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September 20, 2010

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**PUBLIC SERVICE COMMISSION**

Mr. Darrell Nitschke  
Executive Director  
North Dakota Public  
Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Dear Mr. Nitschke:

In re: Enbridge Pipelines (North Dakota) LLC  
Berthold Station Upgrades - Ward County  
Siting Application  
Case No. PU-10-130  
Our File No. 31-411-002

Enclosed please find for filing the original and ten copies of the following:

1. Motion Pursuant to NDCC § 49-22-16(2) To Supersede And Preempt Local Zoning by the City of Berthold, North Dakota,
2. Memorandum in Support of Motion to Supersede and Preempt Local Zoning Regulation,
3. Affidavit of Bruce A. Homeniuk.

Please be advised that we will be providing copies of the foregoing to the City Attorney of Berthold.

Please call should you have any questions.

**43** **PU-10-130** Filed: 9/20/2010 Pages: 15  
**Motion to Supersede and Preempt Local Zoning by  
the City of Berthold + supporting documents**

Enbridge Pipelines (North Dakota) LLC

Brian Bjella, Crowley Fleck

Very truly yours,



BRIAN R. BJELLA

bw

Enc.

cc: Bryan Van Grinsven (w/enc.)  
Berthold City Attorney

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA

ENBRIDGE PIPELINES (NORTH  
DAKOTA) LLC  
BERTHOLD STATION UPGRADES -  
WARD COUNTY  
SITING APPLICATION

CASE NO. PU-10-130

MOTION PURSUANT TO N.D.C.C.  
§49-22-16(2) TO SUPERSEDE AND  
PREEMPT LOCAL ZONING BY THE  
CITY OF BERTHOLD, NORTH DAKOTA

Enbridge Pipelines (North Dakota) LLC ("Enbridge") moves, pursuant to the provisions of N.D.C.C. §49-22-16(2), Chapter 28-32 N.D.C.C., and Article 69-02, N.D.A.C., that the Commission supersede and preempt the application of any zoning ordinance and/or regulation of the City of Berthold, North Dakota to the station expansion and upgrades authorized at Enbridge's Berthold Station in Ward County, North Dakota by the Commission's "Findings of Fact, Conclusions of Law, and Order" and Certificates number 114 and 124, as issued on August 4, 2010. The City of Berthold ("Berthold") has unreasonably and arbitrarily applied its zoning authority to frustrate the station expansion and upgrades authorized by the Commission and is being unreasonably restrictive in application of its zoning authority in view of existing technology, factors of costs and economics, and/or the needs of consumers in North Dakota and elsewhere. In support of this Motion, Enbridge submits herewith its "Memorandum In Support Of Motion" and the "Affidavit of Bruce A. Homeniuk." Enbridge further requests expedited action on this motion due to the public demand for transportation service and the urgent need to commence work on the Station expansion and upgrades to meet such need.

Respectfully submitted,

ENBRIDGE PIPELINES  
(NORTH DAKOTA) LLC

CROWLEY FLECK PLLP  
Attorneys for Enbridge Pipelines  
(North Dakota) LLC  
400 North Broadway, Suite 600  
P.O. Box 2798  
Bismarck, North Dakota 58502

Dated this 20th day of September, 2010

By   
BRIAN R. BJELLA (#03549)

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA

ENBRIDGE PIPELINES (NORTH  
DAKOTA) LLC  
BERTHOLD STATION UPGRADES -  
WARD COUNTY  
SITING APPLICATION

CASE NO. PU-10-130

MEMORANDUM IN SUPPORT OF  
MOTION TO SUPERSEDE AND  
PREEMPT LOCAL ZONING REGULATION

INTRODUCTION

This memorandum is respectfully submitted in support of the motion filed concurrently by Enbridge Pipelines (North Dakota) LLC ("Enbridge") pursuant to N.D.C.C. § 49-22-16(2) to supersede and preempt the application of any zoning ordinance and/or regulation of the City of Berthold, North Dakota ("City") to the station expansion and upgrades at Enbridge's Berthold Station ("Station") in Ward County, North Dakota authorized and certified by this Commission on August 4, 2010. The motion is further supported by the accompanying "Affidavit of Bruce A. Homeniuk" ("Affidavit"). As shown below, the requested relief is warranted under North Dakota law and sound public policy and is needed to prevent frustration of this Commission's order and decisions of August 4, 2010 and to advance the public interest.

Enbridge requests expedited consideration and action on this motion. Relief is urgently required if Enbridge is to be able to complete the authorized work on schedule and fulfill the Commission's mandate. Enbridge will comply with whatever filing or hearing schedule the Commission establishes.

## STATEMENT

The background to this motion is well-known to the Commission and need not be discussed at length herein. The Commission's "Findings Of Fact, Conclusions Of Law, And Order" ("Order") and its Certificates Number 114 and 124 as issued on August 4, 2010 detail Enbridge's plans to expand and upgrade its petroleum-receiving and -processing facility in Berthold, North Dakota as well as the role that project has in further Enbridge plans to expand transport capacity from North Dakota and Montana oil fields by over 140,000 barrels per day (bpd) to meet market need and demand. Enbridge hereby incorporates the discussion and provisions of the Order into this motion and memorandum.

The further facts pertinent to this motion are set forth in the accompanying Affidavit. As shown therein, City representatives alleged that Enbridge was required to seek an amendment to the City's Zoning Map; thereafter, the City denied Enbridge's application for zoning map amendment ("Application") resulting not only in a blockade of the Berthold Station Upgrade Project, but a blockade of Enbridge's planned North Dakota System expansion.. The City has refused Enbridge's Application arbitrarily and capriciously, without rational basis, as all the City's concerns about truck traffic and traffic safety have been satisfied by the conditions of issuance of the Order and Enbridge's acceptance thereof. As stated in the Affidavit, Enbridge is prepared and willing to fulfill the conditions and will do so at a cost of about \$1 million. Aff. at 3. Further, the City's implicit demand that Enbridge relocate the truck-servicing facility included in the Berthold Station Project to a parcel west of the existing Station site is unreasonable in the extreme. Aff. at 4. Existing conditions affecting the western parcel include a silo site for a missile which has a 2,000 USAF-mandated Buffer Zone ("Buffer Zone") surrounding that facility. If Enbridge was forced to construct its facilities on the western parcel they would breach USAF Buffer Zone. The missile facility is for the safety and security of our nation. The

Buffer Zone surrounding that facility was established to ensure its safe operation. The facility is fenced, has electro-magnetic surveillance, and missile related communications and operations technology associated with it. Breaching the Buffer Zone is not an option for Enbridge. Furthermore, if Enbridge was forced to construct its facilities on the western parcel its entire Station would be bisected by the Burlington Northern Santa Fe raised railroad embankment. The overall disruption in access (especially during emergencies), monitoring of the entire site (vision/sight lines), and coordination and construction of the facilities (connecting of pipes and various electrical systems underneath the raised railroad embankment and thereby raising additional issues regarding access to and ongoing integrity of those facilities) in the tightest of proximities to a USAF missile site and active railroad line does not make this location a reasonable option for Enbridge. In addition, it would be necessary to create at least one private crossing of the rail line for Station operations, a situation desirable neither to the railroad nor Enbridge. Alternatively, Enbridge would not face these types of safety and operations problems at its preferred location – the eastern parcel – while at the same time resolving the traffic safety concerns that plague both locations. *Id.*

Mr. Homeniuk's Affidavit also establishes that acceding to the City's relocation demand would increase costs to Enbridge, its customers, who are producers and shippers of North Dakota sourced crude petroleum, and ultimately to the petroleum-consuming public. *Aff.* at 5. As well, the proposed relocation would substantially delay the provision of enhanced transportation service by Enbridge, potentially by as much as five months. *Id.* Such delay is inconsistent with the purpose and intent of the Order.

#### ARGUMENT

It is abundantly clear that the Commission has both the authority and the basis to supersede and preempt Berthold's zoning authority (if any) in the circumstances here. N.D.C.C.

§ 49-22-16(2) allows the Commission to supersede or preempt any local land use, zoning, or building rules, regulations or ordinances "upon a finding by the Commission that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of costs or economics, or needs of consumers regardless of their location." N.D.C.C. § 49-22-16(2). The Commission has, in fact, previously exercised such authority to override the exertion of local zoning power in connection with an energy transmission project certificated by the Commission. Thus when a township tried to use zoning power to impose a costly and unduly restrictive condition -- double-circuiting -- on a planned electric power transmission line, the Commission quashed the zoning requirement pursuant to N.D.C.C. § 49-22-16(2). *Minnkota Power Cooperative, Inc.*, No. PU-08-08, "Findings Of Fact, Conclusions Of Law, and Order," at 5-6, June 2, 2008. It was significant to the Commission in so ruling that the township's demand would, as does the City's demand, impair the system's reliability and impose needless costs. *Id.*

The pre-eminence of the authority of a public-utility regulatory body over local zoning concerns is well-established. Indeed, it is essential if projects considered, analyzed, sanctioned, and ordered by bodies such as this Commission as useful to and in furtherance of public convenience and necessity are not to be frustrated or harassed by purely local parochial interests using zoning codes and ordinances. *See, e.g., In re Application of Nebraska Public Power District*, 354 N.W.2d 713 (S.D. 1984); *Delaney v. New York Public Service Commission*, 123 A.D.2d 861 (N.Y.S.2d 1986); *Skyview Acres Coop., Inc. v. New York Public Service Commission*, 163 A.D.2d 600 (N.Y.S.2d 1990) (pipeline route); *Responsible Use of Rural & Ag. Land v. Wisconsin Public Service Commission*, 619 N.W.2d 888 (Wis. 2000).

The City's action here cries out for pre-emption by the Commission. The facts show that the best existing technology is being applied to the Berthold Station Upgrade Project both in terms of its construction and the traffic safety and management techniques required by the Commission's Order per the NDDOT's advice; that Berthold's action will impose needless and burdensome costs on users of petroleum transport facilities and upon ultimate consumers of refined petroleum products; and that the needs of consumers of crude petroleum, such as Midwestern refineries, will be impaired by the probable delay in the expansion of Enbridge's transport capacity. This Commission should also be cognizant, as in its Order of August 4, 2010, of the importance to the citizens and economy of North Dakota of enhancing the State's role in supplying energy resources to the nation.

CONCLUSION

Parochial interests and preference cannot be allowed to frustrate the actions of this Commission. For the reasons discussed above, the Commission should find and order that the City of Berthold's zoning authority, whatever it may be, should be preempted and superseded in the instance of Enbridge's Berthold Station Project.

Respectfully submitted,

ENBRIDGE PIPELINES  
(NORTH DAKOTA) LLC

CROWLEY FLECK PLLP  
Attorneys for Enbridge Pipelines  
(North Dakota) LLC  
400 North Broadway, Suite 600  
P.O. Box 2798  
Bismarck, North Dakota 58502

Dated this 20th day of September, 2010

By   
BRIAN R. BJELLA (#03549)

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA

ENBRIDGE PIPELINES (NORTH  
DAKOTA) LLC  
BERTHOLD STATION UPGRADES -  
WARD COUNTY  
SITING APPLICATION

CASE NO. PU-10-130

STATE OF NORTH DAKOTA     )  
  ) SS.  
COUNTY OF WARD             )

AFFIDAVIT OF BRUCE A. HOMENIUK

The undersigned, being first duly sworn and under oath, declares and states as follows:

1. My name is Bruce A. Homeniuk. My business address is 2505 16<sup>th</sup> Street SW, Minot, North Dakota 58701. I am employed by Enbridge Pipelines (North Dakota) LLC ("Enbridge") as Supervisor - Engineering and Regional Services and am responsible for operations and certain construction projects related to Enbridge's North Dakota System, including the expansion and upgrading of its Berthold Station ("Station").

2. I submitted testimony on behalf of Enbridge in this proceeding and testified at the public hearing held before the Public Service Commission in Berthold, North Dakota on July 16, 2010. The Commission granted Enbridge's Applications herein on August 4, 2010.

3. As found by the Commission, the purpose for the expansion and upgrades authorized for the Station is to accommodate the increasing demand for mainline receiving and storage capabilities of crude oil produced from the Williston Basin of North Dakota and Montana. The proposed upgrades will enable Enbridge to receive increased supply volumes at

the Station and to increase its injection capacity in order to deliver an additional 15,000 barrels per day of crude petroleum into Enbridge's Mainline System.

4. Oil shippers in North Dakota have requested increased capacity on our North Dakota System to transport greatly increased volumes of oil being produced from the Bakken Formation. New wells in the Bakken Formation have substantially increased North Dakota's oil production. Average monthly production from the Bakken fields has reached its highest average ever. In addition, indications are that the Bakken Formation will continue to see extensive development for many years to come. There are currently over 100 drilling rigs operating in the State of North Dakota and projections are that the "rig count" will increase in the foreseeable future.

5. North Dakota producers and shippers of crude petroleum are seeking increased pipeline transport capacity in order to move the growing Bakken output to various American markets, as the Commission found in its August 10 Order. Enbridge needs to meet shippers' demands and to partner with the State of North Dakota to get this increased oil production to markets, so additional production can be facilitated and consumer demand in the American Midwest and other areas satisfied. The expansion and upgrading of the Station is critical to these goals and it is imperative that Enbridge commence Station construction as soon as possible with the goal of completing the upgrades at the Station and putting them in service by November 1, 2010.

6. The City of Berthold ("City") participated in the proceedings leading to the Commission's Order and Certification of August 4, 2010, expressing therein certain concerns about traffic flows, volumes, and safety in regard to the expansion of the Station into an 80-acre parcel of land adjacent to the east side of the Station and the construction thereon of a truck

delivery and unloading facility. As the Commission found, Enbridge worked with City representatives, the Commission, and the North Dakota Department of Transportation to address such concerns. Enbridge agreed to the adoption of various traffic-safety measures, costing approximately \$1 million, to resolve such concerns and the Commission concurred in this resolution and so conditioned its Order and Certification. Enbridge has accepted such requirements and is willing and prepared to implement them as part of the Station expansion and upgrading.

7. In July of this year, Enbridge applied under protest to the City for an amendment to the City's zoning map that would change the zoning classification of the 80-acre parcel east of the Station, on which the new truck facility is to be located, from "Agricultural" to "Industrial." Subsequent to the proceedings in this docket and the issuance of the Commission's August 4 Order and Certifications, the City Council considered Enbridge's request (the City's Planning Commission had reviewed it on August 2, 2010 and recommended denial). Despite Enbridge's agreement to measures to resolve the City's traffic-safety concerns and the Commission's adoption thereof by its August 4 decision, the City Council denied Enbridge's application at a meeting held on August 9, 2010. Since that time, Enbridge has met with City representatives and has sought to resolve this matter, without success.

8. In the course of dealing with Enbridge's zoning request, various City representatives have requested that Enbridge purchase an approximately 80-acre parcel of land to the west of the Station and install the needed truck facility thereon rather than on the parcel to the east of the Station. A zoning amendment would be necessary for the western parcel as well but no assurance has been given by the City that it would be granted if Enbridge abandoned the eastern 80-acre parcel. The same traffic-safety concerns will continue for the City if the Station

expansion and the truck facility utilize the west 80-acre parcel, as the concerns primarily preexist the development of Enbridge's expansion project – that being the City's desire for a reduced speed limit on Highway 2 through its community that lies to east of the Station and the City's desire to address the safety issue resulting from the requirement that trucks must stop at the existing railroad track. Neither of these safety concerns will be addressed by Enbridge moving its project west of the Station as the North Dakota Department of Transportation has indicated that the only potential road improvement that may be required for the west site is a right hand turn lane for vehicles approaching the site from the west. The City has identified no other basis for shifting the Station expansion from the east side to the west side (expansion to the north is not feasible due to planned wind power facilities and the area to the south is quasi-developed already).

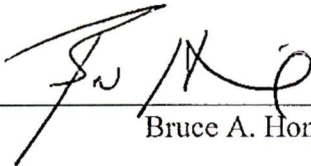
9. Enbridge has assessed the feasibility of utilizing the west 80-acre parcel, as proposed by the City. We have determined that it is not feasible, economic, safe, nor conducive to meeting public need to relocate the planned facility to that location. We have recently determined that the west 80-acre parcel is in close proximity to a missile silo maintained by the United States Air Force. We are advised by USAF representatives that, as a matter of safety, security, and standard operating procedure, the USAF does not allow construction within 2000 feet of the silo site property boundary. Some part of the truck facility planned for the Station expansion would inevitably fall within this exclusion zone if constructed on the west parcel. Enbridge would also be precluded from any further expansion to the west should future production increases require additional Station facility expansion. In addition, the west 80-acre parcel and existing Station, in contrast to the east parcel, is bisected by a raised railroad right-of-way belonging to the Burlington Northern Santa Fe Railroad. If the expansion facilities were to

be constructed on the west parcel, new Station facilities would be separated from existing facilities and both the visibility of and access to the new facilities would be impeded by the railroad embankment and daily railroad operations. This would hamper monitoring of facilities and emergency responses, if required. Moreover, placing the truck facility on the west parcel would require that connecting pipes and systems be placed beneath the railroad roadbed, thereby rendering them virtually unreachable and raising integrity concerns. In addition, it would be necessary to create at least one private crossing of the rail line for Station operations, a situation desirable neither to the railroad nor Enbridge.

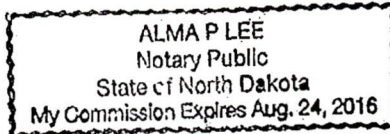
10. Beyond the concerns just noted about relocating to the west 80-acre parcel, it is important to note that such a step would increase our Station improvement and expansion cost by roughly one million dollars (\$1,000,000). These costs include additional design, engineering, and construction costs associated with moving the truck facilities and placing additional, and unnecessary, facilities under and over the railroad right-of-way. It will also cost more in general to construct the Station upgrades if we must do so in the winter, as such a move would require. Such increased costs will have to be recovered in our charges for shipping crude and will ultimately be passed on to consumers, thus increasing the public's cost for refined petroleum products. Moving the facility and constructing in the winter would also delay the provision of increased capacity and service to shippers and producers and the delivery of increased volumes of North Dakota crude to petroleum consumers in the Midwest and elsewhere. Our current plan and goal is to have the initial capacity increase in service by November 1, 2010. Precluding Enbridge from constructing its facilities on the east 80-acre parcel could delay its in-service date until March of 2011, and seriously jeopardizes the timely future expansions of Enbridge's North Dakota System. This delay, and its foreseeable effect on future expansion projects, will be

detrimental to our transport customers and the public. And, of course, we could be further delayed or blocked if the City refuses a zoning amendment for the west 80-acre parcel.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Bruce A. Homeniuk

Subscribed and sworn to,  
before me this 20  
day of September, 2010



Seal)

  
\_\_\_\_\_

Notary Public  
State of North Dakota  
County of Ward

My Commission expires: August 24, 2016

CHI 5465393v.1