

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 17

DANE COUNTY

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ENBRIDGE ENERGY COMPANY INC.,
et al.,

Petitioner,

-vs-

Case No. 16CV08

DANE COUNTY, et al.,

Respondent.

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TRANSCRIPT EXCERPT

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DATE: September 27, 2016

BEFORE: HONORABLE PETER C. ANDERSON
Circuit Court Judge

APPEARANCES: ENBRIDGE ENERGY COMPANY INC., Petitioner,
appeared by ERIC McLEOD and
JEFFREY L. VERCAUTEREN, Attorneys at Law,
Madison, Wisconsin.

DANE COUNTY, Respondent, appeared by
DAVID R. GAULT, City Attorneys Office,
Madison, Wisconsin.

THOMAS R. BURNEY and PATRICIA K. HAMMEL,
Attorneys at Law, Madison, Wisconsin,
appeared on behalf of the Intervenors.

PROCEEDINGS: Oral Ruling

REPORTED BY: Theresa L. Groves, RPR
Official Court Reporter

1 THE COURT: Well, again, I'm thinking about
2 this case on an extremely abstract level and it has
3 nothing to do with what I feel about using pipelines
4 to transport tar sands or whatever the right name of
5 the material is through the country. I certainly am
6 aware, from looking at our record, of some of the
7 really bad environmental catastrophes that have
8 followed, and the last thing I want is for something
9 like that to happen in Dane County. Of course, even
10 these conditions, most of them have to do with that
11 risk I suppose. The insurance doesn't really change
12 that risk. It just has more money available for
13 cleanup but somewhat limited amount when you look at
14 the numbers.

15 But here's the deal: I am dealing on a very
16 abstract level, and if I go back to my reasoning last
17 time, it was this: If you have an administrative
18 action taken for which an appeal is pending and the
19 law gets changed while the appeal is pending, then my
20 view was, consistent with how we do it in case law
21 when there's a change in precedent, is that that law
22 then becomes operative as to everything that's
23 pending at that time. So it's not the case that the
24 CUP was issued prior to the law -- finalized I should
25 say, was not finalized before the legislation was

1 enacted. Had that happened, then all we would say is
2 that it's unenforceable, but we would not change the
3 CUP. So we'd say it's unenforceable and, they're
4 right, put an asterisk on it and that's what it
5 indicates.

6 If the law gets changed, then we have to see what
7 happens. Who knows when that would happen or how the
8 law might be changed. It could be modified or --
9 it's very speculative to think about those
10 possibilities. At the moment, though, while the
11 appeal was still pending and while action was still
12 being taken, the legislation got enacted, and that,
13 therefore, was something that the county had to
14 comply with, and they couldn't just simply impose a
15 condition that had previously been adopted by the ZLR
16 prior to the legislation being enacted. So that was
17 what they could not do.

18 Now, I was told last time, and I think I fairly
19 summarized it, that the main issue here was what
20 happens if the law gets changed. So let's just think
21 about this. This was the issue: The ZLR could have,
22 in the fall of 2015, or at least it was then current,
23 they still would have faced this vested rights issue,
24 but I don't know how that would have played out. But
25 they could have at that time said no, we can't issue

1 this permit with an asterisk on it, this is just
2 completely contrary to what we want, and so we're
3 going to have to start over and see what conditions
4 we can put in place to substitute for the insurance
5 to give us, the residents of Dane County, the
6 protection we feel we need. Maybe there was some
7 mention of a trust, I saw that, a trust doctrine, but
8 maybe further safety measures. I said insurance
9 doesn't make things safer. It just says, if the risk
10 occurs, then we got money to pay for it.

11 Another thing you can do in the alternative to
12 insurance is make things safer. So maybe you put
13 more conditions on it. You'd say the galvanized pipe
14 has to be so many inches or such and such thickness
15 or whatever you do, but they didn't do any of that.
16 So instead, to me, what the ZLR did and what the
17 county board affirmed was the idea that we would keep
18 the conditions in place but put an asterisk on them
19 noting that they're unenforceable; therefore, that
20 would be what would go forward at least until the law
21 got changed, if the law ever did get changed. So the
22 county was at that point satisfied with the
23 conditions that had been imposed and placed in April
24 with the recognition that the insurance requirement
25 was not enforceable.

1 So this was the county's view of what it had
2 issued: A conditional use permit with so many
3 conditions, but one or two of them were unenforceable
4 because they related to the insurance, and that's
5 what it issued, and that's what it was satisfied
6 with. If it goes back to them, what are they going
7 to do? They were already satisfied with that.
8 That's the world as it exists today. Those
9 conditions are unenforceable just as they were back
10 in December. So they have an unenforceable
11 condition.

12 Why do they now get to change it because of my
13 ruling? My ruling has to do with 20 years from now
14 or whenever, 10 years from now or whatever happens to
15 that legislation. That's what my ruling really has
16 to do with. Everybody in the county -- I know the
17 plaintiffs disagree, the intervenors disagree, but
18 the county was of the view the county could not
19 enforce that condition, and there's no dispute on
20 that.

21 So what would the county now do logically? They
22 would then say, well, let's put on some conditions
23 that will protect us when that legislation gets
24 changed, and that makes no sense because, if the
25 legislation gets changed, at worst, you get the new

1 protection. I'm sorry. At worst, it's the same
2 world as before. We have the conditional use permit
3 with the unenforceable provisions or whatever the
4 legislature gives you. I don't see how the
5 legislation being changed in the future is a new
6 risk. The legislation is the risk that you face. It
7 prohibits you from getting the insurance. If they
8 get rid of that, then you're better off.

9 So what do you need to do today about that? Maybe
10 you can't do anything. Under my ruling, I don't
11 think you can do it. I don't think you can put
12 conditional uses that will come into effect upon some
13 contingency years in the future that we don't know
14 whether or not it will occur. We can't create
15 contingent future conditions is my understanding of
16 conditional use permits. You can't just do that. If
17 you could have done that, we wouldn't have needed to
18 argue this last time.

19 MS. HAMMEL: Can I say something?

20 THE COURT: No. I'm sorry. I view you
21 guys as together, and I'm making what we call the
22 ruling. That's all. I apologize but this is how we
23 do it. People do this when they think it's a good to
24 time to interrupt the Judge. I'm just giving my
25 ruling right now.

1 MS. HAMMEL: I understand. I think there
2 was a Supreme Court decision you might want to look
3 at.

4 THE COURT: Yeah. Oh, well. I guess
5 Mr. Burney should have brought that up. In any
6 event, this now is my ruling. If it turns out it's
7 wrong, I'm telling you, there's a Court of Appeals
8 right here. They'll look at your case law and
9 they'll fix it for you.

10 But in my view, those circumstances really, really
11 counsel against authorizing the ZLR or the county
12 board to start again on the conditional use permit
13 even independent of the vested rights issue, but the
14 vested rights issue is not insubstantial. Like I
15 said, a lot of water has flowed under the bridge or
16 tar sands through the pipeline since the legislation
17 a year ago, and the time for the county to have acted
18 was last fall, and rather than take the action that
19 they now want me to authorize them to do, they
20 instead affirm the issuance of the conditional use
21 permit as is with unenforceable provisions.

22 So I just cannot -- again, this is very abstract
23 thinking on my part. It has very little to do with
24 what we're actually dealing with -- namely, this
25 pipeline or its pumping station -- but it has to do

1 with how the government needs to act when it's
2 dealing with citizens, and we give them a lot of
3 deference on certain things, but I certainly can't
4 give them deference on the law if the legislation
5 says they can't do this.

6 So I do not see that this is in any way the
7 appropriate case for me to authorize further action
8 by the county or the ZLR with respect to imposing any
9 additional conditions on this project -- on this
10 permit from those that have already been put in
11 place, and I'm accepting Mr. McLeod's view of the
12 law. I think it's very a technical issue about
13 statutory versus common-law certiorari, remand versus
14 striking. The fact is, even if I remanded it, it
15 would be with instructions that you may not impose
16 additional conditions for the reasons I said. So I
17 think the more straightforward thing to do is, if I
18 have that authority, and Mr. McLeod believes I do, to
19 strike the insurance requirements that were found
20 invalid in the previous ruling which have been
21 accepted as invalid by the county.

22 So, Mr. McLeod, you may prepare an order
23 consistent with that ruling and just be explicit as
24 to what we're striking so it's very clear. The main
25 thing I remember was \$25 million in the additional

1 environmental insurance. That was the main thing I
2 remember. I think the 100,000 they already had,
3 something like that. The statutes said they had to
4 have 100,000.

5 MR. BURNEY: Your Honor, could I ask a
6 couple housekeeping things so we don't have to come
7 back on this order.

8 THE COURT: I'm sorry. What?

9 MR. BURNEY: A couple housekeeping
10 questions I have for you.

11 THE COURT: Sure.

12 MR. BURNEY: We have our writ of cert.
13 There was a motion to dismiss so we need a ruling
14 from you on that. But previous to that, we would ask
15 you to just -- that Mr. McLeod's order would affirm
16 that we are parties to this action with the full
17 rights which, in their briefs and their papers, they
18 continue to raise an issue about that.

19 Second of all, I got lost in all the debate that
20 went on in July that we've requested leave, we
21 believe as a matter of right under the statute, to
22 file an amended answer to one paragraph about the
23 sudden and accidental, so we'd like it to be clear
24 that we were granted leave to do that.

25 THE COURT: Okay. So we dismiss your

1 complaint in the original case since I found that
2 there's no -- cannot be a valid provision of the CUP,
3 then you wouldn't be enforcing anything. So we
4 dismissed that complaint. You want some kind of
5 declaration of your party status?

6 MR. BURNEY: Just finding that consistent
7 with --

8 THE COURT: Obviously you've been
9 participating pretty actively. Let's see what
10 Mr. McLeod says.

11 MR. MCLEOD: I don't think we concede that,
12 Judge. I think the decision the Court is making now
13 confirms that they were not -- that they didn't have
14 standing or a proper basis to proceed with their
15 claim. That they're here in the courtroom is
16 certainly a matter of record, but they're not parties
17 to the question about whether or not these conditions
18 in the CUP are enforceable. In a separate action,
19 which it's been consolidated for convenience of the
20 parties here, but it doesn't result in them having
21 standing to appeal. If the county wanted to appeal
22 the Court's decision, I believe it could. I don't
23 believe the plaintiffs have standing to appeal on
24 behalf of the county.

25 THE COURT: This is my view of it: They

1 were parties in their own case. I didn't say they
2 didn't have standing. I just said the claim fails.
3 The claims fails to state a claim upon which relief
4 can be granted so I didn't say you didn't have
5 standing on that one. You definitely were parties in
6 that action. That's been consolidated with this
7 action.

8 My view of it is that -- and we discussed this
9 before somewhat. I would view them as intervenors.
10 If it's permissive, then it's by permission, and if
11 it's by right, then it's by right because. If you
12 need permission, I'm granting the permission,
13 intervenors, in the certiorari action to defend the
14 action of the board and the ZLR. And if that wasn't
15 clear before, I would make it nunc pro tunc to the
16 time in which we consolidated the cases. What I did
17 not really intend was that their intervening then
18 gave them rights to challenge the board's action
19 since they never filed a petition.

20 So that's the intent of my ruling. So I view them
21 as intervenors in the same defense of the board and
22 ZLR action with comparable status to the county in
23 the certiorari case. That's my ruling on that.
24 Finally, we had one other thing.

25 MR. BURNEY: It was the leave to file the

1 amended answer which we've filed within the statutory
2 period. Even if you go back --

3 THE COURT: I think I gave you time to do
4 that; right?

5 MR. BURNEY: We filed it. There was a lot
6 going on in July, your Honor. I know we might have a
7 disagreement with Mr. McLeod or his office about the
8 order, and we'd like the order to reflect that we
9 were granted leave to amend our answer, and this is
10 on an issue that you don't want to talk about which
11 is the --

12 THE COURT: So we ruled on it.

13 MR. BURNEY: This is to make clear that we
14 do not agree. We did not concede that they have
15 sudden and accidental insurance, and that's what that
16 paragraph is amended to make clear.

17 THE COURT: So my intent there, Mr. McLeod,
18 is to say yes, they did take that position, and this
19 makes it clear that that's the position they took in
20 the certiorari action, but it does not mean that they
21 challenged the Dane County board or the ZLR for the
22 failure to make that determination or incorrectly
23 determine that there was sudden and accidental.

24 MR. MCLEOD: I understand, your Honor.
25 Thank you.

1 THE COURT: Do you understand too,
2 Mr. Burney?

3 MR. BURNEY: I do, your Honor. Thank you
4 for that clarification.

5 THE COURT: I didn't really think that's
6 where this case focused because the board and the
7 county was satisfied with the insurance under the new
8 statute. So, Mr. McLeod, make it short and sweet.
9 Just for the reasons stated on the record today, as
10 well as the previous hearing, one, two, three, four.
11 You don't need to in any way state my reasoning at
12 all.

13 These thoughts, they're very logical to me, but
14 they're sometimes difficult to articulate, and it's
15 always a challenge, but I'm satisfied in the logic of
16 it, at least from my point of view. Again, I'm not
17 saying all these rulings are -- especially the
18 original ruling is correct. I think this ruling I
19 feel pretty confident of because this makes sense for
20 the reasons I said. The original ruling, yeah, it
21 could be wrong, but by the time -- like I say, if you
22 wanted to go up on appeal, you'll easily get a
23 decision before this law gets amended or repealed or
24 whatever happens to it.

25 MR. BURNEY: I appreciate your advice about

1 the motion to reconsider as well, your Honor.

2 THE COURT: If you file it, I'll do with it
3 what I have to, but there's nothing I --

4 MR. BURNEY: I got the message.

5 THE COURT: Doing cases after you thought
6 you were done with it and then you find out, oh, no,
7 but it happens. And not just you guys. I've got
8 several. I think it actually is a consequence of
9 oral rulings. I think if you make written rulings,
10 they're less inclined to do this, but oral rulings --
11 it's just like last time with Mr. Gault. He said
12 here's an idea, Judge, let's do the remand, and none
13 of us even thought of it. I assume he had. But when
14 you do a written ruling, it's less easy to blurt that
15 out. So I have several cases sort of kind of in the
16 same procedural posture where I made a main ruling,
17 and recently I made a ruling where I actually did
18 grant the motion for reconsideration and vacated the
19 summary judgment. It happens. So it's good seeing
20 everybody and good luck. We're adjourned.

21 (Adjourned at 11:13 a.m.)

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1 STATE OF WISCONSIN)
2 COUNTY OF DANE) ss

3 I, THERESA L. GROVES, Official Court Reporter, do
4 hereby certify that I took in shorthand the
5 above-entitled proceedings held on the 27th day of
6 September 2016, I reduced the same to a written
7 transcript, and that it is a true and correct
8 transcript of my notes and the whole thereof.

9 Dated at Madison, Wisconsin this 5th day of
10 October 2016.

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Theresa L. Groves, RPR
Official Court Reporter

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