barrels of oil across to Wisconsin using its existing mainline corridor.<sup>19</sup> The capacity for existing Line 67 has essentially doubled and therefore compensated for any loss that the current Line 3 had in throughput due to its deterioration.<sup>20</sup> Even with Line 3 operating at half its previous capacity, the barrels per day throughput of the

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<sup>19</sup> Evid. Hrg. Tr. Vol 7B (Nov 13, 2017) at 97 - 101 (Paul Eberth).

<sup>20</sup> Evid. Hrg. Tr. Vol 10B (Nov 16, 2017) at 41-44 (Paul Eberth).

Enbridge mainline corridor had remained roughly the same and has not experienced a drop off in the amount of barrels of crude oil shipped to Superior, Wisconsin on a daily basis.<sup>21</sup>

Undoubtedly, Enbridge wants to maximize its profits by having these lines run at or near full capacity. This is also evident in Enbridge's applications for the certificate of need and the proposed route.<sup>22</sup> Rather than pull up existing Line 3, which Enbridge certainly could do, the applicant plans, if the certificate of need is granted, on running the current Line 3 up until the proposed alternative route is completed, then connecting it back with the existing corridor.<sup>23</sup> Financially speaking, however, the applicant has the financial ability to pull up the existing Line 3 right now and alleviate the chance of any environmental or other damage should the line fail or have a release.<sup>24</sup> From a standpoint of jobs and the ability to pull up current Line 3, there was testimony stating that it could be done, that the line could be completely removed.<sup>25</sup>

Enbridge has six pipelines running through a congested mainline corridor already.<sup>26</sup> The basis of the applicant's current request is that one of these many lines is running at approximately half capacity due to its age and structural issues. So, with that Enbridge only has five and a half lines, in terms of capacity, running across the Leech Lake Reservation in its mainline corridor. During the time the time this matter has been pending before the Commission, the capacity of Line 67, the Clipper Line, has basically doubled and it is carrying approximately 800,000 barrels per day.<sup>27</sup> Someday Line 3 will deteriorate to the point where it is no longer functional, where it is more of a risk than it is a source of profit for the applicant.<sup>28</sup>

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<sup>21</sup> Evid. Hrg. Tr. Vol 7B (Nov 13, 2017) at 97 - 101 (Paul Eberth)(stating the 2.6 million barrels per day figure).

<sup>22</sup> Ex. EN-1 (CN Application) and Ex. EN-4 (R Application).

<sup>23</sup> Evid. Hrg. Tr. Vol 7B (Nov 13, 2017) at 137-139 (Paul Eberth).

<sup>24</sup> Evid. Hrg. Tr. Vol 7B (Nov 13, 2017) at 137-139 (Paul Eberth)(Enbridge has the financial resources to remove existing Line 3 but contends it is both risky and expensive to do so).

<sup>25</sup> Evid. Hrg. Tr. Vol5A at 68 (Evan Whiteford).

<sup>26</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 76-77 (Levi Brown).

<sup>27</sup> Evid. Hrg. Tr. Vol 4A (Nov. 6, 2017) at 87- 88 (Ray Philipenko).

<sup>28</sup> Evid. Hrg. Tr. Vol. 1A (Nov. 1, 2017) at 25-27 (Laura Kennett)(discussing integrity threats inherent to Line 3)

When Enbridge says it is attempting to return a detonating pipe to its former functionality, it really means it is putting in a new replacement line.<sup>29</sup> Enbridge certainly wants another line running, it does not need one under the circumstances.

If the Commission does indeed find that the applicant has demonstrated that there is adequate need pursuant to the relevant statutes and regulations, there is not going to be any in-trench replacement.<sup>30</sup> There will be no alongside replacement of Line 3 in the mainline corridor.<sup>31</sup> The Leech Lake Band of Ojibwe is already host to the congested main line corridor which contains the current Line 3.<sup>32</sup> The current Line 3 has integrity concerns that are the basis of this effort to replace the current line.<sup>33</sup> The line already operates at half capacity due to these issues with its integrity.<sup>34</sup>

A spill or release in the current corridor, where Line 3 currently runs, would endanger the very cultural and socioeconomic well-being of members of the Leech Lake Band.<sup>35</sup> The existing pipeline runs over the heart of wild rice country when it crosses the Leech Lake Reservation.<sup>36</sup> The damage to the environment if a significant spill or release occurred with the current Line 3 on the Leech Lake reservation would be nothing short of catastrophic for Leech Lake Band members and their way of life.<sup>37</sup> While these type of impacts are often given very little consideration when it comes to the overall assessments for these projects by the State, the Leech Lake Band is a sovereign entity and has the power to regulate these projects within its

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<sup>29</sup> Ex. EN-24 at 5 (Eberth Direct)

<sup>30</sup> Ex. LL-4 (Official Statement of Leech Lake Band, dated November 14, 2017); *also* (Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 67-68 (Brown) (stating opposition of the Band).

<sup>31</sup> Ex. LL-4 (Official Statement of Leech Lake Band, dated November 14, 2017).

<sup>32</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 84-86 (Levi Brown).

<sup>33</sup> Evid. Hrg. Tr. Vol. 1A (Nov. 1, 2017) at 25-28 (Laura Kennett).

<sup>34</sup> Evid. Hrg. Tr. Vol. 1A (Nov. 1, 2017) at 25-27 (Laura Kennett).

<sup>35</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 74-75 (Levi Brown).

<sup>36</sup> Evid. Hrg. Tr. Vol 5B at 65-66 (Jeff Lee).

<sup>37</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 74-75 (Levi Brown).

reservation boundaries.<sup>38</sup> Whether an outside entity has a permit from the State to attempt to replace Line 3 in-trench or alongside the current Line, the Leech Lake Band will grant no such permit to do so on its lands.<sup>39</sup> In a Resolution, dated November 27, 2017, Leech Lake Band reiterated its refusal to approve a route across the Reservation and resolved to “use all means at its disposal to ensure that the Line 3 proposed route does not cross through the Leech Lake Indian Reservation.”<sup>40</sup> The Leech Lake Band’s objection to constructing the Project through the Reservation has been consistent throughout the permitting process.<sup>41</sup> The Leech Lake Band of Ojibwe does not support utilizing the same corridor for Line 3, whether in-trench or alongside, for replacement of existing Line 3. That has been made very clear by this point in these proceedings.

Routes RA-07 and RA-08 would both cross the Leech Lake Reservation and would therefore not receive approval from the Leech Lake Band even if such routes were approved by the State of Minnesota.<sup>42</sup> The Band has indicated that there aren’t going to be any new routes for pipelines approved that cross the Reservation and there will not be any.<sup>43</sup> Considering this, these proposed routes should not be considered viable when making any determination regarding the route of any Line 3 replacement.<sup>44</sup> Proposed Routes RA-07, RA-08, any in trench replacement, and any alongside replacement all face the same lack of regulatory approval by the Leech Lake Band of Ojibwe.<sup>45</sup> None of these routes will be approved, even if they are approved by the State

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<sup>38</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 71-72 (Levi Brown).

<sup>39</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

<sup>40</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

<sup>41</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 142 (Brown) (“Enbridge will not get a permit from Leech Lake to access our property.”).

<sup>42</sup> Ex. EN-22, Sched. 7 at 37-43 (Simonson Direct)

<sup>43</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

<sup>44</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017); Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 103-104 (Levi Brown).

<sup>45</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

of Minnesota. The Leech Lake Band in exercising its sovereign regulatory authority will not approve any new pipelines crossing the reservation.<sup>46</sup>

Any attempt at in-trench replacement of Line 3, even if it completely ignored tribal sovereignty, would still be subject to the environment hazards of doing an in-trench replacement of Line 3.<sup>47</sup> The act of trying to do a replacement, on an already deteriorating pipeline, was described by The Leech Lake Band's Environmental Land Director, Levi Brown, as "trying to do construction on Easter Eggs that haven't been boiled and hoping they don't crack."<sup>48</sup> The risk involved with attempting an in-trench replacement of Line 3 was also echoed by Mr. Eberth in his testimony regarding making such an attempt.<sup>49</sup>

Even if the State of Minnesota fails to consider the sovereignty of the Leech Lake Band of Ojibwe and its ability to regulate its lands, even if the State of Minnesota fails to consider the environmental hazards of attempting to do an in trench replacement of Line 3 in a congested utility corridor, it should not ignore the voice of the people of the Leech Lake Band of Ojibwe.<sup>50</sup> As Mr. Brown's testimony at the evidentiary hearings indicated, there were 256 testimonies given by Leech Lake members regarding the Line 3 replacement project.<sup>51</sup> Of these, one hundred percent of these comments were in opposition to any replacement route of Line 3, in-trench or otherwise, going across the Leech Lake Reservation.<sup>52</sup> Additionally, Mr. Brown went on to state about the opposition to Line 3's replacement crossing the reservation: "there will be thousands of tribal members there, if they try to replace in trench. And that's why I said is you have to be

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<sup>46</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

<sup>47</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 81-82 (Levi Brown).

<sup>48</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 81-82 (Levi Brown).

<sup>49</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 81-82 (Levi Brown).

<sup>50</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 85-86 (Levi Brown).

<sup>51</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 85-86 (Levi Brown).

<sup>52</sup> Evid. Hrg. Tr. Vol. 10A (Nov. 16, 2017) at 85-86 (Levi Brown).

careful when you tread on tribal sovereignty and our ability to make a choice. So if the Utility Commission goes against what the tribe wants, this will be way worse than Standing Rock, because this is on the reservation. Meaning that this isn't on the fringe. We have our own law enforcement, who are, like I said, they're there. Their job is to protect tribal members. And we're trying to be as cordial as we can with the State in these proceedings, and we're trying to be respectful...[b]ut it is a no, even in place."<sup>53</sup> For the State to approve any route that crosses the Leech Lake Reservation it would have to ignore the sovereign government of Leech Lake, the people of Leech Lake, and the potential damage to the environment that attempting to replace Line 3 in its existing corridor could cause.

### **Conclusion**

Enbridge does not need another Line to compensate for the lack of capacity in its failing line. Should the certificate of need be granted, Routes RA-07 and RA-08 would both cross the Leech Lake Reservation and would therefore not receive approval from the Leech Lake Band even if such routes were approved by the State of Minnesota.<sup>54</sup> There should be no consideration of any in-trench replacement or alongside replacement when considering the route alternatives for the Line 3 replacement. The Band has indicated that there aren't going to be any new routes for pipelines approved that cross the Reservation and there will not be any.<sup>55</sup> The people and the sovereign government of the Leech Lake Band are in opposition to any routes crossing the Reservation and will remain opposed to any such routes.

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<sup>53</sup> Evid. Hrg. Tr. 10A (Nov. 16, 2017) at 151-152 (Levi Brown)

<sup>54</sup> Ex. EN-22, Sched. 7 at 37-43 (Simonson Direct)

<sup>55</sup> Ex. LL-10 at 1 (Leech Lake Tribal Council Resolution No. LD2018-073, dated November 27, 2017).

Dated: January 23, 2018

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