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IN COURT OF APPEALS

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APPELLATE COURTS**

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.

Appellate Case Nos.
#A20-1071
#A20-1072
#A20-1074
#A20-1075
#A20-1077

**BRIEF OF AMICUS CURIAE
THE NORTHERN COUNTIES LAND USE COORDINATING BOARD**

Anne Marcotte (0304414)
PO Box 192
Hill City, MN 55748
(218)256.0277
Chair, Northern Counties Land Use Coordinating Board
NCLUCB
E-mail- amarco@centurytel.net

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STATEMENT OF AMICUS CURIAE¹

The Northern Counties Land Use Coordinating Board (NCLUCB) was created in 1983 as a joint powers board². The NCLUCB board consists of elected county commissioners from Aitkin, Cook, Itasca, Koochiching, Lake, Lake of the Woods, Pennington, Roseau and St. Louis counties. NCLUCB's mission is to: provide leadership and support on regional issues of comprehensive land use and natural resource management that meets the social, environmental and economic needs of the people of the region. It fulfills this mission by providing a local government perspective regarding regulation, implementation, and coordination of environmental and natural resource policies and developments with its state and federal partners.

Counties administer land use regulations, administer shoreland regulations, and are responsible for wetland management, forest management, outdoor recreation programs and facilities, aquatic invasive species initiatives, mineral management, public drainage statutes, public land exchanges, solid waste management, soil and water conservation programs, and surface and groundwater quality monitoring.

The nine NCLUCB member counties encompass:

- 20% of Minnesota's land area,
- 45% of the states regulated surface waters,
- 46% of Minnesota's remaining wetlands,
- 38% of the MPCA's listed wild rice waters,

¹ In accordance with the Minnesota Rule of Civil Appellate Procedure 129.03, no party authored this brief in whole or part, and no party made any monetary contributions.

² MSA Chapt. 471.59; per Rule 129.03.

- 65% of the state's forest lands.
- 5% of the state's population
- 4% of the state's aggregate net tax capacity.

This is a region rich in natural resources subject to the realities of a rural economy.

PROCEDURE/ HISTORY

Since 2014, NCLUCB members have tracked the Enbridge Line 3 application for the Line 3 Replacement Project. Its members, Tribal Governments, and hundreds of the residents we serve have participated in the MPUC proceedings regarding the fundamental EIS scoping documents, the Environmental Impact Statement, the Certificate of Need (CON), the manifold agency permits and the Routing permit. NCLUCB has submitted comments to the docket and participated in many of the over 70 public meetings in our capacity as local elected officials and as members of the Northern Counties Land Use Coordinating Board.

Governor Walz's comment of Feb. 14, 2019 prior to the first MPUC affirmative opinion reflects NCLUCB's hope for the current Appeal: "*...if the PUC ruled correctly, the Appeals Court will rule the same...and then they [Enbridge] will move forward.*"³ We respectfully believe that the MPUC did indeed "rule correctly" and are submitting this amicus brief in support of the MPUC from a local elected official perspective.

In granting NCLUCB amicus status for the Enbridge application for a Certificate of Need and Routing Permit, the Court stated: "The purpose of an amicus brief is to

³ "Walz in his own words: an explanation of his Line 3 decision", Minnpost, Feb. 14, 2019

inform the court of facts or matters of law that may have escaped its considerations, not to repeat or emphasize arguments already put forth by a party...it is the practice of this court to freely grant amicus applications to ensure a more complete appellate record, which may aid the Minnesota Supreme Court, when deciding to grant further review.”⁴

We believe this submittal both complies with the Court’s guidance and NCLUCB’s mission to represent the social, environmental and economic needs of the people of our region.

ARGUMENTS

It is our intention to offer three arguments that lie outside the core positions of Appellants and the voluminous record but highlight the political distortions within the Line 3 public dialogue, the attempt to employ the Line 3 application as a referendum on the state’s environmental policies, and the long-term value of a modern Line 3 configuration in facilitating the transition to low/no carbon-based transportation fuels:

1. The Line 3 regulatory process has achieved all statutorily mandated standards for economic, environmental and safety related analyses, studies, and state authorizations.
2. The Line 3 project does not compromise the transition to a low-carbon economy and should not become the venue for a supply-side market intervention as a substitute for a publicly deliberated comprehensive energy policy.
3. The Line 3 project is essential for pipeline integrity and economic continuity.

⁴ Authorized amici curiae, Minnesota Court of Appeals, Sept. 15, 2020

I.

SHOULD THE LINE 3 REGULATORY PROCESS INCLUDE A “SOCIAL PERMIT CONCEPT” WHEN ALL STATUTORILY MANDATED STANDARDS FOR ECONOMIC, ENVIRONMENTAL AND SAFETY RELATED ANALYSES, STUDIES AND STATE AUTHORIZATIONS HAVE BEEN MET?

NCLUCB members acknowledge that the concept of social license is not a formal component of the Line 3 Certificate of Need record. We respectfully ask the Court’s indulgence as we discuss the intrusion of social license concepts into the public dialogue regarding the MPUC Line 3 regulatory process.

In following the various regulatory corridors of the Line 3 project, NCLUCB commissioners were initially puzzled by the Governor’s frequent reference to Enbridge’s need for a social permit:⁵ The “social permit” concept, or the more commonly used phrase, “social license”, was originally applied to the regulatory vacuum that existed in developing countries where corporations promoting massive mining projects faced little or no enforceable standards or accountability for their impacts on environmental, cultural, human rights, or other socio-economic conditions. The concept of social license has apparently become politically popular with elected officials with both Governor Walz and Prime Minister Trudeau invoking its perceived public appeal.

Both Governor Walz and Canada’s Prime Minister, Pierre Trudeau, have endorsed the concept of “social license”:

“As I often say, projects like these don’t only need a building permit to go forward, they also need a social permit. My take is, if you can’t get people’s

⁵ “Walz in his own words: an explanation of his Line 3 decision”, Minnpost, Feb. 14, 2019

buy-in, to believe that there's validity behind the discussion, the social permit, it makes it very difficult to get these things done without great disruption.”⁶

“Social License is more important than ever. Governments may be able to issue permits but only communities can grant permission.”⁷

However, applying the social license concept to statutorily established procedures of regulatory agencies and commissions is not universally accepted:

“But, insofar as Trudeau’s statement can be understood to mean anything at all, the official government permission -the one that counts- under the elastic rules of social license really has no force at all. Governments ‘may’ issue permits he says, but only “communities” can grant ‘permission’. A very odd understanding from a prime minister: that ‘communities’ are the final authority, and that government permits function very much like a tarted-up suggestion box.”⁸

Within the context of contemporary democratic governance, social license is:

“being used more and more frequently by minority or special interest groups, purporting to speak for the public, whom they claim are inadequately represented by the current process. However, there is no useful or widely accepted working definition of the term: ‘social license’; the term does not mean the same thing as the greater public interest. Representing or protecting the public interest is the job for regulators when making their decisions. The concept of social license is embedded in, and reflects and represents the collective public good. In reality, it is effectively granted every time a project is reviewed by and acted upon by the public regulator or decision-maker. The new view or alternative premise of social license suggests that grant of authority to regulators is not complete.”⁹

NCLUCB is deeply concerned that by conflating “social permit” with statutory compliance, the “social permit” becomes an ambiguous extra-legal criterion appended to the regulatory process. In so doing, the “social permit” challenges the underlying

⁶ Ibid.

⁷ Prime Minister Justin Trudeau, speech to the Calgary Petroleum Club, Oct 30, 2016

⁸ “Notley learns a hard truth about social license—it’s not meant to be granted, ever. That’s the point.” Rex Murphy, National Post, May 15, 2017

⁹ “The Question of Social License and Regulatory Responsibility”, March 2016, Vo.8, Issue 7, The School of Public Policy, University of Calgary.

legislatively delegated authority within the regulatory process itself. The social permit: **“becomes shorthand for a demand from self-appointed interest groups to be consulted and granted effective veto power over regulatory approvals prior to any final project approval.”**¹⁰

While the Department of Commerce appeal cites specific theoretical errors in the CON, it appears that the motivation for their second intervention is the quixotic quest to achieve social license not, perhaps, as an undefinable obligation for Enbridge to attain, but a short-lived political aspiration of the Walz administration itself. Examples of the advisory and regulatory presumptions embedded in the social license concept are readily apparent within the Line 3 permitting process. Immediately after a water permit for a Line 3 river crossing was issued by the MPCA, a spokesperson for one of the Line 3 opponents stated: “It’s clear now that Governor Walz’s wish for Line 3 to have a ‘social permit’ was all talk and no action”.¹¹

It is both unfortunate and inevitable that the political concept of social license entered the Line 3 public debate. Its advocates have attempted to de-legitimize the authority of the MPUC, attribute veto power to some opposing organizations, and impugn a deliberative process that is arguably one of the most transparent, publicly accessible and responsive in the history of the MPUC.

A review of the Order for the Routing Permit and CON underscores the active participation of many of the current Appellants in framing provisions and specifying

¹⁰ Op.Cit., University of Calgary, “The Question of Social License and Regulatory Responsibility”

¹¹ “Walz Administration Ignores Line 3 threat to clean water, climate and communities”, StopLine3.org.

components of the conditions adopted by the MPUC. Among the conditions that would favorably conform to “social license” norms include:

- Landowner’s Choice Program
- Public Safety Escrow Trust Account
- Tribal Economic Opportunity and Labor Education Plan and Liaison position
- Neutral Footprint Program
- Tree Replacement Program
- Decommissioning Trust Fund
- General Liability and Environmental Impairment Insurance
- Human Trafficking Prevention Plan
- Public Safety Liaison
- Cybersecurity coordination
- Field Emergency Response Plan
- Existing Line Removal Plan.

The ephemeral nature of the social permit concept is a threat not only to political aspirations, but to the regulatory process itself. The Court’s affirmation of the MPUC Certificate of Need and Routing Permit will confirm the position of Chair Sieben that the MPUC deliberations are “committed to the best for all Minnesota”.¹²

¹² Commissioner Sieben comments, Stay Hearing, Friday, Dec. 4

II.

DOES LINE 3 PROJECT COMPROMISE THE TRANSITION TO A LOW-CARBON ECONOMY OR BECOME A VENUE FOR A SUPPLY-SIDE MARKET INTERVENTION AS A SUBSTITUTE FOR A PUBLICLY DELIBERATED COMPREHENSIVE ENERGY POLICY?

The attempt to substitute unilateral supply-side intervention for a comprehensive energy policy is, to borrow a metaphor from Harvard environmental economist Robert Stavins: “a fast train to the wrong station”¹³ particularly when considering an existing¹⁴ rather than a proposed pipeline. The probable consequences of the complete denial of the CON or continued prolonged legal interventions could result in one of the following scenarios:

- (1) Enbridge continues to operate Line 3 along the existing corridor. Despite employing an aggressive Integrity Management Program, a major break/spill requires shut-down for a prolonged period. Opposition to a post-repair and cleanup restart forces Enbridge to abandon Line 3.
- (2) A corporate decision to withdraw both the application and reliance on the pipeline as presently configured.
- (3) Denial of the CON and Route Permit sending jurisdiction to the Federal Government via the Consent Decree resulting in either Scenario 1 or Scenario 2.

It is our concern that abandoning this existing major pipeline ecosystem will create an economic shock, disrupt complex logistical systems, potentially bankrupt local

¹³ Personal lecture notes: Stavins, Environmental Micro-economics, 1992.

¹⁴ Commissioner Sieben assertion: “this is a replacement pipeline”, MPUC hearing, Dec 10, 2020

governments and create a political backlash within constituencies whose support is essential to effective climate change policy implementation. The transition to an economy less dependent on carbon-based fuels and products is in our national interest and best achieved through a deliberative process, not by advocating an ad-hoc policy of constricting our access to traditional energy resources. The Minnesota Public Utility Commission Order dated May 1, 2020 emphasizes the reality of focusing policy initiatives on demand rather than supply:

“The Commission also acknowledged the significant lifecycle greenhouse gas emissions from the Project and the cost to society arising from those emissions. However, the Commission found that most of those emissions would not result directly from the Project but rather from ultimate consumption of the oil transported by the Project. The Commission recognized the potential impacts of global climate change, but after carefully reviewing the record concluded that denying the certificate of need would not significantly reduce the demand for crude oil and would therefore not significantly reduce climate change impacts. Instead, the record demonstrated that the most likely consequence of denial would be increased transport of crude oil via more dangerous means such as truck, rail and the existing Line 3.”¹⁵

Economists frequently refer to this petrochemical market behavior by the unfortunate term: leakage. “Leakage means that some portion of our emissions aren’t actually reduced, they are just shifted.”¹⁶

So long as demand is present, price is competitive, manifold regional and global supply options are available and national clean energy policies are not effectively shaping

¹⁵ MPUC Order, May 1, 2020, page 13.

¹⁶ “Arguments for and against supply side climate policies”, Canada’s Ecofiscal Commission, May 14, 2019.

consumer preferences (demand), shutting the regulatory valve on Line 3 will not be effective.

NCLUCB supports Governor Walz's initiative in Executive Order 19-37: the establishment of a Climate Change Subcabinet and an Advisory Council on Climate Change. The Subcabinet and Council are the appropriate venue in which to deliberate and advocate for policy and legislative initiatives which ultimately will guide decisions within the MPUC. As the MPUC Order articulates¹⁷ and most climate change economists agree, effective Greenhouse Gases (GHG) reduction policies should be focused on the demand side of the energy market. A clearly mapped transition scheme must be developed and implemented that includes: a combination of carbon pricing mechanisms that reflect the social and environmental costs of production and consumption on a national scale to address leakage; a restructuring of subsidies within the energy market to favor renewable energy alternatives; and policy initiatives designed to accelerate development of an array of carbon neutral energy resources.¹⁸ Despite claims to the contrary, neither this state nor this nation has a clear roadmap for the transition to a low-carbon economy. Minnesota does have a multitude of goals and targets and legislatively crafted statements of intent. MPUC Commissioner Schuerger in a footnote to his dissent cites Minn. Stat. Sec. 116D.02 subs. (3), (9), and (16) which states:

“discourage ecologically unsound practices, to minimize the environmental impact of energy production and use and to reduce the deleterious impact

¹⁷ Ibid MPUC

¹⁸ Kaufman, Noah, “A near-term net zero alternative to the social cost for setting carbon prices”, Nature Climate Change, August, 2020

on air and water quality from all sources, including the deleterious environmental impact due to the operation of vehicles with internal combustion engines in urbanized areas...and to encourage energy conservation and renewable energy use to the maximum reasonable extent.”¹⁹

‘Discourage’, ‘minimize’, ‘reduce’, ‘encourage’ and to the ‘maximum reasonable extent’ are malleable statements of intent that are in reality guidelines for the deliberations of agency regulators and MPUC Commissioners. NCLUCB believes, within the policy constraints of the MPUC these guidelines are fully manifest in the Scoping Process, foundational EIS and reflected in their affirmative decision.

Much of the advocacy for denying the Line 3 redevelopment is premised on forecasts that project significant declines in petroleum demand due to emerging low/no carbon fuel substitutes generally, and the significant impact of electric vehicles specifically. An interesting study conducted by the Columbia Center on Global Energy Policy: “Electric Vehicles and Their Impact on Oil Demand: Why Forecasts Differ” modulates these assumptions of declining consumption expectations:

“Most forecasters agree that there will be little or no growth in the passenger car gasoline market. But any declines in the passenger car sector of the market may be offset by demand growth in the petrochemical, aviation, and freight transport sectors, which have fewer and more costly substitutes for oil.”

“Forecasters have widely disparate views of the underlying drivers of demand...it is possible that these lower carbon demand projections reflect: *what needs to happen* rather than *what is likely to happen*.”²⁰

What needs to happen is unfortunately a critical and as yet unresolved policy debate to address climate change and the potentially catastrophic impacts therein. But that is a

¹⁹ Commissioner Mathew Schuenger, dissenting, Docket 14-916, Dec. 4, 2020.

²⁰ Kah, Marianne, “Electric Vehicles and Their Impact on Oil Demand: Why Forecasters Differ”, interim report, Columbia University, July 2018.

legislative obligation that cannot or should not be assumed by a regulatory body...particularly on the shoulders of what is essentially a mandated maintenance project on an existing pipeline.²¹ The differentiation between “what *needs* to happen” and “what is *likely* to happen” is critical to this appeal. “What *needs* to happen” is a legislative prerogative while “what is *likely* to happen” is subject to a bewildering variety of mathematical, economic and political projections.

NCLUCB Commissioners respectfully suggest that within the confines of the MPUC ‘forecast years’, projections of ‘what is likely to happen’ with regard to the decline in overall traditional transportation fuel and petrochemical demand cannot responsibly be the basis for rejecting the CON.

NCLUCB Commissioners contend that abandoning Line 3 is simply irresponsible and ineffective in addressing GHG reductions.

III.

LINE 3 PROJECT IS ESSENTIAL FOR PIPELINE INTEGRITY AND ECONOMIC CONTINUITY.

As noted earlier, NCLUCB members are elected county commissioners, many of long tenure. In that leadership role, much of their focus is planning, financing, and maintaining public infrastructure such as buildings, park developments, airports, drainage systems, and public roads and bridges. NCLUCB commissioners are mindful of the critical obligation to invest in maintenance to accommodate not only current needs, but also to anticipate future opportunities to support our communities. It is from that

²¹ Commissioner Sieben: “this is a replacement pipeline...”, MPUC stay hearing, December 10, 2020.

perspective that NCLUCB offers several observations that are, perhaps, beyond the temporal scope of the Line 3 Certificate of Need and Routing Permit, but relevant to the potential longer-term value of the Line 3 improvements.

It seems reasonable to ask: Can Line 3 and the Enbridge Mainline System ultimately facilitate the nascent technologies identified as key to a zero-net carbon emission economy?^{22, 23}

In evaluating the long-term value of the Line 3 project, the following comments should be considered:

“They are not investing hundreds of billions of dollars in pipelines that will last 75 to 100 years without knowing that infrastructure can be readily repurposed. Instead of thinking of pipelines as single use systems like high voltage transmission lines, think of them as paved highways.”²⁴

“This was an especially difficult week for the pipeline industry across North America as two lines were dealt headline-making setbacks and another major project was cancelled.”²⁵

“Defeats at three projects reflect increasingly sophisticated legal challenges, shifting economics and growing demands by states to fight climate change.”²⁶

We recognize that as the headlines quoted above suggest, efforts to construct new pipelines will become an increasingly costly, prolonged and politically challenging task, thereby amplifying the benefits of a modern existing pipeline.

²² The Line 3 Scoping, Final EIS and the subsequent Certificate of Need and Routing Permit did not consider this question.

²³ Eric Larson “Net- Zero America: Potential Pathways, Infrastructure, and Impacts,” Princeton University, Dec. 15, 2020

²⁴ Partisan Issues, Oct. 14, 2019

²⁵ “Cloudy outlook for pipelines gets even murkier amid court rulings, U.S. elections” CBC News, July 11, 2020.

²⁶ “Is This the End of New Pipelines?” The New York Times, July 8, 2020.

In affirming the CON and Routing Permit for Line 3, the MPUC has provided essential infrastructure for the long-term transition to low/no carbon transportation fuel market. This transition will occur over a time-period considerably longer than is provided for within the MPUC regulatory forecast: “[f]orecast years means the 16-year period consisting of the year in which an application is filed plus the next 15 years.”²⁷

A review of the MPUC Line 3 record offers a few clues in the unredacted testimony that suggest some capabilities to accommodate future low/no carbon feedstocks and fuels: “Enbridge’s Mainline system has more flexibility than a stand-alone pipeline would have” and “The replacement pipeline will be constructed using thicker-walled pipe to handle greater pressure cycles...and manage more variation in through put demand.”²⁸

The Enbridge Line 3 replacement is part of a national infrastructure of pipelines serving current energy and feedstock demands. While some may regard this network of both crude oil, natural gas, and various other petrochemical raw materials as a necessary evil in the context of climate change, components of this same infrastructure most assuredly will be essential to achieving carbon emission reductions and policy goals.

The Midwest and Great Plains regions with their strategically located wind power capabilities, agricultural base and favorable geology for carbon sequestration will be a national focus for production of these key low/no carbon fuels and permanent carbon sequestration sites. Research and demonstration projects, as well as biofuel production

²⁷ Minn.R. 7853.0010 subd. 10

²⁸ Kennent testimony, CNRI 434 at 26.

facilities and a commercial Carbon Capture and Utilization (CCUS) facility are active within the Line 3 region. Producing green energy products such as biofuels/biodiesel, hydrogen derivatives (blue hydrogen/green hydrogen and anhydrous ammonia), and operating future CCUS systems will require pipeline collection and distribution systems to serve their distributive producers and end users: refineries, fuel depots, agricultural regions, power plants and subterranean storage/sequestration sites.

Line 3 in its modern replacement configuration is geographically located to be a significant infrastructure asset for this transition to cleaner fuels and a reliable, stable, carrier for traditional fuels and feedstocks during the transition.^{29, 30}

NCLUCB commissioners contend that the timeframe within which GHG reduction policies will be implemented and technologies will reach commercial scale extends many years beyond the MPUC Line 3 regulatory horizon. An existing modern, dependable, and flexible infrastructure system capable of transporting both traditional feedstocks and anticipated low-carbon fuels and mitigation products is in the state's best interest. An in-place transportation system will reduce the costs of introducing these new feedstocks and fuels and accelerate their acceptance in the marketplace.

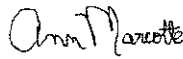
²⁹ "A Clean Fuels Policy for the Midwest," A White Paper from the Midwestern Clean Fuels Policy Initiative, Great Plains Institute, January, 2020.

³⁰ "Transport Infrastructure for Carbon Capture and Storage: Regional Infrastructure for Midcentury Decarbonization", Regional Carbon Capture Deployment Initiative, Great Plains Institute, June 2020.

CONCLUSION

NCLUCB respectfully requests that the Court uphold the Routing Permit, the Certificate of Need and, in so doing, hold that the underlying 6-year process of deliberation has successfully balanced the social, economic, and environmental interests of the State of Minnesota.

Respectfully submitted,



By:

Anne Marcotte, Attorney of Law, AIN 0304414
Chairperson, Northern Counties Land Use
Coordinating Board (NCLUCB)
P.O. Box 192
Hill City, Minnesota 55748
(218) 326-8535
Email: amarco@centurytel.net

STATE OF MINNESOTA
IN COURT OF APPEALS

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**CERTIFICATE OF AMICUS BRIEF LENGTH AS TO NORTHERN COUNTIES LAND USE
COORDINATING BOARD**

I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. (1) and (3), for a brief produced with a proportional font. The length of the brief is 4,331 words by using Microsoft Office Word 2010.

Date: January 13, 2021

