BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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Katie Sieben	Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
John Tuma	Commissioner
Joseph Sullivan	Commissioner

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border	MPUC PL-9/CN-14-916
In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project in Minnesota From the North Dakota Border to the Wisconsin Border	MPUC PL-9/PPL-15-137

ANSWER OF INTERVENOR FRIENDS OF THE HEADWATERS TO MOTION OF WHITE EARTH AND RED LAKE BANDS FOR A STAY PENDING APPEAL

December 2, 2020

I. INTRODUCTION

On July 20, 2020, the Commission denied petitions for reconsideration and rehearing of its May 1, 2020 order finding the second revised environmental impact statement for the Line 3 project to meet the requirements of the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, and reissuing its previous decisions to grant a Certificate of Need and a Routing Permit for this project. On November 12, 2020, the Minnesota Pollution Control Agency (MPCA) issued a certification under Section 401 of the Clean Water Act that the Line 3 project will comply with state water quality standards.[1] Those decisions are now on appeal. The expectation is that the Court of Appeals will take briefs and hear these cases over the next six months.

On Tuesday, November 24, 2020, the PUC indicated that Enbridge could commence construction. The next day, the White Earth Band of Ojibwe and the Red Lake Band of Chippewa Indians filed a motion with the PUC to stay its final orders pending the ongoing appeal. In the meantime, Enbridge has started construction in earnest, and has stated its intention to complete building the pipeline in the next six months, before the appeals will be decided.

Intervenor Friends of the Headwaters supports the tribes' motion, and submits this separate answer to emphasize certain additional critical points that justify the requested stay.

1 The U.S. Army Corps of Engineers announced on November 23, 2020 that it was issuing dredge-and-fill permits under Section 404 of the Clean Water Act for construction-related impacts to waters of the United States for the Line 3 project. As of the date of this filing, the Record of Decision (ROD) for the Corps has not been made publicly available. A challenge in federal district court under the federal Administrative Procedures Act (APA) to the Corps permits is likely to be filed after the ROD appears.

II. ARGUMENT

III. PUC JURISDICTION AND STANDARDS FOR GRANTING A STAY

First, although the PUC has issued its final orders in these dockets, there is no question that the PUC retains the jurisdiction and the obligation to consider a request for a stay pending appeal. Minn. Stat. § 216.25 says appeals from PUC Certificate of Need orders are governed by the Minnesota Administrative Procedure Act (MAPA), which expressly gives agencies like the PUC the authority to grant stays pending certiorari appeals, Minn. Stat. § 14.65. MAPA also provides that appeals from contested case decisions are to proceed under the rules of civil appellate procedure, Minn. Stat. § 14.64. Minn. R. Civ. App. P. 108.02, subd. 1 provides that a party seeking a stay of a judgment or order of a trial court (which includes agencies under Minn. R. Civ. App. P. 101.02, subd. 4) must move first in the trial court or agency. Minn. R. Civ. App. P. 115.03, subd. 2(b) provides that applications for a stay "must be made in the first instance to the agency or body." The PUC cannot avoid ruling on the tribes' motion for a stay pending appeal on the grounds that it no longer has jurisdiction. The agency clearly does have jurisdiction and must rule on the motion under its procedural statute, MAPA, and the rules of civil appellate procedure.

The Tribes' motion contains a detailed explication and review of the relevant law. But the standards for granting a stay pending appeal are straightforward:

(1) Does the appeal raise substantial issues?

(2) Will there be injuries to one or more parties absent a stay?

(3) Would a stay promote the public interest in preserving the appellate court's jurisdiction?

Webster v. Hennepin County, 891 N.W.2d 290, 293 (Minn. 2017); *see also State v. Northern Pacific Railway Co.,* 221 Minn. 400, 22 N.W.2d 569, 574-75 (1946); *DRJ, Inc. v. City of St. Paul,* 741 N.W.2d 141 (Minn. Ct. App. 2007). In today's circumstances, the answer to each of those questions is yes. Therefore, a stay pending appeal is fully justified.

IV. THE APPEALS RAISE SUBSTANTIAL ISSUES

In this case, there should be little question that the appeals raise substantial issues. As the Tribes' motion explains, at this level, it is not the "likelihood of success" element that typically applies for temporary or preliminary injunctions, but instead an assessment on whether there are genuine issues that justify review by the appellate courts. There is no point in relitigating the merits here, but there are many indications that the issues in the multiple appeals meet the "substantiality" test:

- The PUC itself was divided on the issues now on appeal;
- The PUC has already been reversed twice on the environmental review of the Line 3 project and the previous Sandpiper project that would have followed much of the same route;
- The government agency with the acknowledged expertise on the need/demand question has concluded that the project does not meet the requirements of the statute and the rules, and is appealing the PUC decision itself, not a regular occurrence;
- The relevant facts keep changing, but the PUC does not want to consider the changed circumstances. Demand for oil is down and there is a growing consensus that demand

will likely never recover to even 2019 levels, and will almost certainly go into a steeper decline before this proposed pipeline is even ten years old;

- Minnesota law will continue to require drastic reductions in greenhouse gas emissions, perhaps soon to zero by 2050, and, even more clearly today, those goals cannot be reached without fossil fuel consumption dropping to zero and any need for crude oil transportation well before 2050;
- More aggressive federal action to address climate change and to reduce fossil fuel consumption—from rejoining the Paris climate accord to reducing or eliminating fossil fuel subsidies to promoting the electrification of the transportation system—is a priority of the new Administration;
- Alternative means to accomplish the Canadian oil industry objective of better access to global markets are further along than they were, and even Canadian regulators treat overbuilding as a serious concern.

The PUC may have rejected those arguments, and may believe circumstances have not materially changed since 2018, but it cannot fairly characterize these issues as insubstantial or unworthy of appellate review. Consideration of the first *Webster* factor, whether there are substantial issues, supports a stay. *Webster*, 891 N.W.2d at 293.

V. THERE WILL BE SUBSTANTIAL, IRREMEDIABLE INJURIES IF A STAY IS NOT GRANTED.

Just yesterday, December 1, 2020, the U.S. Court of Appeals for the Fourth Circuit in Richmond granted a motion to stay or enjoin the construction of a natural gas pipeline pending

the outcome of an appeal from a number of U.S. Army Corps of Engineers permitting decisions. *Sierra Club v. U.S. Army Corps of Eng'rs,* --- F.3d ---, 2020 WL 7039300 (4th Cir. Dec. 1, 2020). That court applied the long-recognized principle that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable." *Id.* at *10, *quoting Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987). And that court acknowledged that dredging for pipeline projects, in particular, "cannot be undone." 2020 WL 7039300 at *10, *citing and quoting Sierra Club v. United States Army Corps of Eng'rs,* 399 F.Supp.2d 1335, 1348 (M.D. Fla. 2005), *vacated on other grounds,* 464 F. Supp.2d 1171, 1228 (M.D. Fla. 2006). The Fourth Circuit found that the irreparable injury from dredging clearly outweighed the pipeline company's litany of concerns about the billions of dollars it had spent on project tasks and the claimed $140 million in unrecoverable costs that would be incurred if construction were postponed until spring 2021. 2020 WL 7039300 at *10.

The same reasoning should apply here. Enbridge cannot complete significant construction on this project without trenching through or digging under protected waterbodies and wetlands. Once that happens, just filling in the trench again does not eliminate the harm. Pipelines under protected waters change the hydrology of the surrounding area, by restricting or redirecting groundwater flow. The sediment that (hopefully) settles to the bottom can have long-term deleterious effects on fish and other invertebrates. The loss of trees and other wooded vegetation increases the risk of polluted stormwater, invasive species, and erosion. These are long-term injuries that cannot be effectively remediated, the same kind of injuries that justified preliminarily enjoining the Fargo diversion project in 2017. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs,* 279 F.Supp.3d 846, 878-80 (D. Minn. 2017). As Judge Tunheim

concluded, those irreparable environmental injuries outweighed the alleged higher construction costs and delayed flood control for purposes of maintaining the status quo until the merits could be resolved. *Id.* at 880. *Accord Sierra Club v. U.S. Army Corps of Eng'rs,* 645 F.3d 978 (8th Cir. 2011) (affirming preliminary injunction of power plant construction until challenges to Corps section 404 permits could be resolved).

Of course, as the Tribes' motion explains, construction of this project now also poses the substantial risk of additional exposure to the virus that causes Covid-19. Since the Tribes filed their motion a week ago, the Covid-19 situation has only deteriorated further, with record levels of infections, hospitalizations, and deaths occurring even before the incubation period from potential Thanksgiving weekend exposures expires. Minnesota has again imposed additional restrictions on business activity, and it is quite likely those restrictions will continue or even be tightened to limit travel after the current expiration date of December 18. It is grossly unfair for Minnesota small businesses to suffer, while a giant Canadian company is allowed to incent hundreds of workers and other people to counties that are current Covid hot spots.

These irremediable injuries will, of course, occur before the first drop of oil flows through the proposed pipeline. At that point, of course, the hundreds of waterbodies and wetlands and Minnesota land through which no pipeline currently runs face the risk of oil spills, and the climate impacts of any increase in the production and ultimate consumption of Canadian oil come into play.

Enbridge will no doubt claim millions of dollars of unavoidable costs if this project is delayed. But Enbridge also knows that it is voluntarily assuming the risk that any loss on appeal could leave them with a project that can never be used and with expenses they will not be able to recover. Enbridge is in the best position and indeed has a duty to mitigate its risks and should

not "jump the gun" by proceeding with construction without court affirmance of its permits and then claim those expenses as reasons why project construction may not be stayed. *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers, 826 F.3d 1030, 1039 (8th Cir. 2016).* As the Eighth Circuit has recognized, when proponents of large energy projects anticipate a positive ultimate result in permitting applications and proceed with construction, they become "largely responsible for their own harm." *Sierra Club*, 645 F.3d at 997, *quoting Davis v. Mineta,* 302 F.3d 1104, 1116 (10th Cir. 2002). Such is the case here.

There is little or no *public* cost if the project is delayed. The demand for oil is still well below 2019 levels, while the transport capacity has only increased, with Enbridge's own improvements to its Mainline system, with the approval of the doubling of capacity of the Dakota Access Pipeline (DAPL) for lighter oil, and with the ongoing construction of the Trans Mountain Expansion Project (TMEP) and Keystone XL. Canadian producers may want additional pipeline transport capacity as soon as possible to gain a competitive advantage—or more precisely to reduce their competitive disadvantage—over U.S. producers, but that is hardly an interest the PUC is obliged to protect. To the extent there is any public interest in more oil moving into the U.S. and then back out of the U.S. for the most part—a notion FOH of course disputes—there is no urgency that overcomes the reality of imminent irreparable injuries to public health and the environment. Consequently, consideration of the second *Webster* factor, injury to the parties, also supports granting a stay.

VI. THE PUBLIC INTEREST FAVORS GRANTING A STAY TO PRESERVE

THE JURISDICTION OF THE APPELLATE COURT.

Obviously, avoiding the long-term environmental risks from pipeline construction is in the public interest, and those risks are not outweighed by any public costs. The Commission need also consider the preservation of appellate jurisdiction. Minnesota courts have acknowledged that one of the most important public interest considerations is the need to preserve the ability of the appellate courts to make meaningful decisions. *Webster v. Hennepin Cty.,* 891 N.W.2d 290, 293 (Minn. 2017)(holding that preservation of appellate jurisdiction was "the most important factor to consider"). Allowing Line 3 to be constructed and put into operation in the next few months, as Enbridge says it intends to do, will effectively take away the ability of Minnesota's appellate courts to decide these important questions and grant any meaningful relief. Once a project is built and operating, appeals become largely moot, because courts are very reluctant to order projects "unbuilt," no matter the merits of the legal arguments made by those challenging the project. Changing the "facts on the ground" and gaining some public perception of inevitability may be Enbridge's business strategy, but it is not an interest the PUC should seek to protect. It should be in the PUC's interest, and the public interest, to get these substantial issues resolved in the appellate courts, not to in effect foreclose that possibility.

VII. CONCLUSION

For the reasons stated above, and in the Tribes' motion, Friends of the Headwaters (FOH) respectfully requests that the PUC stay construction of the new Line 3 pending the resolution of appeals.

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Respectfully Submitted,
/s/ Scott Strand

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