STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

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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	**OAH 65-2500-32764** **PL-9/CN-14-916**

MEMORANDUM IN SUPPORT OF MOTION FOR STAY OF THE LINE 3 REPLACEMENT PROJECT FINAL ORDERS OF THE RED LAKE BAND OF CHIPPEWA AND THE WHITE EARTH BAND OF OJIBWE

November 25, 2020

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INTRODUCTION

Pursuant to Minn. Stat. §§14.65, 116D.04, subd. 10, and 216B.53 (2020), and Minn. R. 7829.0410, the Red Lake Band of Chippewa and White Earth Band of Ojibwe (together, "Tribes") move the Minnesota Public Utilities Commission ("Commission") to stay its orders[1] finding the Environmental Impact Statement adequate and approving the Certificate of Need for the Line 3 Replacement Project ("L3RP") proposed by Enbridge Energy, Limited Partnership ("Enbridge"), pending a final order by the Minnesota Court of Appeals in the following consolidated certiorari appeals: A20-1071 by Friends of the Headwaters; A20-1072 by the Red Lake Band of Chippewa Indians, the White Earth Band of Ojibwe, Honor the Earth, and The Sierra Club; A20-1074 by Minnesota Department of Commerce ("Department"); A20-1075 by Youth Climate Intervenors; and A20-1077 by the Mille Lacs Band of Ojibwe (together "2020 Appeals"). For the following reasons, the Commission should stay the effect of its L3RP Orders.

Enbridge has informed landowners that it is "estimating construction on or near your property will start on approximately November 30, 2020."[2] It has also stated that intends to finish constructing the L3RP within six to nine months of the start of construction.[3] Therefore, the Tribes respectfully request that the Commission expedite consideration of this motion.

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[1] Order Granting Certificate of Need as Modified and Requiring Filings (Sept. 5, 2018); Order Denying Reconsideration, Excluding Filings, and Granting Variance (Nov. 21, 2018); Order Approving Compliance Filings as Modified and Denying Motion (Jan. 23, 2019); Order Denying Reconsideration (Mar. 27, 2019); Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified (May 1, 2020); Order Denying Reconsideration (July 20, 2020) (together "L3RP Orders").

[2] Enbridge Compliance Filing, Route Permit Section 4.2, Permit Distribution to Affected Landowners, Letter to Landowners at 2 (Nov. 12, 2020) ("Enbridge is now conducting staking surveys along the pipeline route as well as other preconstruction activities. We are estimating construction on or near your property will start on approximately November 30, 2020.") (filing available at EDockets Document ID. No. **202011-168227-01 .**

[3] Enbridge News Release (Nov. 6, 2020) ("Once Enbridge receives all necessary permits and the Authorization to Construct from the MPUC, the Company expects Minnesota construction to take 6 to 9

PROCEDURAL BACKGROUND

On April 24, 2015, Enbridge filed separate applications for a certificate of need[4] ("CN") and a route permit[5] ("RP") for the L3RP, an approximately 338-mile crude oil pipeline, along with associated facilities, extending from the North Dakota–Minnesota border to the Minnesota–Wisconsin border to replace its existing Line 3 pipeline ("Existing Line 3") in Minnesota.

Following a contested case hearing on and preparation of a first revised Environmental Impact Statement ("EIS") for the L3RP, the Commission issued a series of orders in 2018 and early 2019 finding the revised EIS adequate and approving a CN and RP for the L3RP.[6] A number of parties appealed these orders to the Court of Appeals, and on June 3, 2019, the court found the EIS inadequate, which had the effect of vacating the CN and RP.[7] Following preparation of a Second Revised Final Environmental Impact Statement ("2RFEIS"), the Commission by order dated May 1, 2020, found the 2RFEIS adequate and "reissued" its 2018-19 orders granting a certificate of need and routing permit. The Tribes together with Honor the Earth and The Sierra Club filed petitions for reconsideration of this order, as did the Department, Mille Lacs Band of Ojibwe, Friends of the Headwaters, and the Youth Climate Intervenors. The

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months."), available online at: https://www.enbridge.com/media-center/news/details?id=123646&lang=en.

[4] *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916 (need docket).

[5] *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/PPL-15-137 (routing docket).

[6] Order Granting Certificate of Need as Modified and Requiring Filings (Sept. 5, 2018); Order Approving Pipeline Routing Permit With Conditions (Oct. 26, 2018); Order Denying Reconsideration, Excluding Filings, and Granting Variance (Nov. 21, 2018); Order Clarifying Prior Order, Excluding Filing, and Denying Reconsideration (Jan. 18, 2019); Order Approving Compliance Filings as Modified and Denying Motion (Jan. 23, 2019); Order Denying Reconsideration (Mar. 27, 2019).

[7] *In Re Applications 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*, 930 N.W.2d 12 (Minn. App. 2019).

Commission denied all of these petitions on July 20, 2020, which denial constituted final agency action.[8] Thereafter, the relators timely filed the 2020 Appeals.

STATEMENT OF LAW

I. STATUTORY AND REGULATORY AUTHORITY TO STAY ORDERS

The right to move the Commission for a stay pending appeal is governed by applicable statutes, regulations, the Minnesota Rules of Civil Procedure and Civil Appellate Procedure, and judicial and Commission precedent. The applicable statutes include:

- Minnesota Administrative Procedure Act, Minn. Stat. ch. 14 ("APA") – Minn. Stat. § 14.63 authorizes appeal and Minn. Stat. § 14.65 authorizes stay pending appeal;
- Minn. Stat. § 216.25 – provides a general right to appeal contested case orders ("Any party to a contested case before the commission may appeal from the decision and order of the commission in accordance with chapter 14."), but is silent with regard to the right to stay;
- Minn. Stat. ch. 216B – Minn. Stat. § 216B.52 authorizes appeal of certificate of need orders in accordance with the APA, and Minn. Stat. § 216B.53 authorizes stay of such orders and includes language related to security bonds; and
- Minnesota Environmental Policy Act, Minn. Stat. ch. 116D ("MEPA") – Minn. Stat. § 116D.04, subd. 10, authorizes appeal and stay of EIS adequacy determinations in accordance with its own terms and the APA and includes provisions related to security bonds.

None of the regulations applicable here contain language authorizing appeal or stay pending appeal.[9] The foregoing statutes are supplemented by:

[8] Order Denying Reconsideration (July 20, 2020).

- Minnesota Rule of Civil Procedure 62 and Rule of Civil Appellate Procedure 108, which authorize agencies and courts to stay agency orders pending appeal;
- judicial precedent, and particularly the stay standard contained in *State v. Northern Pac. Ry. Co.*, 22 N.W.2d 569 (Minn. 1946), as confirmed by *Webster v. Hennepin County*, 891 N.W.2d 290 (Minn. 2017); and
- Commission precedent.

These various authorities are described below.

A. Statutory Authority to Stay Commission Orders

The Commission may consider motions to stay under Minn. Stat. § 14.65 (APA), Minn. Stat. § 216B.53 (CN), and Minn. Stat. § 116D.04, subd. 10 (MEPA).

1. Authorization to Stay in APA

Minn. Stat. § 14.65 states in full:

> The filing of the writ of certiorari shall not stay enforcement of the agency decision, but the agency may do so, or the court of appeals may order a stay upon such terms as it deems proper.

The APA states that both the Commission and the Court of Appeals may issue a stay. However, it authorizes only the Court of Appeals to impose terms on a stay; the Commission lacks that authority under the statute.[10]

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[9] The Commission's general procedural regulations (Minn. R. ch. 7829) state that the Commission may stay the effect of an order in response to a petition for rehearing to the Commission, Minn. R. 7829.3000, subp. 6, but this chapter is silent as regards stay pending judicial appeal. Minn. R. ch. 7853 (pipeline CN regulations) contains no language related to the right to appeal or to a stay pending appeal. The MEPA regulations, Minn. R. ch. 4410, contain no language related to appeal, other than Minn. R. 4410.0400, subp. 4, authorizing appeal to the district courts (not applicable here), and no language related to stay pending appeal.

[10] "[A] qualifying phrase ordinarily modifies only the noun or phrase it immediately follows . . ." *In re Estate of Butler*, 803 N.W.2d 393, 397 (Minn. 2011); *see also* Minn. Stat. 645.08(1) ("words and phrases are construed according to rules of grammar and according to their common and approved usage"). Here, "upon such terms as it deems proper" immediately follows "the court of appeals," and not "the agency."

2. Authorization to Stay in Minn. Stat. § 216B.53

Minn. Stat. § 216B.53 states in full:

> The pendency of proceedings on appeal shall not of itself stay or suspend the operation of the order of the commission unless the commission so orders, but during the pendency of the proceedings the court in its discretion may stay or suspend, in whole or in part, the operation of the commission's order on terms it deems just, and in accordance with the practice of courts exercising equity jurisdiction. No stay shall be granted by the court without notice to the parties and opportunity to be heard. Any party shall have the right to secure from the court in which an appeal of an order of the commission is sought an order suspending or staying the operation of an order of the commission, pending an appeal of the order, but no commission order relating to rates or rules shall be stayed or suspended absent a finding that great or irreparable damage would otherwise result to the party seeking the stay or suspension, and any order staying or suspending a commission order shall specify the nature of the damage.
>
> In case the order of the commission is stayed or suspended, the court shall require a bond with good and sufficient surety, conditioned that the public utility petitioning for review shall answer for all damages caused by the delay in enforcing the order of the commission, and for all compensation for whatever sums for transmission or service any person shall be compelled to pay pending review proceedings in excess of the sum the person or corporation would have been compelled to pay had the commission's order not been stayed or suspended. The court, may, in addition or in lieu of the bond require other further security for the payment of such excess damages or charges it deems proper.

(Emphasis added.) The first paragraph of this section makes clear that the Commission may order a stay of a certificate of need order, but this law, like the APA, does not include a general authorization for the Commission to impose terms on a stay. Instead, it authorizes the reviewing

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This grammatical rule can be overcome by "indication of a contrary meaning," such as "the presence of a comma between a series and a modifying phrase." *In re Estate of Butler*, 803 N.W.2d at 397. But here, no such indicia are present. The statute includes a comma before the final clause authorizing the Court of Appeals to issue a stay, but not after; and the law only says that "it" (the Court of Appeals) may impose terms deemed proper. If the APA intended to authorize agencies to impose terms on stays, this language would not use a singular pronoun and would have included an additional comma after the word "stay" in the last clause.

court to stay a Commission order "on terms it deems just, and in accordance with the practice of courts exercising equity jurisdiction."

The second paragraph of Minn. Stat. § 216B.53 governs whether security bonds are required for a stay. It grants this authority only to the reviewing court and not to the Commission. Rather than require bonds for all stays, the statute indicates that the security bonding requirement applies to "the public utility petitioning for review" and then specifies the particular types of damages and compensation allowed to be included in such bond. Thus, Minn. Stat. § 216B.53 does not authorize or require the Commission to impose a security bond as a term of a stay, and it limits the entities that may be required to pay a security bond to public utilities.

3. Authorization to Stay in MEPA

Minn. Stat. § 116D.04, subd. 10, states in relevant part:

> The filing of the writ of certiorari does not stay the enforcement of any other governmental action, provided that the responsible governmental unit may stay enforcement or the Court of Appeals may order a stay upon terms it deems proper. A bond may be required under section 562.02 unless at the time of hearing on the application for the bond the petitioner-relator has shown that the claim is likely to succeed on the merits.

This authorization to stay mirrors that in the APA, and similarly does not authorize the Commission to impose terms on a stay. MEPA limits security bonds to those authorized by Minn. Stat. § 562.02, which provides for bonds in the following circumstances:

> Whenever any action at law or in equity is brought in any court in this state questioning directly or indirectly . . . the validity of any action . . . by any public body . . . <u>in the course of the authorization or sale, issuance or delivery of bonds, the making of a contract for public improvement or the validity of any proceeding to alter the organization of a school district</u> in any manner, such <u>public body may move the court</u> for an order requiring the party, or

> parties, bringing such action to file a surety bond as hereinafter set forth.

(Emphasis added.) This bond requirement applies only when agency action relates to public bond transactions, government contracts, and alterations to school districts, and only the defendant public body may move the court for such bond.

Minn. Stat. § 562.02 provides the exclusive authorization to require a security bond in MEPA. If the phrase "the responsible governmental unit may stay enforcement or the Court of Appeals may order a stay upon terms it deems proper" was interpreted to broadly authorize security bonds, there would be no need to call out Minn. Stat. § 562.02 specifically, because a bond could be required for any reason "deemed proper." Such broad reading would render the reference to Minn. Stat. § 562.02 superfluous.[11] Since MEPA specifically allows bonds under only Minn. Stat. § 562.02, a security bond may be required in a MEPA appeal only under this particular bonding provision.[12]

This statutory limitation on the imposition of security bonds for stays of MEPA decisions is consistent with the broad public participation mandate in MEPA and its public interest purpose.[13] If citizen and public interest relators were required to post bonds to stay agency MEPA actions pending judicial review, few if any projects would be stayed because few if any

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[11] *See Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) (quoting *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) ("A statute should be interpreted, whenever possible, to give effect to all of its provisions, and 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'") If MEPA allowed the imposition of bonds in all situations, the language permitting a bond under section 562.02 would be redundant, violating this canon against surplusage.

[12] The Tribes are aware of only two unpublished cases that discuss MEPA's bond requirement: *Davis v. Hennepin County*, 2008 WL 5335314 (Minn. App. 2008); *Assoc. for Better Living, Inc. v. Federal Reserve Bank of Minneapolis*, 1994 WL 323412 (Minn. App. 1994). The former expressly stated that a bond was sought under Minn. Stat. § 562.02. The latter provides no details about the bond, but since the City of Minneapolis was also a defendant and the case involved a major development project, it is likely that the bond there was also imposed under Minn. Stat. § 562.02.

[13] *See* Minn. Stat. §§ 116D.01, 116D.02, subd. 1, 116D.03, subd. 2(6), 116D.04, subds. 2a(d), 6a, 8; Minn. R. 4410.1200.B, 4410.1600, 4410.2100, subp. 5, 4410.2600, subps. 2, 9, 4410.2700, subp. 6, 4410.2800, subp. 2.

citizens or nonprofit groups could afford security bonds. Absent stay of agency MEPA orders, project proponents would almost always be able to inflict impacts to the environment before a judicial decision issues, thereby making remand to the responsible government unit pointless and judicial action moot. Requiring security bonds to stay agency MEPA actions, therefore, would generally act as a bar to judicial relief.

If the legislature sought to impose a bond requirement in MEPA, presumably it would have included language similar to that within Minnesota Environmental Rights Act, Minn. Stat. ch. 116B.07 ("MERA") ("When the court grants temporary equitable relief, it may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted."). No such language is present in MEPA.

For the foregoing reasons, the Commission may stay its orders under MEPA but may not require a security bond as a condition of such stay except when authorized by Minn. Stat. § 562.02.

B. Authorization to Stay in Rule of Civil Procedure 62 and Rule of Civil Appellate Procedure 108

An appeal of a Commission order is subject to the Minnesota Rules of Civil Appellate Procedure.[14] Although Minnesota Rule of Civil Procedure 62.01 authorizes trial courts and agencies to stay their own orders,[15] Rule 62.03 makes clear that when an appeal is taken a stay is subject to the Minnesota Rules of Civil Appellate Procedure. Minn. R. Civ. P. 62 states in relevant part:

62.03. Stay Upon Appeal

[14] Minn. Stat. § 216.27.
[15] *See* Minn. R. Civ. App. P. 101.02, subd. 4 (defining "trial court" to include court or agency whose decision is being reviewed).

> When an appeal is taken, the appellant may obtain a stay only when authorized and in the manner provided in Rules 107 and 108, Rules of Civil Appellate Procedure.

Rule 62.03 states that a stay on appeal may be obtained only when authorized and in the manner provided in R. Civ. App. P. 107[16] and 108, but only Rule 108 is relevant here. Rule 62.05 is a savings provision clarifying that the provisions of Rule 62 do not limit "any" power of an appellate court to stay proceedings during an appeal or to preserve the *status quo* or a subsequent judgment of the appellate court. It states:

> **62.05. Power of Appellate Court Not Limited**
> The provisions of Rule 62 do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal . . . or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

In turn, Minn. R. Civ. App. P. 108 states in relevant part:

> **Rule 108.01. Effect of Appeal on Proceedings in Trial Court**
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> **Subdivision 1. Generally No Stay of Enforcement of Judgment or Order on Appeal.** Except as otherwise provided by rule or statute, an appeal from a judgment or order does not stay enforcement of the judgment or order in the trial court unless that court orders relief in accordance with Rule 108.02.
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> * * *
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> **Rule 108.02. Motion for Stay or Injunction in Trial Court; Security**
>
> **Subdivision 1. Motion in Trial Court.** A party seeking any of the following relief must move first in the trial court:
> (a) a stay of enforcement of the judgment or order of a trial court pending appeal;
> (b) approval of the form and amount of security, if any, to be provided in connection with such a stay; . . . .
>
> **Subd. 2. Security Required.** Except as to cases in which a governmental body is the appellant or as otherwise provided by

[16] Minn. R. Civ. App. P. 107 relates to cost bonds and is not applicable here.

> rule or statute, a trial court may grant the relief described in subdivision 1 of this rule if the appellant provides security in a form and amount that the trial court approves. The security provided for in this rule may be in one instrument or several. The appellant must serve proof of the security in accordance with Rule 125.02.
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> * * *
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> **Subd. 6. Review by Court of Appeals.** On a motion under Rule 127, the Court of Appeals may review the trial court's determinations as to whether a stay is appropriate, the terms of any stay, and the form and amount of security pending appeal. The motion for review must:
> (a) set forth the reasons for granting the relief requested and the facts relied on;
> (b) include originals or copies of affidavits or other sworn statements supporting the facts that are subject to dispute; and
> (c) include a copy of any submissions to the trial court, any order entered by the trial court relating to security pending appeal, and any other relevant parts of the record in the trial court.
> If the Court of Appeals grants the motion, it may give relief on the same terms that a trial court may give relief under Rule 108.02, subds. 2, 3, and 4, and may require that any security that the appellant must provide be posted in the trial court.

(Emphasis added.) Subdivision 1 requires that appellants first seek a stay from the agency whose decision is appealed. Subdivision 2 requires that appellants provide security unless "otherwise provided by rule or statute" or if the appellant is a "governmental body."[17] Where a statute authorizing stay contains language related to the requirement for or terms of a security bond, this legislative language supersedes the general security bond requirement found in Rule 108.02, subd. 2. Rule 108.02, subdivision 6, states that on appeal the Court of Appeals is authorized to consider "whether a stay is appropriate, the terms of any stay, and the form and amount of security pending appeal," and also clarifies that the Court of Appeals, trial courts, and agencies may grant relief in accordance with Rule 108.02, subdivisions 2, 3, and 4.

[17] Neither Rules of Civil Appellate Procedure nor judicial precedent define the scope of the term "governmental body."

C. Summary of Authority Under Statutes and Rules of Procedure to Stay Orders

The Commission is authorized to stay the L3RP Orders under the APA, the CN statute, MEPA, and R. 108.02. Only Rule 108.02, subd. 2, establishes a general obligation to require a security bond. This requirement, however, is limited by two exceptions: (a) where a "governmental body" is the relator; and (b) where a statute otherwise establishes terms for or limits use of security bonds. In this regard, both Minn. Stat. § 216B.53 and Minn. Stat. § 116D.04, subd. 10, contain limitations on the use of security bonds for stays brought under them. The CN statute requires security bonds only against "the public utility petitioning for review," and MEPA limits security bonds to those authorized by Minn. Stat. § 562.02. Therefore, the Commission may stay its L3RP Orders, but it may not impose a security bond as a condition of a stay where a governmental body is a relator or where not allowed by Minn. Stat. § 216B.53 and Minn. Stat. § 116D.04, subd. 10.

II. JUDICIAL AND ADMINISTRATIVE PRECEDENT

A party seeking a stay in a certiorari appeal must first request the stay from the agency.[18] The Court of Appeals will review agency stay decisions for abuse of discretion.[19] The following describes the standard to which the Court of Appeals will hold Commission orders granting or denying stays.

A. Minnesota Judicial Precedent

1. The Standard Applicable to Motions for Stay of Administrative Orders

The Commission's discretion should be exercised in accordance with *State v. Northern Pac. Ry. Co.*, 22 N.W.2d 569 (Minn. 1946) and its subsequent precedent. In its *Northern Pacific*

[18] *See* Minn. R. Civ. App. P. 115.03, subd. 2(b); 108.02, subd. 2; *see also DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 143 (Minn. App. 2007).
[19] *DRJ*, 741 N.W.2d at 144.

decision, the Supreme Court reviewed an order by the Minnesota Railroad and Warehouse Commission and confirmed that the courts have inherent discretionary power to stay enforcement of an agency order pending appeal. The court quoted the following standard in the Corpus Juris Secundum, 4 C.J.S. Appeal and Error § 636 (1937), as the standard for stay of administrative orders:

> As a rule a supersedeas or stay should be granted, if the court has the power to grant it, whenever it appears that without it the objects of the appeal or writ of error may be defeated, or that it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury in case of affirmance. It should be granted where . . . the loss or damage occasioned by the stay can be met by a money award, where important questions of law are raised, which, if decided in favor of appellant or plaintiff in error, will require a reversal, to avoid a multiplicity of suits, or to protect the appellate court's jurisdiction.[20]

The Supreme Court, therefore, recognized the following stay factors:

- to prevent the judicial appeal from becoming moot due to action taken under the agency order;
- the degree to which appellant will suffer irreparable or serious injury in case of a reversal;
- the degree to which respondent will sustain irreparable or disproportionate injury in case of affirmance;
- whether damages resulting from a stay can be met by a money award;
- to preserve important questions of law that would, if decided in favor of appellant, require a reversal;
- to avoid a multiplicity of suits; and

[20] 22 N.W.2d at 574-75 (emphasis omitted).

- to protect the appellate court's jurisdiction.[21]

In *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017), the Supreme Court quoted the Corpus Juris Secundum stay standard adopted by the *Northern Pacific* court, thereby confirming it, but clarified that an agency need not consider all of the stay factors contained therein and rather "need only analyze the relevant factors" based on "individualized judgments" of the specific facts of each case.[22] Although the *Webster* decision did not require trial courts, or by extension agencies, to provide a written analysis of each relevant *Northern Pacific* factor, it cautioned that "the better practice is to do so in the interest of completeness and to facilitate appellate review."[23] Therefore, the Commission should evaluate all of the relevant factors identified in the *Northern Pacific* decision, because those are the factors that the Court of Appeals would examine in a review of a Commission decision on a motion for stay.

With regard to the weight given to the *Northern Pacific* stay factors, the Commission's discretion is not unlimited, because the *Webster* decision found that of all of the stay factors "[t]he ALJ correctly identified . . . the most important factor" to be "preserv[ation of] the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal."[24] (Emphasis added.) The Court of Appeals in *DRJ, Inc. v. City of St. Paul,* 741 N.W.2d 141, 143 (Minn. App. 2007) further emphasized the need to preserve matters for the court when

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[21] *Id*.

[22] 891 N.W.2d at 293. The *Webster* decision stated: "[A] trial court has broad discretion in deciding which of the various factors are relevant in each case . . . " and it found that "[t]he fact that the ALJ did not expressly analyze every factor listed in *Northern Pacific Railway* was not an abuse of discretion." The *Webster* decision also cited *Hilton v. Braunskill*, 481 U.S. 770, 776-78, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987), for the proposition that a decision on a motion for stay requires "individualized judgments in each case" as "the formula cannot be reduced to a set of rigid rules."

[23] 891 N.W.2d at 293 n. 2; *see also DRJ,* , 741 N.W.2d at 145 (need for "sufficiently detailed" agency action).

[24] 891 N.W.2d at 293. This prioritization is consistent with the Minn. R. Civ. P. 62.05 clarification that a purpose of Court of Appeals review of agency action on a stay pending appeal is "to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

it stated: "[e]nsuring that the appealing party can obtain effective relief, if it prevails on appeal, is a crucial consideration in determining whether and on what terms to grant a stay pending appeal."[25] (Emphasis added.) While the Commission may choose which factors are relevant and the weight given to each factor, it must weigh these factors knowing that the "most important" and "crucial" consideration before it is whether a stay would ensure that relators can obtain effective relief. If denying a stay would prevent the Court of Appeals from ordering effective relief, the Commission should deny a motion to stay only when the equities clearly justify rendering an appeal moot.

2. Consideration of the Public Interest, Including Protection of Court Jurisdiction and the Risk of Injury to the Public and Its Interests

The *Webster* court recognized that an agency should consider not just the relative impacts of a stay on the parties, but also on:

> the public interest, which includes the effective administration of justice. Effective administration includes protecting appellate jurisdiction, avoiding multiple lawsuits, and preventing the defeat of the objects of the appeal or writ of error.[26]

The court noted the ALJ 's finding there that if an order to release information under the Data Practices Act, Minn. Stat. ch. 13 ("DPA"), was not stayed the information in dispute would be made public, such that there would be no "live controversy" for the court to consider and the Court of Appeals would lose jurisdiction.[27] The court agreed with this finding and held that the stay would be upheld because "issuing a stay would preserve the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal."[28] Therefore, as part of

[25] 741 N.W.2d at 145.
[26] 891 N.W.2d at 293.
[27] *Id*. at 292.
[28] *Id*. at 293

its public interest determination, the Commission must weigh the importance of preserving the Court of Appeals' jurisdiction.

The Supreme Court's concern to preserve jurisdiction also suggests that agencies and courts should examine not just the risk that a particular case will become moot, but that a failure to favor stays in cases where actions cannot be undone would as a practical matter severely reduce or eliminate the Court of Appeals' role within our government. For example, it is always true that information once released to the public cannot be retracted and made nonpublic. Therefore, the decision in *Webster* to grant a stay pending judicial review did more than preserve the status quo in that particular case. It also created precedent that the Court of Appeals will generally grant a stay in DPA cases where an order cannot be undone, and thereby reduced the potential for future litigation[29] and preserved the Court of Appeals' jurisdictional role. Should the courts not strongly favor stays where action under agency order cannot be undone, as a practical matter the courts would relinquish jurisdiction to enforce the law in such cases. The need to preserve court jurisdiction weighs heavily against parties that seek to take irreversible actions under agency orders.

The *DRJ* decision expanded on consideration of the public interest when it recognized that a stay determination should "focus in part on the risk to others, including the public . . . ."[30] There, the St. Paul City Council refused to grant a stay pending appeal to a bar with multiple code violations in part due to the risk that the bar posed to the public.[31] The court considered whether it was appropriate for the City to consider the public interest in its stay analysis and held that "the public interest and the potential risk to the public are equally applicable to the issue of a

[29] *Id*. ("The ALJ also noted that granting the stay would reduce future litigation regarding Data Practices Act requests.")
[30] *DRJ*, 741 N.W.2d at 144.
[31] *Id.* at 145.

stay pending appeal."[32] In affirming the City's denial of the stay, the court recognized that "[t]he likely financial impact on relator of denying a stay is both obvious and serious. But that impact must be balanced against the public interests."[33] Therefore, the Commission should also consider the public interest when evaluating a motion for stay.

3. Balancing the Interests of Moving and Nonmoving Parties and the Public Interest

With regard to balancing the interests at stake, the *Northern Pacific* court held that a stay should be granted:

> whenever it appears that without it the objects of the appeal or writ of error may be defeated, or that it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury in case of affirmance.[34]

In addition, the *Webster* and *DRJ* decisions make clear that the public interest need also be considered. Therefore, the Commission should consider: (a) whether denial of a stay would block the purpose of an appeal;[35] (b) whether denial of the stay would cause the moving party to suffer irreparable and serious injury; (c) whether a failure to grant a stay would void the Court of Appeals' jurisdiction over a case; (d) whether other risks to the public interest exist, such as safety and welfare matters; and then (e) weigh these factors against the degree to which the non-moving party would suffer "irreparable or disproportionate injury." That the stay standard requires consideration of "irreparable or disproportionate injury" to the nonmoving party, indicates that a mere finding that a stay would adversely impact a nonmoving party is not in and

[32] *Id.* at 144.
[33] *Id.* at 145.
[34] 22 N.W.2d at 574.
[35] *See also DRJ*, 741 N.W.2d at 145 (The Commission should consider whether a party "can still obtain effective relief from some of the[] consequences" if they succeed).

of itself grounds to deny a stay. Instead, the irreparable harm to the non-moving party must be so great and disproportionate that the moving party should be prevented from gaining relief and the jurisdiction of the Court of Appeals be mooted.

4. The Minnesota Courts Do Not Include Consideration of the Likelihood of Success on the Merits as a Required Stay Factor

Consideration of the likelihood that the moving party will prevail on the merits is not one of the *Northern Pacific* stay factors. In fact, the *Northern Pacific* court expressly declined to consider the merits before it.[36] Instead, likelihood of success is a factor used when evaluating motions for injunctions. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321 (1965). That the likelihood of success need not be considered when deciding motions for stay of agency orders was confirmed by the *Webster* court. There, the appellant argued that the City of St. Paul was in error because it failed to consider the likelihood of success when it denied appellant's motion for stay.[37] In response, the *Webster* court did not discuss this factor, and instead re-quoted the C.J.S. standard adopted by the *Northern Pacific* court and then summarized this standard without mentioning success on the merits:

> Among the factors that may be relevant are: whether the appeal raises substantial issues; injury to one or more parties absent a stay; and the public interest, which includes the effective administration of justice. Effective administration includes protecting appellate jurisdiction, avoiding multiple lawsuits, and

[36] In *Northern Pacific*, the court considered whether a determination of the merits was necessary to stay the effect of a rate order. It held that it was not necessary for the parties seeking a stay (the affected carriers) to present evidence as part of their argument for stay, and that a failure to consider the merits of the case did not prevent the court from ordering a stay when other factors, including avoiding a multiplicity of suits, justified the stay. It concluded, "A discussion of existing rates, or of the maximum rate fixed by the commission, based upon the present record, would serve no purpose now." 22 N.W.2d at 575-6.

[37] 891 N.W.2d at 292 ("Webster [the appellant] argues that *DRJ*'s balancing test is "fundamentally inadequate" because it omits factors that must be analyzed under *Northern Pacific Railway*: whether the appellant is likely to succeed on the merits of the appeal . . . .").

> preventing the defeat of "the objects of the appeal or writ of error." *N. Pac. Ry.*, 22 N.W.2d at 574-75 (quoting 4 C.J.S., *supra*).[38]

(Footnote omitted.) Thus, the *Webster* court was expressly asked to include the likelihood of success on the merits as a factor when deciding a stay, and it did not do so. The Court of Appeals in *DRJ* followed the clear direction provided by the *Northern Pacific* and *Webster* decisions and also did not identify the likelihood of success as a stay factor.[39] Therefore, the Minnesota courts have not identified the likelihood of success on the merits as a factor to be used when deciding whether to grant a motion to stay.

One reason that the stay standard differs from that used for injunctions may be because a motion for stay of agency action follows an agency decision on the merits, whereas motions for injunction precede decisions on the merits. Where an agency has made a decision on the merits, it is unlikely that it would find that it will be reversed on appeal, such that further reconsideration of the merits in the context of a motion for stay of an agency's own order would be redundant and almost always futile.[40] In contrast, when presented with a motion for an injunction, courts typically have no prior knowledge of the merits of the movant's case, such that it makes sense to evaluate the merits and confirm that the movant may prevail.

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[38] *Id.* at 293.

[39] The Court of Appeals in its *DRJ* decision included the following description of the stay analysis:

> When determining whether or not to grant a stay pending appeal, the trial court or governmental unit must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain "secure in victory" while the appeal is pending. See 3 Eric. J. Magnuson & David F. Herr, *Minnesota Practice* § 108.1, at 389–90 (2007) (describing rule 108.01 as striking balance between these competing interests).

741 N.W.2d at 144. Thus, the *DRJ* decision also did not identify the likelihood of success on the merits as a factor when deciding motions for stay and instead emphasized balancing the parties' interests.

[40] This conclusion is particularly applicable to Commission decisions as they must be reconsidered as a condition of appeal. Minn. Stat. § 216B.27, subd. 2.

Also, motions for injunction typically arise in matters between private parties that do not implicate important public policies, whereas motions to stay agency action are typically public matters in which the courts have jurisdictional responsibility to ensure agency compliance with law. The *Northern Pacific* and *Webster* decisions both emphasized the importance of stays to preserving the public's interest in judicial review of agency action, because they considered factual circumstances where it was necessary to preserve the status quo apart from the likelihood of success on the merits, the former to avoid the filing of multiple law suits and the latter to preserve the confidentiality of documents whose confidentiality could not be recovered. Therefore, the Minnesota courts have stated a clear priority for using stays to preserve judicial review of agency action, and have rejected a requirement that motions for stay show a likelihood of success on the merits.

5. Public Interest Considerations May Obviate the Need for a Security Bond

With regard to security bonds, the Minnesota Supreme Court held in *No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 330-31 (Minn. 1977), that the public interest may be considered in security bond decisions:

> We are satisfied that the Minnesota Supreme Court has inherent power to order a stay of proceedings pending before it without the necessity of a supersedeas bond. This authority, however, should be exercised sparingly and only when we are satisfied that the unique circumstances of a particular case makes it in the public interest to order such a stay.

Although this decision did not expressly identify which "unique circumstances" lead the court to not require a security bond, the general circumstances of this case are known. First, the appeal related to a highly controversial high-voltage electrical transmission line proposed to pass

through central Minnesota.[41] Second, the appellants were citizen nonprofit organizations.[42] Third, the case analyzed claims of agency error of law in an order approving a corridor and certificate of need and MEPA analysis for a high-voltage transmission line.[43] Fourth, the appellants raised a number of important questions of law related to: agency jurisdiction;[44] non-compliance with applicable statutes including MEPA and the certificate of need statute;[45] and the scope of alternatives considered.[46] Although the Court did not discuss the potential impact of a security bond requirement on appellants, it seems likely that the citizen and nonprofit appellants there would not have been able to afford a security bond.

The *No Power Line* decision did not discuss the impact of Minn. Stat. § 216B.53[47] on the imposition of security bonds on motions for stay brought under it. Nonetheless, the court's decision to deny the supersedeas bond is consistent with the language of Minn. Stat. § 216B.53 limiting imposition of a security bond to public utility appellants.

B. Commission Precedent

When determining whether to grant a stay, the Commission recognizes that it "is governed by the same standards that the Courts would apply,"[48] including the standard contained in the *Northern Pacific* decision[49] and the importance of maintaining the *status quo* on appeal.[50]

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[41] *No Power Line,* 262 N.W.2d at 316-317.
[42] *Id.*
[43] *Id*. at 317.
[44] *Id*. at 319-322, 330.
[45] *Id*. at 326.
[46] *Id*. at 327.
[47] Minn. Stat. § 216B.53 was enacted in 1974 and amended in 1977 to allow the Commission to stay its own orders. 1974 Minn. Laws 914; 1977 Minn. Laws 783-84.
[48] *In the Matter of the Minnesota Public Utilities Commission's Initiation of Summary Investigation of the Nature and Extent of Contacts Between Public Utilities and Telephone Companies and Former Minnesota Public Utilities Commissioners*, Docket No. U-999/CI-86-177, Order Granting Stay and Accepting Agreement to Refund (June 30, 1987) at 2.
[49] *Id*.
[50] *Id*. at 4.

The Commission has also incorrectly applied the *Dahlberg Bros.* injunction factors to its stay decisions, for example in Docket No. GR-95-700,[51] and imprecisely summarized its motion for stay analysis to include:

> factors such as the likelihood that denying the stay would cause irreparable harm, the likelihood that denying the stay would render the appeal meaningless, the gravity of any harm the stay would cause non-moving parties, the likelihood of reversal on appeal, and whether granting the stay would frustrate public policy.[52]

(Emphasis added.) Consideration of the likelihood of success makes no sense where an agency is asked to stay its own order on the merits, as it is highly unlikely that any agency would think that its own decision is likely to be reversed on appeal. Moreover, consideration of the likelihood of reversal on appeal would essentially be a request for reconsideration, which Minn. Stat. § 216B.27, subd. 2, requires as a condition precedent to judicial appeal. Since the Commission must always reconsider the merits of any order before it is appealed, reconsideration of the merits in a decision on a motion for stay would in all circumstances be redundant and almost always futile. Accordingly, the Commission should not reject a motion for stay because it believes movants are unlikely to prevail on appeal. Instead, it should weigh the long-standing *Northern Pacific* factors.

[51] *In the Matter of the Petition of Minnegasco, a Division of NorAm Energy Corp., for Authority to Increase Its Rates for Natural Gas Service in Minnesota*, Docket No. G-008/GR-95-700, Order Granting Request for Stay at 3 (Apr. 3, 1997).
[52] *Minnesota Power*, Docket No. E-015/GR-94-001 Order Denying Stay at 3 (Nov. 9, 1995).

ARGUMENT

I. THE COMMISSION SHOULD GRANT THE MOTION FOR STAY

For the following reasons, the equities here favor granting a stay of the L3RP Orders pending resolution of the 2020 Appeals.

A. Absent a Stay the Tribes' Appeal Would Become Meaningless

Tribes have presented a number of claims related to a lack of need for the proposed L3RP, all of which would be rendered moot by a failure to grant a stay. In particular, Tribes have claimed that Enbridge has failed to comply with Minn. Stat. § 216B.243, subd. 3, by not providing a forecast of demand for energy, as required by the plain language of the statute, and instead provided an unsubstantiated oil industry forecast of Canadian crude oil supply together with an unsupported assumption that global crude oil demand will grow indefinitely. This claim strikes at the heart of Minn. Stat. § 216B.243's purpose of approving only large energy facilities needed to meet consumer demand for energy, whether that be demand for electric, natural gas, or petroleum energy.

Should a stay not be granted, it is likely that Enbridge will proceed with construction, thereby rendering moot all issues related to whether or not energy consumers in Minnesota and the U.S. demand consumption of more Canadian crude oil. If the L3RP is built, then as a practical matter the State of Minnesota would have decided that the project is needed regardless of whether demand for additional crude oil energy in fact exists. Put another way, if a stay is not granted and the court uphold Tribes' claims, there would be no point to remanding the case to the Commission, because if the Commission held another contested case hearing on need, the pipeline would have long been in operation, making such hearing pointless.

Tribes have also presented a claim that the Commission illegally determined existing Line 3 must be replaced for safety reasons, despite the fact that (a) neither Minn. Stat. § 216B.243 nor Minn. Stat. ch. 216G identify pipeline safety as a policy factor for granting either permit; (b) the State of Minnesota has no legal authority to order the replacement of an interstate crude oil pipeline for safety reasons as such determinations are preempted by federal law; and (c) neither the Commission nor the Department of Commerce have any jurisdiction over pipeline safety, any expertise in pipeline safety, or any authority to make pipeline safety decisions, such that the Commission's safety-based decision was *ultra vires*. Should a stay not be granted, it is likely that Enbridge will complete construction before the court could rule on these claims, such that if the court finds the Commission acted illegally there would be no point in remand for a Commission decision not based on pipeline safety, because by the time of a decision by the Court of Appeals in June or July 2021, existing Line 3 would already have been replaced, and the lack of a stay would have allowed construction based on illegal process.

Tribes have also presented a claim that the Commission erred by approving an EIS that does not analyze the potential impacts of an oil spill on Lake Superior, and instead relied on a representative spill modeling approach that modeled a spill site too far from Lake Superior to have a significant impact on the Lake, thereby avoiding analysis of the actual potential impacts of an oil spill on Lake Superior. Should a stay not be granted and the court find that the EIS is still inadequate, by that time Line 3 would be either nearly or completely constructed and there would be no utility in further supplementing the EIS to inform Commission decision making on a built project.

Since Enbridge has asserted that construction would be completed within six to nine months of the start of construction,[53] and has informed landowners that it is "estimating construction on or near your property will start on approximately November 30, 2020,"[54] without a stay it is likely that construction of the L3RP could be complete as early as May 2021, before the Court of Appeals could issue a decision. Even if construction continued into September 2021, by the time of a court decision, it is likely that most of the L3RP would be constructed. Once the pipeline is complete, a finding by the court that the Commission failed to comply either with the CN statute or MEPA would bear no remedy, because a remand to the Commission for further hearings in accordance with law would be pointless.

B. Failure to Grant a Stay Would Cause Tribes Irreparable Harm

The administrative record is replete with evidence of the irreparable harm that the L3RP would inflict on Tribes. In addition, employment of thousands of construction workers to build the project during the currently raging COVID-19 pandemic will likely accelerate the spread of infection, sickness, and death through northern Minnesota, including within tribal communities and tribal members, thereby creating irreparable harm.

1. Evidence of Irreparable Harm in the L3RP Hearing Record

The administrative record is replete with evidence of the irreparable harm that would result if the L3RP is constructed. The Administrative Law Judge's ("ALJ") Findings of Fact,

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[53] Enbridge News Release (Nov. 6, 2020) ("Once Enbridge receives all necessary permits and the Authorization to Construct from the MPUC, the Company expects Minnesota construction to take 6 to 9 months."), available online at: https://www.enbridge.com/media-center/news/details?id=123646&lang=en.

[54] Enbridge Compliance Filing, Route Permit Section 4.2 – Permit Distribution to Affected Landowners, Letter to Landowners at 2 (Nov. 12, 2020) ("Enbridge is now conducting staking surveys along the pipeline route as well as other preconstruction activities. We are estimating construction on or near your property will start on approximately November 30, 2020.") (filing available at EDockets Document ID. No. **202011-168227-01 .**

Conclusions of Law, and Recommendation ("ALJ Report")[55] in the L3RP dockets details the inevitable and potential impacts of the L3RP, which impacts irrevocable and permanent impacts. In particular, Sections III (Public Comment Summary); Section V.C.ii (Consequences of Granting vs. Consequences of Denial – Effect on Natural and Socioeconomic Environments); and VIII (Route Permit discussion), all discuss the tremendous impacts that the L3RP would have on northern Minnesota's environment and the people, indigenous and otherwise, who live there. With regard to impacts to the natural environment, the ALJ Report found:

> The proposed Project would impact 25,765 acres of high vulnerability water table aquifers; 26,382 acres of high groundwater contamination susceptibility; and 16,299 acres of high pollution sensitivity areas. The APR would expose 12,318 acres of unusually sensitive ecological (high consequence) areas and 2,444 acres of high consequence drinking water sources to the risks of accidental release. And the APR would place over 83,000 acres of drink water areas of interest at risk of potential releases. Moreover, the APR is located within 2,500 feet of over 28,000 acres of Minnesota Biological Survey (MBS) sites of biodiversity significance, which would be placed at risk in an event of release.[56]
>
> In sum, the Project would cross 227 waterbodies, has 46 designated waterbody crossings; and would cross 174 streams, six trout streams, 16 impaired water bodies, and five wild rice waterbodies. In addition, within 2,500 feet of the APR there are 181 wild rice lakes and within 10 miles downstream of the APR, there are 982 wild rice lakes, which could be potentially subject to impact in the case of accidental release.[57]
>
> * * *
>
> There are unique environmental concerns with establishing a new pipeline corridor. Trees cut down to construct a new pipeline would be permanently cleared. New water ways would be crossed by a crude oil pipeline where there was not one before, with all its appurtenant effects.[58]

[55] ALJ Report (available on Edockets at Document No. **20184-142235-01**
[56] *Id*. at 236 (footnotes omitted).
[57] *Id*. at 236-37 (footnotes omitted).
[58] *Id*. at 238 (footnotes omitted).

> According to the EIS, the Project would have long-term to permanent/major impacts to 440 acres of wetlands and 2,202 acres of forests or woody wetlands.1821 As the EIS noted:
> The proposed Project would require that an approximately 120-foot-wide construction work area be cleared in upland areas and an approximately 95-foot-wide construction work area be cleared in wetlands. Forested uplands and woody wetlands within the permanent right-of-way through northern Minnesota would be permanently converted, thereby permanently affecting more forested land cover and wildlife habitat than any other CN Alternative. A total of 38 miles of the Applicant's proposed Project, for example, would cross and permanently fragment 21 large-block forested and wood wetland habitats (i.e., habitats larger than 100 acres). This would permanently impact approximately 2,202 acres of forest and woody wetlands.[59]
>
> In total, the proposed Project crosses 10,959 acres of highly populated areas; 12,318 acres of unusually sensitive ecological areas; 2,443 acres of drinking water sources; 102,426 acres of biological areas of interest; and 3,704 acres of recreational/tourism areas of interest.1823 Moreover, it is located in an area of high-quality water sources,1824 as set forth above.[60]

In addition, the ALJ found that:

- the L3RP would result in habitat fragmentation, habitat disturbances (destruction), and exposure of more state resources to the risk of accidental crude oil release in a new corridor;[61]
- "[i]n addition to the irreparable damage that can be caused to the environment by an oil spill, the cleanup costs of an accidental release by a pipeline can be enormous;"[62]
- the "number of water crossings along Applicants Preferred Route heightens the risk or could exacerbate the impact of an accidental release;"[63]

[59] *Id*. at 238-239 (footnotes omitted).
[60] *Id*. at 239 (footnotes omitted).
[61] *Id*. at 233 (footnotes omitted).
[62] *Id*. at 235 (emphasis added, footnotes omitted).
[63] *Id*. at 236 (footnotes omitted).

- The Project also has the potential to impact the global environment by contributing directly and indirectly to climate change.[64]

With regard to impacts to indigenous peoples, the ALJ Report found:

> climate changes negatively impact lands and resources that are particularly important to preserving traditional ways of life. Changes to Minnesota's land and natural resources affect hunting, fishing, wild rice farming, maple sugar gathering, and the collection of plants for medicines, spiritual and ceremonial purposes, shelter, and other need – all critically important to the Anishinaabe culture.[65]
>
> In addition to climate change, the potential direct effects of the Project on Minnesota's natural resources would disproportionately impact Minnesota's Native American population, whose culture and belief system is dependent upon the natural environment.[66]
>
> * * *
>
> Because of the interconnection between nature and Native American cultures and spiritual beliefs, the EIS determined that the Project could result in a "diminishment of Indian interests." The potential impacts to tribal resources identified in the EIS include:
>
> - **Water** – the disruption of water bodies and the potential degradation of water quality impacts the Native Americans' spiritual connectedness to water, a sacred element to Native culture.
> - **Hunting** – the loss of natural resources and destruction of habitat caused by forest fragmentation associated with a new pipeline corridor; and the potential for contamination caused by release, all have the potential to impact hunting rights and activities of tribal members.
> - **Fishing** – the potential loss of resources from contamination and habitat destruction have the potential to impact the fishing rights and activities of tribal members.
> - **Wild Rice** – the potential impact to wild rice beds caused by contamination and habitat destruction have the potential to

[64] *Id*. at 240-241 (footnotes omitted).
[65] *Id*. at 241 (footnotes omitted).
[66] *Id*.

impact the health, vitality, and existence of wild rice, a resource of particular significance to the Anishinaabe people.

- **Spiritual practices** – construction activities and operation of the pipeline, as well as the potential for contamination related to release, have the potential to impact sacred sites, areas of religious or cultural significance, and natural resources used or worshiped in spiritual practices.
- **Medicinal and traditional plants and food** – a loss of resources that could occur from contamination and habitat destruction have the potential to impact plants used by the Natives for food, medicine, and spiritual practices.
- **Community health and mental well-being** – the loss of tribal connections to natural resources; the potential for contamination of natural resources; and the use of tribal land for an oil pipeline can cause tribal members to experience "cultural trauma" reminiscent of historical actions that stripped Native Americans of their land, rights, and access to natural resources.[67]

* * *

Manoomin is sacred not only to the Anishinaabe, but also to other American Indian tribes. Minnesota and northern Wisconsin are the largest producers of wild rice in the U.S., making it an economic mainstay, as well as a federally-protected tribal resource. Tribal members believe that Manoomin is priceless; it nourishes the soul, community, and bodies of the Anishinaabe.[68]

* * *

A total of 17 wild rice lakes are located within 0.5 miles of the centerline of APR; whereas SA-04 has none, RA-06 has five; RA-07 has 11; RA-08 has nine; and RA-03AM has 11.1867 Therefore, the APR has the most potential impact – and mostly new impact -- on wild rice waters. The APR would result in impacts on approximately 4.92 acres of wild rice lakes during construction and operation.[69]

* * *

[67] *Id*. at 242-43 (footnotes omitted).
[68] *Id*. at 244 (footnotes omitted).
[69] *Id*.

> Like Manoomin, water is a sacred resource for the Anishinaabe people. It is the source of all life and its interconnectedness with all of nature, makes it a primary resource to protect. Therefore, any negative impacts to water in the Project area would have increased impact to the Anishinaabe people.[70]
>
> Potential impacts of the Project on Minnesota's water resources are discussed extensively above. Decreases in water quality and quantity can impact traditional ways of life in irreparable ways, including the loss of culturally important species, medicinal plants, traditional foods, and cultural sites. Because of the spiritual and cultural connection between water and Native American people, any impacts upon Minnesota's water resources have particular impacts to Minnesota's Indigenous populations.[71]

Thus, the ALJ expressly found that the L3RP would have "irreparable" adverse impacts on Minnesota's natural environment and its indigenous peoples.

Likewise, the L3RP EIS details the significant adverse impacts of the project on Minnesota's land, water, climate, and people. In particular, the following EIS sections expressly state that the L3RP would have irreparable and/or permanent impacts on, or simply destroy, Tribal cultural rights and resources:

> **EIS, Chapter 9, Tribal Resources, Section 9.6.1, at 9-33:**
> Ancestral cultural sites within a reservation and/or ceded lands also would be subject to irreparable damage, if directly crossed by construction activities that cause ground disturbance or potential indirect visual impacts or access restrictions; these impacts, in turn, would damage each tribe's heritage. Impacts on various tribal resources on these lands would be similar to those described herein.
>
> **EIS, Chapter 9, Tribal Resources, Section 9.6.2, at 9-34:**
> Any release affecting a wild rice lake or river and/or a walleye or trout lake or stream would cause irreparable impact on tribal resources.
>
> **EIS, Chapter 5, Section 5.4.3, at 5-611 to 5-612:**
> The types of direct impacts on cultural resources during construction and operation may include the following:

[70] *Id*. at 245-46 (footnotes omitted).
[71] *Id*. at 246 (emphasis added, footnotes omitted).

- Physical destruction of or damage to a cultural resource/historic property;
- Alteration of a cultural resource/historic property;
- Removal of a cultural resource/ historic property from its historic location;
- Change of the character of the cultural resource's/ historic property's use or of physical features as they relate to historical setting; and/or
- Neglect of a cultural resource/ historic property that causes its deterioration (except where such neglect and deterioration are recognized qualities of a sacred place).

* * *

Indirect impacts during construction and operations may include:

- Permanent change in viewshed of a historic resource;
- Limited or altered access to a historic resource, whereby the resource may be neglected and fall into ruin, or conversely, access to a historic resource may be facilitated, causing vandalism to increase;
- Introduction of visual, atmospheric, or audible elements that diminish integrity;
- Temporary construction-related impacts including dust, noise, vibration, and visual intrusions caused by heavy equipment.

FEIS, Chapter 11, Section 11.3, at 11-18:

Long-term impacts on vegetation would be associated with maintenance of a permanent pipeline right-of-way and aboveground facilities. The loss of native vegetation and alteration of species composition would impact tribal use of resources.

EIS, Chapter 11, Section 11.3.1, at 11-19:

Permanent impacts to tribal use and access to resources would occur as a result of altering plant composition and the introduction of invasive species.

The EIS is also replete with evidence of the permanent environmental harm that the L3RP would inflict, for example:

FEIS, Executive Summary at ES-17:
The Applicant's proposed Project would require that an approximately 120-foot-wide construction work area be cleared in upland areas and an approximately 95-foot-wide construction work area be cleared in wetlands. Forested uplands and woody wetlands within the permanent right-of-way through northern Minnesota

would be permanently converted, thereby permanently affecting more forested land cover and wildlife habitat than any other CN Alternative. A total of 38 miles of the Applicant's proposed Project, for example, would cross and permanently fragment 21 large-block forested and woody wetland habitats (i.e., habitats larger than 100 acres). This would permanently impact approximately 2,202 acres of forest and woody wetlands.

FEIS, Executive Summary at ES-20:
Maintaining the pipeline right-of-way would prevent woody vegetation from re-growing, and the conversion of forested land to a non-forested land use would result in a permanent loss of carbon sequestration.

FEIS, Executive Summary at ES-22:
The changing composition of vegetation could affect resident wildlife unable to adapt to changing conditions. This could be worsened by the permanent loss of trees and shrubs, habitat fragmentation, and changes in vegetation cover in large blocks of forest habitats within the pipeline right-of-way.

FEIS, Chapter 12, Section 12.4.3.3.4, at 12-36:

Permanent loss of forest would lead to fragmentation by reducing intact blocks of forest vegetation. Removal of vegetation and conversion to open habitat would increase the potential for spread of invasive species and would alter the structure and function of rare communities, potentially making them less suitable for the species that would typically inhabit them.

FEIS, Chapter 12, Section 12.4.3.3.4, at 12-40:

The cumulative permanent loss of wildlife habitats (including wetlands and forest lands) would affect wildlife inhabiting these areas. These cumulative potential effects could be major in areas where high-value wildlife habitat is altered.

FEIS, Chapter 12, Section 5.2.1.2.4, at 5-68:

With implementation of the Applicant-proposed measures described above to prevent or minimize erosion and sedimentation, monitor stream flows during water appropriation and discharge, and restore streambanks to their original attributes after construction, impacts on flow and hydrologic connectivity during construction along the construction work area would be temporary to permanent and minor to major. Potential impacts that are

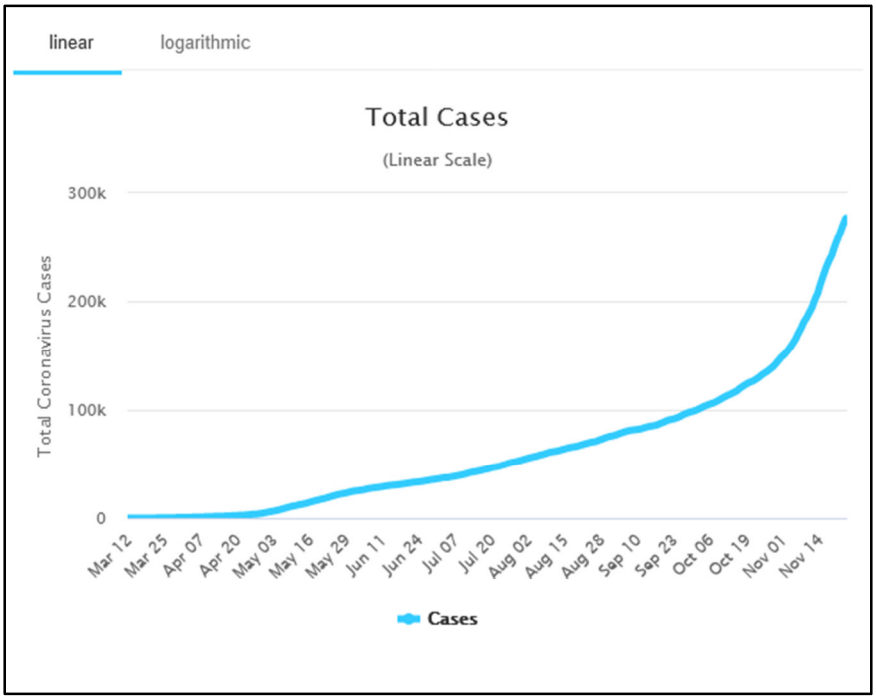
> permanent and major would be associated with specific site features that are sensitive to disruption of hydrologic connectivity. Springs and other surface water features that are dependent on shallow groundwater have the potential for permanent and major impacts.

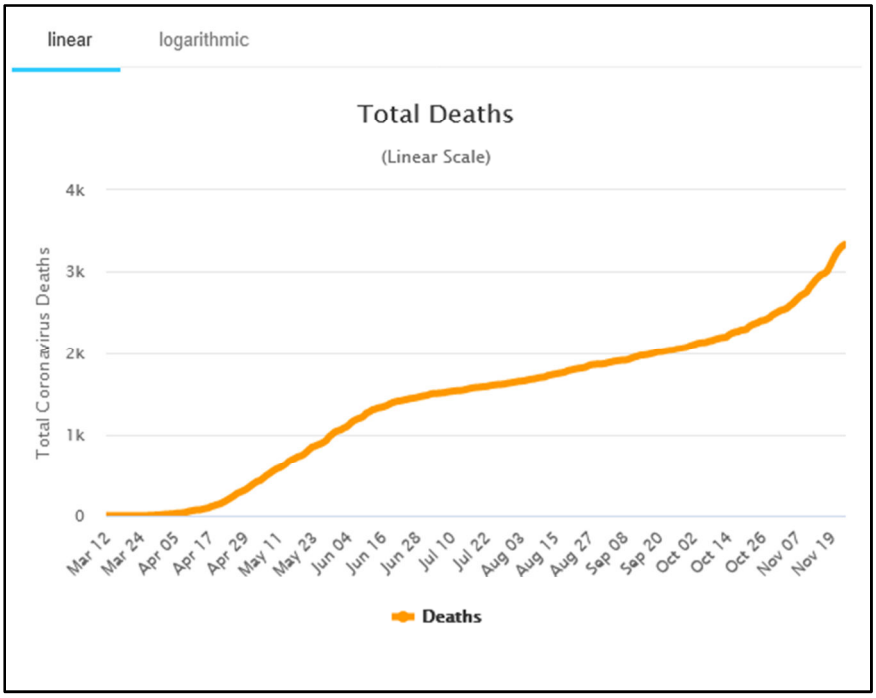
Given the contents of the EIS, the findings in the ALJ Report, and the extensive evidence in the record of permanent and irreparable environmental and cultural harm and destruction, there is no reasonable argument that the L3RP will not irreparably and permanently impact the Tribes, indigenous and other peoples, and the land, air, water, and climate within Minnesota.

2. Evidence of the Irreparable Harm That Will Likely Be Caused by Construction of the L3RP During the COVID-19 Pandemic

Death is irreparable. The COVID-19 pandemic is an ongoing public health crisis having a historically unprecedented impact on the lives of Minnesotans and all global citizens. As of November 24, 2020, this pandemic has killed over 1.4 million people, including 264,534 Americans and over 3,359 Minnesotans.[72] As shown by the following charts, over 280,000 Minnesotan's have contracted this disease and the rate and number of infections in Minnesota is increasing exponentially.[73]

[72] Daily COVID-19 statistics are available at: https://www.worldometers.info/coronavirus/ and https://mn.gov/covid19/data/response-prep/dial-back-dashboard.jsp.
[73] *Id*.

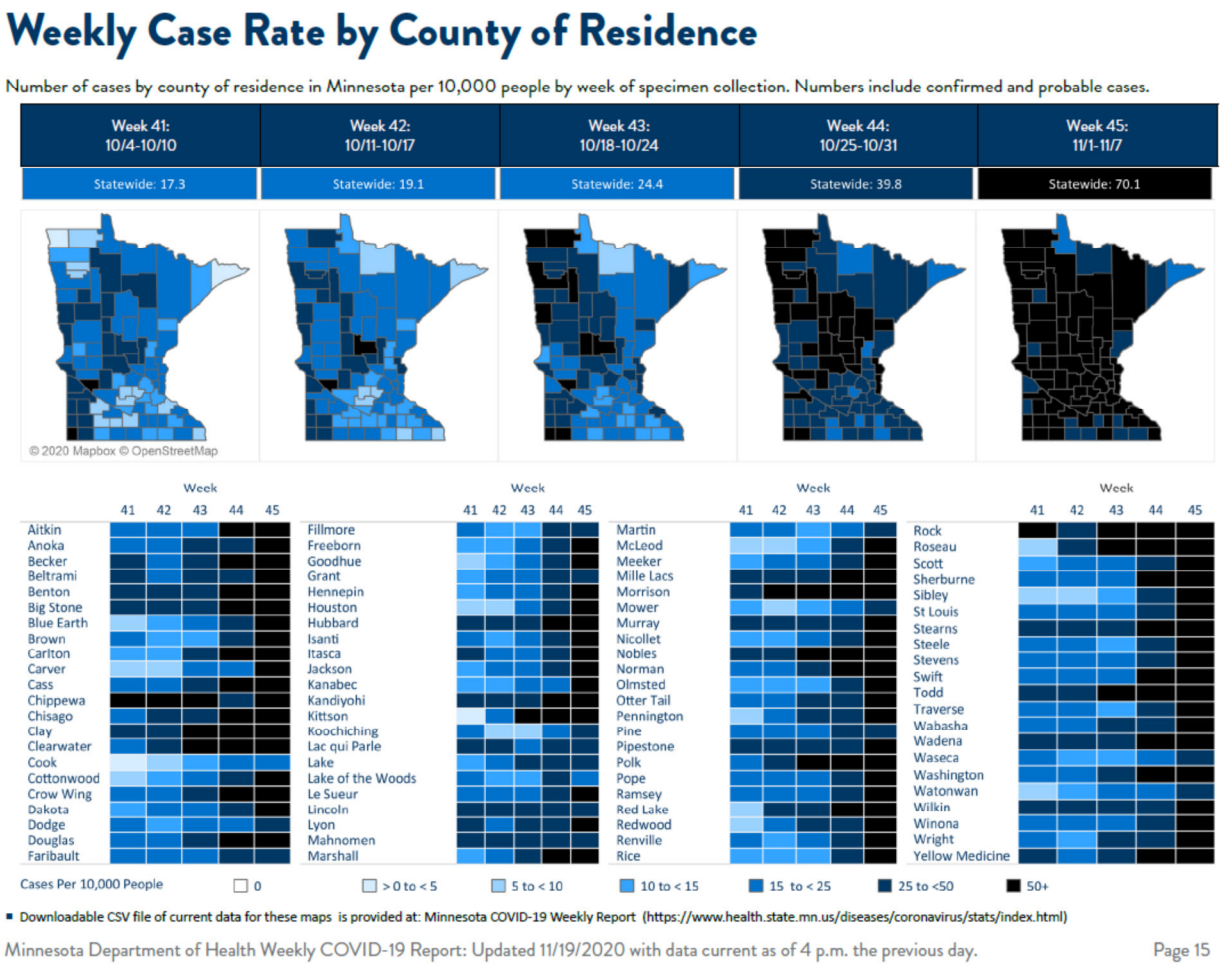




The Minnesota Department of Health publishes a weekly COVID-19 Report providing statistics regarding the spread of this disease (Attachment A).[74] Page 15 of this report shows that infection

[74] Current and past reports are available at: https://www.health.state.mn.us/diseases/coronavirus/stats/index.html#wcrmap1.

rates per 10,000 people have been higher in the region crossed by Enbridge's preferred route than other regions of the state.[75]



Moreover, according to the State of Minnesota:

- Communities of color and indigenous communities have increased exposure to COVID-19 because of work in low-paying jobs that are now considered essential; and
- Communities of color and indigenous communities have substantially higher rates of health inequities, making them more susceptible to infection and death by COVID-19.[76]

[75] *Id.*
[76] https://mn.gov/covid19/data/data-by-race-ethnicity/index.jsp.

The Minnesota Department of Health's website[77] states that COVID-19 spreads through the following means:

- People can spread the COVID-19 disease to each other.
- The disease spreads by droplets or aerosols (tiny particles) from the nose and mouth when someone who is infected coughs, sneezes, or exhales.
- The most common way COVID-19 spreads is through close contact. When people are close to each other, the droplets can land in the mouths or noses of people nearby. It may be possible for people to breathe the droplets into their lungs. It is important to stay at least 6 feet away from other people in public. At home, someone who is sick should stay alone and in one room as much as possible.
- COVID-19 can also sometimes spread through airborne transmission. This means that aerosols (small droplets or particles) can sometimes linger in the air for minutes to hours, and may be able to infect people who are further than 6 feet from the person with COVID-19 or after they have left the room.
- Airborne transmission of COVID-19 is more likely to happen in indoor spaces without good ventilation, or when the infected person was breathing heavily, like when singing or exercising.
- It is possible that COVID-19 can spread when droplets land on surfaces and objects that other people then touch, though this is not thought to be a common way that it spreads. It is important to wash your hands before you touch your mouth, nose, face, or eyes. Clean surfaces that are touched often, especially if someone in the house is sick.

[77] https://www.health.state.mn.us/diseases/coronavirus/basics.html.

- Infected people may be able to spread the disease before they have symptoms or feel sick.
- A person can also spread the disease if they have no symptoms. Research has shown that around 40-50% of people infected do not develop symptoms.

Thus, COVID-19 is spread geographically and to new communities when people travel between communities and live and work together.

In order to slow the spread of COVID-19, the State of Minnesota has prepared guidance for individuals and businesses, including over 40 gubernatorial Executive Orders.[78] Yet, COVID-19 is spreading faster and faster, indicating that the Executive Orders and other state efforts to control the pandemic are not sufficient either in their terms or because of a lack of compliance by people within the state.

In the midst of this public health crisis, Enbridge seeks to employ at least 4,200 workers, at least half of which will be from out-of-state.[79] These workers would be employed across seven construction spreads, or at least 600 workers per spread. Although Enbridge originally estimated that construction would last approximately twelve months, it now apparently intends to finish most construction in Minnesota within six to nine months,[80] thereby implying that more workers will work for a shorter period of time.

Since there are few hotels and motels available near most of the pipeline route in Minnesota and much of the construction will likely take place in winter such that use of recreational vehicles and campers will be impractical, it is likely that workers will fill available hotels and motels, requiring use of other shared spaces, such as homes, cabins, and resorts. Also,

[78] https://mn.gov/governor/news/executiveorders.jsp.
[79] EIS Section 5.3.4.3.1, Employment and Income, at 5-571 to 5-572.
[80] Enbridge News Release (Nov. 6, 2020) available online at: https://www.enbridge.com/media-center/news/details?id=123646&lang=en.

workers will shop and socialize along the pipeline route, patronizing grocery stores, gas stations, pharmacies, bars, and other services. Given the politicization of individual response to COVID-19, it seems likely that many workers will not wear masks or maintain physical distance.

Gathering and employing this large number of L3RP workers in northern Minnesota creates a very real risk that workers will spread COVID-19 among themselves but also within local communities, including indigenous communities, and to the many elderly in these communities and other areas of rural Minnesota. Therefore, it is likely that transporting thousands of workers into Minnesota during the worst phase of the pandemic to date will accelerate the infection rate, thereby putting more tribal members, healthcare workers, and other citizens at risk, and increasing the number of Minnesotans who will be killed. Since death is irreparable, construction of the L3RP during the course of the COVID-19 pandemic will create irreparable harm.

C. Respondents Will Not Sustain Irreparable or Disproportionate Injury if the Commission's Orders Are Stayed and the L3RP Orders Affirmed

The Supreme Court requires that the Commission consider whether the respondents "will sustain irreparable or disproportionate injury in case of affirmance" of the L3RP Orders.[81] Should the Court of Appeals affirm the L3RP Orders, the Commission would not suffer irreparable or disproportionate injury and neither would Enbridge or the oil industry. If a stay is granted, the impact on Enbridge would be temporary and economic, because it will likely be able to recover the costs resulting from the stay through its federal tariffs, either as construction work in progress, through the Facilities Surcharge Mechanism ("FSM") approved by the Federal

[81] *Northern Pacific*, 22 N.W.2d. at 574.

Energy Regulatory Commission ("FERC") in Docket No. OR04-2,[82] or via another cost recovery arrangement with its customers.

The impact of a stay on oil imports from Canada would likely be minimal due to the impact of ongoing low crude oil prices as exacerbated by the global reduction in crude oil demand in response to the COVID-19 pandemic. Global oil market dynamics resulted in a nearly complete halt to major project development in Canada long before the start of the pandemic, and the pandemic further depressed global oil prices, resulting in a reduction in demand for Canadian crude oil and a reduction in demand for Enbridge's Mainline System services amounting to hundreds of thousands of barrels per day. At the same time, through efficiency improvements and upgrades, Enbridge has increased the effective capacity of its Mainline System by at least 400,000 bpd, and is currently implementing a plan to further increase Mainline System capacity through Minnesota by another 178,000 bpd. Since the COVID-19 pandemic is expected to continue to impact the global economy in 2021 and has likely permanently changed petroleum consumption patterns, it is unlikely that demand for crude oil will recover to pre-pandemic levels.

Therefore, a stay would not have irreparable or disproportionate impacts on Enbridge's financial circumstances or on the oil industry.

[82] Enbridge described the FSM in a February 28, 2017, letter to FERC (Attachment B) on pages 1-2 as follows: "In June 2004, the FERC approved an Offer of Settlement in Docket No. OR04-2-000 establishing a Facilities Surcharge to be implemented separately from and incremental to the then-existing surcharges in its tariff rates.[Enbridge Energy, Limited Partnership, 107 FERC ¶ 61, 336 (2004)] The Facilities Surcharge, negotiated between the Canadian Association of Petroleum Producers (CAPP) and Enbridge Energy, allows for the recovery of costs associated with particular Shipper-approved projects through an incremental surcharge layered on top of its indexed base rates. The Facilities Surcharge is intended to be a tariff mechanism that is trued-up each year to actual costs and throughput and is not subject to adjustment under indexing. The annual revenue requirements for projects which are not in service for the full year are pro-rated to reflect the partial year in service."

1. A Stay Would Not Cause Respondents Irreparable or Disproportionate Harm

A delay resulting from a stay could have financial impacts on Enbridge, but these would not be irreparable because they would be a cost of regulatory compliance and therefore of doing business. In its 2020 Q2 Form 6Q filing with the FERC (Attachment C), which was submitted on September 8, 2020, Enbridge included the following statement about the L3RP on page 123.2 (Notes to Financial Statements):

> At this time, we cannot determine when all necessary permits to commence construction will be issued. Depending on the final in-service date, there is a risk that the project may exceed our total cost estimate of $9 billion for the combined L3R Program. However, at this time, we do not anticipate any capital cost impacts that would be material to our financial position and outlook.

Thus, it appears that Enbridge anticipates uncertainty about the Minnesota regulatory process and does not see the cost impacts of this process as being "material."

It is likely that Enbridge would be able to recover the costs resulting from a stay through its federal tariffs, because Enbridge received approval from its customers to recover the costs of the L3RP development process and the project's ultimate costs in accordance with the Issue Resolution Sheet included as Appendix D to its Application for Certificate of Need (Attachment D),[83] which allows cost recover through the 2011 Competitive Toll Settlement Agreement (Attachment E) between Enbridge and its customers. Also, it appears that Enbridge has been recovering its L3RP development costs on an ongoing basis for a number of years. The following documents filed by Enbridge with FERC indicate that Enbridge has been recovering the development costs of the L3RP through its tariffs.

- July 22, 2014, letter from CAPP to Enbridge (Attachment F): "In a letter dated September 10, 2013, the Canadian Association of Petroleum Producers ("CAPP") provided its

[83] EDockets Document ID No. **20154-109653-07**.

support for the recovery of early execution activities and the preparation of Class IV cost estimates for the Line 3 Pipeline Replacement . . . under the Facilities Surcharge Mechanism ("FSM"). This letter contains CAPP support for an additional US$ 26 million . . . . As per the approved mechanism, the Project costs will be recovered under the FSM [Facilities Surcharge Mechanism] which will be included in the Enbridge Energy Limited Partnership Lakehead Surcharge FERC Tariff Filings."

- All FERC tariffs from October 30, 2019, (Attachment G) through the current in-effect tariffs state on page 2: "The following tables [tariff rate tables] provide rates including . . . the Interim Line 3 Replacement Surcharge . . . ." Page 5 of these tariffs list the projects whose costs are recovered through the tariff, and this list includes the following: "Interim Line 3 Replacement Surcharge: Pursuant to CTS [Competitive Toll Settlement] Section 13.1(c), the transportation tolls for all commodity movements include a transmission surcharge which is adjusted for distance only."

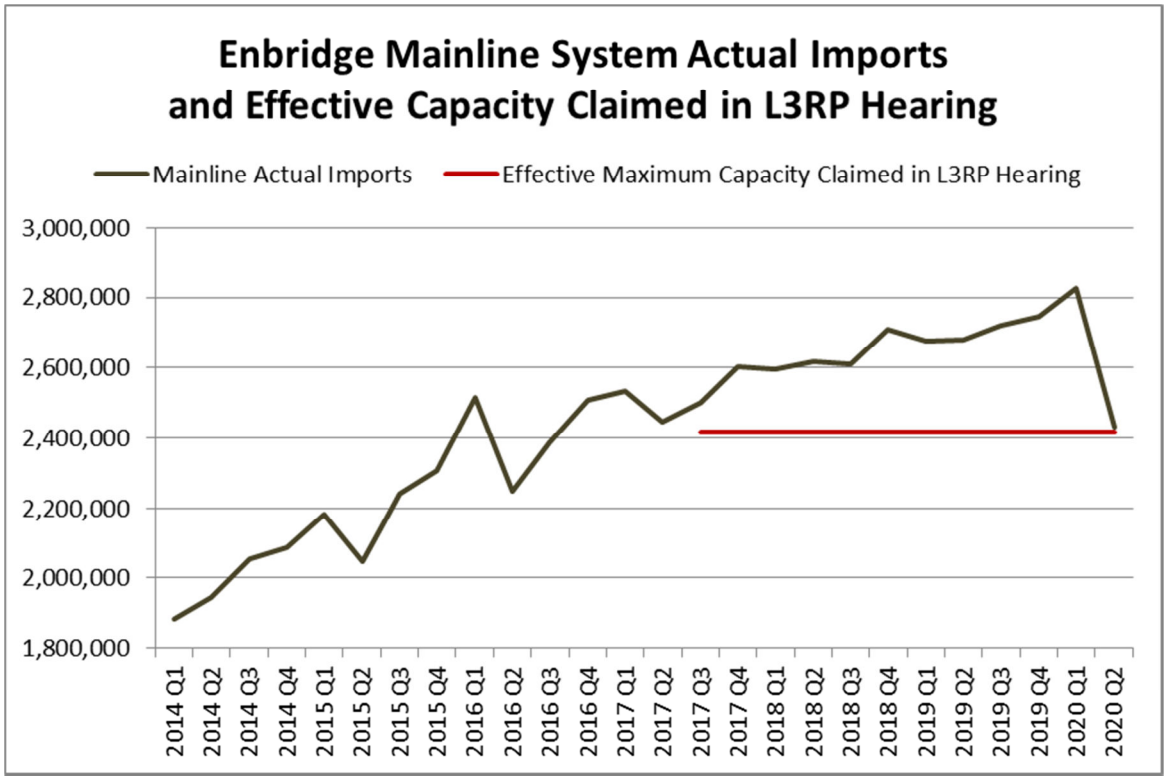
Thus, it appears that Enbridge and its customers have agreed to allow Enbridge to recover the L3RP's development costs on an ongoing basis, and that these costs are rolled into the overall tariff for use of the Mainline System. Likely, the regulatory costs of the L3RP represent a small fraction of the total project costs, and an even smaller fraction of the Mainline System tariffs, and the incremental costs associated with a stay would be a fraction of the regulatory costs to date. Since the impacts of a stay on Enbridge would be incremental, financial, and recoverable through federal tariffs over the life of the L3RP, as a cost of doing business, these impacts would not be irreparable.

2. Enbridge's Customers and Petroleum Consumers Would Not Be Irreparably or Disproportionately Harmed by a Stay Because Enbridge Has Increased the Capacity of Its Existing Pipelines and Crude Oil Demand Is Suppressed, Such that Additional Pipeline Capacity Is Unlikely to Be Needed

Two significant factors make it unlikely that additional import pipeline capacity will be needed before 2022, if ever. First, as more fully described in the initial filing in *Petition for Investigation and Complaint of Capacity Additions to Enbridge Mainline System*, Docket No. PL9/C-20-801 ("Complaint") (Attachment H), Enbridge has already increased the effective capacity of the Mainline System by at least 400,000 bpd, from a claimed cap of 2.4 million bpd in 2017, to over 2.8 million bpd in 2020, and it is undertaking efforts to add another 178,000 bpd of capacity, probably early in 2021. Thus, Enbridge has already added more capacity to the Mainline System than would have been provided by the L3RP, and will soon add even more capacity through efficient use of existing infrastructure. Second, the Complaint also provides evidence that in the second quarter of 2020 utilization of Enbridge's existing pipelines through Minnesota dropped from 2.8 million bpd to 2.4 million bpd, due to the crude oil market crisis induced by COVID-19, resulting in more than 400,000 bpd of unused Mainline System capacity. Enbridge's increased effective capacity increase and decreased utilization are proven by data reported by Enbridge itself to the U.S. and Canadian federal governments.

The chart below from the Complaint shows FERC data[84] for Enbridge's actual crude oil shipments on its Mainline System compared to Enbridge's claimed 2.4 million bpd capacity cap at the time of the Commission's L3RP evidentiary hearing in November 2017.

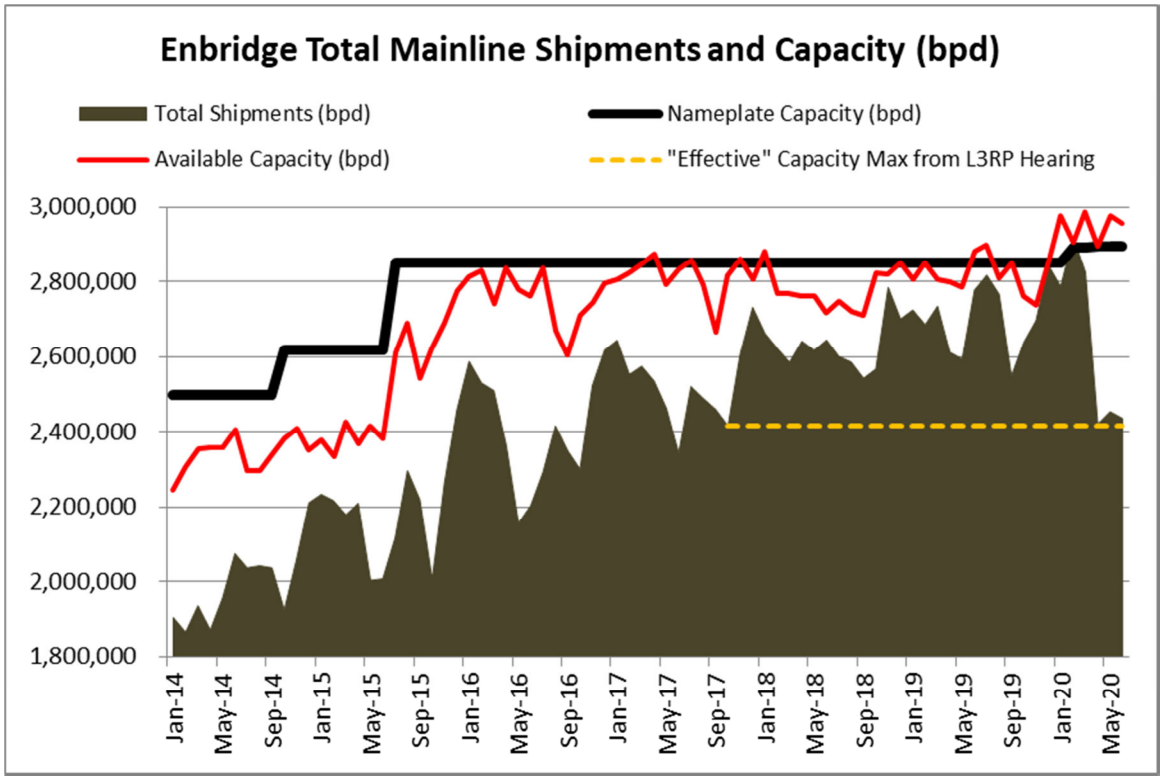
[84] Enbridge's FERC Form 6 and 6Q filings can be downloaded from the FERC eLibrary at: https://elibrary.ferc.gov/eLibrary/search. This data is provided by Enbridge to FERC under penalty of perjury.



The data in Enbridge's FERC Form 6 and 6Q filings prove that in 2020 Q1 the Mainline System transported a record 2,826,172 bpd on average in that quarter from Canada into Minnesota. The FERC data also shows that throughput dropped to an average of 2,430,259 bpd in 2020 Q2.

Similarly, the Complaint also shows that Canadian monthly data[85] from the Canadian Energy Regulator ("CER") shows that Enbridge shipped a peak of 2,919,773 bpd in February 2020 and that shipments dropped to 2,436,000 bpd in June 2020, leaving approximately 500,000 bpd of unused capacity.

[85] The CER data including an interactive charting tool is available at https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/pipeline-profiles/pipeline-profiles-enbridge-mainline.html.

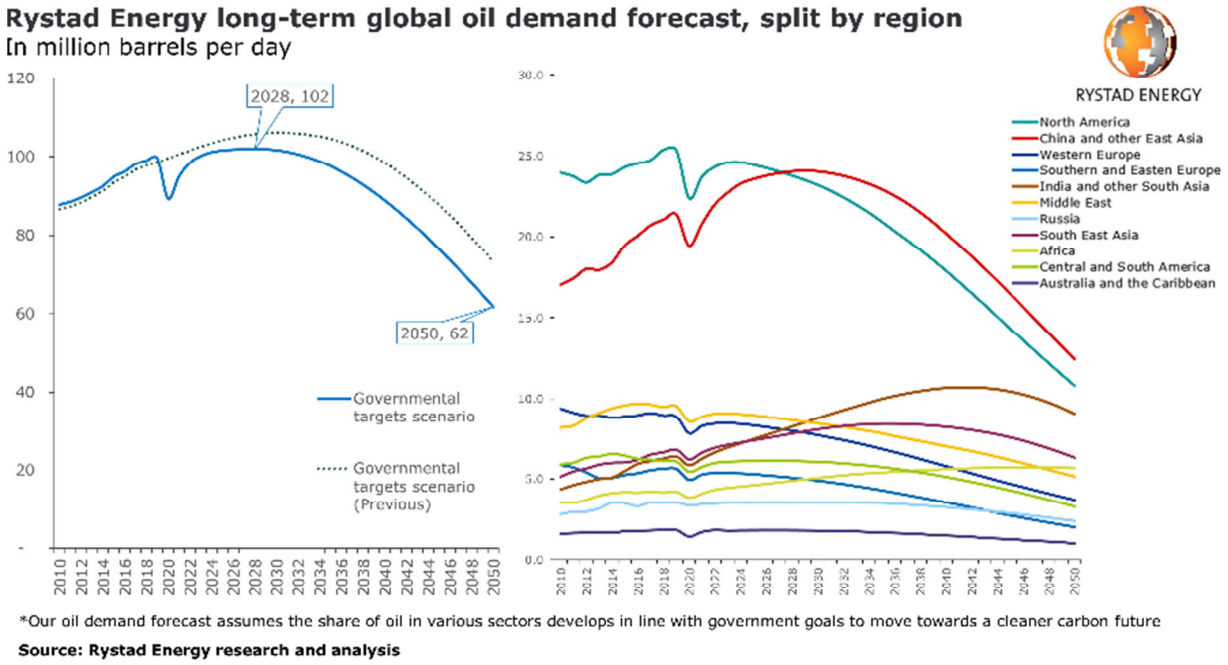


Current Mainline System oil flows are known only by Enbridge but, given ongoing reduced global and U.S. demand for crude oil due the pandemic, it seems likely that Enbridge continues to have significant unused capacity.

That demand for additional Canadian crude oil is unlikely to increase significantly is indicated by continued global weak demand for crude oil caused by continuing consumer reaction to the dramatically worsening COVID-19 pandemic. Rystad Energy forecasts that 2020 global demand for crude oil will be 89.3 million bpd, compared to 99.6 million bpd in 2019,[86] an unprecedented drop of 10.3 million bpd or over 10 percent demand loss. Rystad estimates that global demand will recover to 94.8 million bpd in 2021, which is still 4.8 million bpd below 2019 demand.[87] Moreover, as shown in the chart below, Rystad forecasts that global demand for crude oil will peak in 2028 at just 102 million bpd, and that North American crude oil demand

[86] https://www.rystadenergy.com/newsevents/news/press-releases/covid-19-and-energy-transition-will-expedite-peak-oil-demand-to-2028-and-cut-level-to-102-million-bpd/
[87] *Id.*

peaked in 2019 and is not expected to exceed this peak – ever.[88] It attributes the reasons for this peak and decline to continued electrification of transportation and permanent changes to consumer oil consumption behavior, for example a permanent increase in telecommuting and greater use of videoconferencing instead of automobile commuting and business air travel.[89]



The International Energy Agency's ("IEA") November 2020 Oil Market Report forecast is slightly more optimistic than Rystad's, in that it predicts that global demand in 2020 will fall by 8.8 million bpd and the to rise by 5.8 million bpd in 2021, which is still far below the 2019 peak.[90] The IEA's report states, "Vaccines are unlikely to significantly boost demand until well into next year."[91] The IEA's 2021 demand forecasts indicates that oil demand and consequently prices will likely remain suppressed through at least 2021, making it very unlikely that Canadian oil production will increase beyond current Mainline System capacity.

[88] *Id.*
[89] *Id.*
[90] https://www.iea.org/reports/oil-market-report-november-2020.
[91] *Id.*

Given Enbridge's past and planned capacity additions, the ongoing reduction in demand for its services, the dramatic worsening of the COVID-19 pandemic, and the likely long-term suppression of North American and global oil demand, it is unlikely that Enbridge's customers will need the additional capacity that would be provided by the L3RP in 2021, and very likely they will never need more import capacity on the Mainline System than currently exists.

D. For Practical Purposes, Damages Resulting from a Stay Cannot Be Met by a Money Award

Should the alleged damages resulting from a stay be large, then as a practical matter the Tribes could not afford to pay them, such that a stay here could not be met by a money award.

E. Relators Have Raised Important Questions of Law That if Decided in Their Favor Would Require Reversal

The Commission should stay the L3RP Orders because the Tribes have raised a number of important questions of law. A stay "should be granted . . . where important questions of law are raised, which, if decided in favor of appellants . . . will require reversal."[92] The Minnesota courts have not fully described what constitutes an "important question of law" but the federal courts have interpreted the phrase "substantial question of law or fact" to mean a question that is "close" or could be decided either way.[93] The Third Circuit has interpreted "substantial question" to mean "one that is novel, has not been decided by controlling precedent, or is fairly doubtful."[94] Either interpretation supports the grant of a stay here.

Tribes have raised the following important questions of law, all of which are novel lacking any controlling precedent:

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[92] *Northern Pacific*, 22 N.W.2d at 574, *quoting* 4 C.J.S. Appeal and Error § 636 (1937).
[93] *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985); *see also United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985).
[94] *United States v. Miller*, 753 F.2d 19, 22-24 (3d Cir. 1985).

- Whether the Commission violated the law by failing to require a forecast of "demand" for crude oil as required by Minn. Stat. § 216B.243, subd. 3, and Minn. R. 7853.0130.A(1). This issue strikes at the heart of the purpose of the certificate of need requirements in Minn. Stat. § 216B.243. Specifically, the issued raised is whether the Commission must base a finding of need on demand by energy consumers, as opposed to industry desire for transportation capacity based on industry forecasts of crude oil extraction and supply. Moreover, this issue relates not just to oil pipelines, but to need decisions under Minn. Stat. § 216B.243 for electric power plants, high-voltage transmission lines, and intrastate natural gas facilities, because the need for all such new facilities is determined pursuant to Minn. Stat. § 216B.243. The Commission's disregard for energy consumer demand here establishes a dangerous precedent that would allow the state's electric and natural gas public utilities to construct new infrastructure based not on consumer demand for energy but on industry growth aspirations and development plans within and outside of Minnesota.
- Whether the Commission violated the law by allowing Enbridge to substitute an assumption of demand for crude oil rather than providing the data and calculations needed to verify and test the forecast, as required by Minn. R. 7853.0520. This claim raises the issue of whether the Commission may rely on energy industry forecasts that are unsupported by release of underlying data and calculations. Specifically, it is undisputed that the forecast relied on by Enbridge in the L3RP CN docket was produced by the Canadian Association of Petroleum Producers, which does not release any of the data or calculations used to create its forecast, thereby making it

impossible to quantifiably verify or manipulate the forecast using different data and assumptions, as required by Minn. R. 7853.0520. The Commission's reliance on an unverifiable industry forecast and an assumption of demand creates precedent that other energy facility proposals subject to Minn. Stat. § 216B.243, including electric and natural gas proposals, need not release the forecast data, calculations, and assumptions used to create their forecasts of demand, thereby allowing the Commission to rely on self-serving industry black-box forecasts and/or unsupported assumptions.

- Whether the Commission may base a decision to replace the existing Line 3 pipeline on pipeline safety concerns, even though pipeline safety is not a decision criterion under Minn. Stat. § 216B.243, subd. 3, or Minn. R. 7853.0130. This claim raises an important question about the proper scope of analysis under these laws, particularly since the Commission has no express jurisdictional authority over pipeline safety, and therefore no expertise to make safety-based determinations.
- Whether the Commission's determination that the Project is needed to replace existing Line 3 to improve pipeline safety is preempted by the federal Pipeline Safety Act, 49 U.S.C. § 60101, *et seq*. ("PSA"). This claim raises important questions about the role of the State of Minnesota in a decision to replace a crude oil pipeline, which decision is expressly within the scope of and preempted by the PSA. The State of Minnesota could not enact a statute that authorizes the Commission or any other agency to order the replacement of an interstate crude oil pipeline due to safety concerns, as such legislation would be preempted by the PSA. Therefore, this issue raises an important question of federal preemption.

- Whether MEPA requires analysis of impacts to particular critical and unique resources, or whether agencies may use a "representative" impact methodology that fails to analyze such impacts. The record clearly shows that the L3RP creates a potential risk of oil spill into Lake Superior from a number of potential spills sites in Wisconsin that are close to the Lake. Yet, the EIS here rejected analysis of oil spills from sites near to Lake Superior and the Duluth Superior Harbor in favor of a "representative" site over 30 miles upstream from the Lake within Minnesota. Since oil spill impacts are attenuated over geographical distance, the "representative" site chosen to evaluate a spill into Lake Superior is simply too far upstream to model the potential impacts that a spill from the L3RP near Lake Superior would have on the Lake.

Accordingly, the Tribes have raised multiple important questions of law that strike at the heart of the legislative purpose and meaning of the statutory and regulatory language under which the Commission approves large energy facilities,[95] including the Minn. Stat. § 216B.243 and MEPA, which category of decisions are undoubtedly are among the most important and controversial decisions made by the Commission. If any one of these questions of law is decided in Tribes' favor, the Commission's error would be significant and require remand for a contested case hearing and decision in accordance with law. A stay pending resolution of judicial appeal is necessary to preserve these issues for judicial determination.

F. The Risk of a Multiplicity of Law Suits Does Not Appear To Be an Issue Here

Use of a stay to avoid a possible multiplicity of law suits is intended to address situations where a failure to stay an order would result in a number of unavoidable financial transactions

[95] Minn. Stat. § 216B.2421.

that would be subject to litigation, if the order were to be affirmed on appeal. For example, the *Northern Pacific* case involved an order that decreased regulated railroad freight charges.[96] The railroad alleged that if the stay was not granted and the order were reversed on appeal, then to recover its damages it would be compelled to engage in a multiplicity of law suits to enforce collection of charges due.[97] The *Northern Pacific* court issued a stay to avoid this litigation. This situation does not exist here.

G. A Stay Is Necessary to Protect the Court of Appeals' Jurisdiction

This situation here is similar to that in *Webster*, because it too concerns actions that cannot be undone. A pipeline cannot be unconstructed any more than publicly disclosed confidential information can be made un-public. Without a stay, Enbridge will begin construction of the L3RP under authority of the Commission's L3RP Orders, and complete this construction within six to nine months. These construction activities cannot be undone. Absent a stay, by the time of a court order in June or July 2021, construction would be finished or nearly finished; the Tribes' resources and rights would be damaged or destroyed; and the Tribes' claims rendered moot, such that a judicial opinion would be without practical effect. A remand by the Court of Appeals at that time for further proceedings in compliance with law would be pointless, because there is no logic in determining the need for a pipeline once it has been constructed; no ability for a *post hoc* MEPA Lake Superior oil spill analysis to influence the Commission's decisions on the CN and RP; no use in determining that the Commission is barred by law from ordering the replacement of existing Line 3 for safety reasons if it has already been replaced.

Yet, the legislature has assigned the Court of Appeals jurisdiction over interpretation of the laws under which the Commission issues certificates of need and environmental impact

[96] 22 N.W.2d at 575
[97] *Id*.

statements for proposed new major crude oil pipelines and other type of large energy projects. The Court of Appeals has jurisdiction to judge whether the Commission has violated the law, and if it has, to require Commission action in compliance with law. Absent a stay, it would be impossible for the Court of Appeals to exercise its jurisdiction here. Since the Court of Appeals will favor a stay where its jurisdiction will be lost, the Commission should stay the L3RP Orders pending a decision by the Court of Appeals.

H. The Commission Should Not Consider the Likelihood of Reversal on Appeal

The Supreme Court in *Northern Pacific* did not include the likelihood of reversal on appeal as a factor for determining whether to grant a stay of an administrative order, and in 2017 the *Webster* court affirmed this position despite a request by the appellant there to include it. Instead, likelihood of success is an element in the *Dahlberg Brothers* analysis applicable to motions for injunction and not applicable here.[98] Therefore, the Commission should limit its analysis here to the *Northern Pacific* factors.

It makes sense for the Commission to not hear arguments on the likelihood of success, because:

- the Commission has already considered the Tribes' arguments at least four times on the merits: in its substantive CN and MEPA 2018-19 orders; in its 2019 reconsiderations of these orders; in its May 2020 order reinstating the 2018-19 orders; and in its July 2020 order denying reconsideration, such that rearguing the merits of the Tribes' claims a fifth time would be redundant and wasteful;

[98] 137 N.W.2d at 321.

- if the Commission had been inclined to find that its L3RP Orders violated the law or are unreasonable it presumably would have modified its position by now, but has not; and
- a finding by the Commission that it would likely be reversed on appeal would have the effect of an admission and substantially weaken its position on appeal, making it extremely unlikely that the Commission and the Assistant Attorneys General representing it would ever agree that the Tribes' are likely to succeed on the merits.

There is no reason for yet another reconsideration of the merits of Tribes' arguments. This being said, should the Commission wish to do so, the Tribes refer the Commission to their initial and reply briefs, as well as their multiple petitions for reconsideration, comments, and other record documents on the merits. Because the Tribes have raised important questions of law and alleged multiple violations by the Commission of the plain language of the law, as explained in their prior filings in Docket PL9/CN-14-916, the Court of Appeals is likely to find for Tribes.

I. The Balance of Equities Favors a Stay

The Commission must grant a stay if doing so would (a) prevent Tribes' appeal from becoming moot, (b) protect Tribes from irreparable harm, (c) not cause respondents irreparable or disproportionate injury in the case of affirmance, (d) preserve important questions of law, and (e) serve the public interest by protecting the court of Appeals' jurisdiction as well as public health and welfare. All of these factors weigh heavily in Tribes' favor. When weighing these factors the Commission should heed the Supreme Court's guidance that the "most important factor" is "preserv[ation of] the court of appeals' jurisdiction by preventing a significant legal

issue from becoming moot during appeal,"[99] as well as the Court of Appeals guidance that "[e]nsuring that the appealing party can obtain effective relief, if it prevails on appeal, is a crucial consideration in determining whether and on what terms to grant a stay pending appeal."[100]

Here, if no stay issues, the project would almost certainly be substantially complete by the time of a court decision in approximately June or July of 2021, at which time the Tribes will have suffered irreparable injury. Allowing Enbridge to construct the L3RP pending a court decision would mean the project would be largely complete by the time the court issues its decision, making a possible reversal and remand to the Commission for hearings on the need for the project and its environmental impacts entirely hypothetical and pointless. Therefore, a failure to grant a stay would void the Court of Appeals' jurisdiction over the important legal questions raised by tribes, and completion of construction would prevent the Tribes from obtaining effective relief in the event the Commission is overturned. Therefore, both the "most important" and "crucial" factors identified by the courts weigh in Tribes' favor.

With regard to irreparable harm, there is no doubt that construction of the L3RP would cause irreparable harm to the Tribes and the environment that is the foundation for their lives and culture. Irreparable harm is proven by the administrative record including: (a) the findings of irreparable and permanent harm expressly identified in Administrative Law Judge's findings of fact; (b) the identification of permanent and significant harm by the 2RFEIS; and (c) the extensive testimony of indigenous people and others of the irreparable harm that would be caused to them.

[99] 891 N.W.2d at 293. This prioritization is consistent with the Minn. R. Civ. P. 62.05 clarification that a purpose of a stay pending appeal is "to preserve the status quo or the effectiveness of the judgment subsequently to be entered."
[100] 741 N.W.2d at 145.

In addition, the Tribes are extremely concerned about the potential for construction of the L3RP to exacerbate the spread of the COVID-19 pandemic, which is currently ravaging the people of northern Minnesota and worsening by the day. Importing thousands of workers from out-of-state and moving thousands more within the state during the ongoing surge in infections increases the risk that Tribal members will contract COVID-19, including the elderly and those with pre-existing health conditions that substantially increase the risk of severe infection and death. Tribal health care resources are very limited, northern Minnesota's hospitals are nearly out of capacity, and health care workers are either exhausted or sick themselves, creating a staffing crisis for hospitals and senior care facilities. Actions that accelerate the spread of COVID-19 will significantly stress Tribal health care resources, as well as the Tribes' ability to provide basic human services to their members. The risk created by importing L3RP workers arises in part because they will not be isolated in a few "man camps" and instead will generally be left to find their own accommodation, food, and other services. Due to limited accommodation in the region, it is likely that many workers will room and board together, and of course they will work together. Enbridge has no ability to control the behavior of these workers outside of worksites, such that its pandemic response plan will not control the spread of COVID-19 outside of work hours when it is most likely to occur. Therefore, there is a substantial risk that the L3RP workers will infect each other and local Minnesotans, including tribal members directly or indirectly, and that this will irrevocably harm the Tribe and its members.

Any death and illness caused by construction of Line 3 could not be remediated after the fact. Death is an irreparable harm. A stay of construction for the duration of this serious phase of the pandemic will protect the Tribes and their members from increased irreparable impacts of

COVID-19 and is in the public interest. Therefore, a stay is necessary to protect Tribes from serious irreparable harm.

The Tribes also raise multiple serious and difficult questions of law that strike at the heart of the Minn. Stat. § 216B.243 need analysis, the Commission's scope of jurisdiction over pipeline safety, and the efficacy of the Commission's environmental impact analysis for oil spill threats to Lake Superior. Should the Commission find the Commission in error on any of these claims, the remedy would be remand to the Commission for additional hearings in accordance with law. The Court of Appeals should fulfill its jurisdictional role by considering and issuing a decision on all of these issues. Since the Tribes have raised serious and difficult questions of law, this factor also weighs in their favor.

Finally, Tribes have proven that a stay is necessary to protect the Court of Appeals' jurisdiction, because without a stay Enbridge will construct and likely finish the project before a court decision, rendering such decision moot and irrelevant. The Commission should recognize that protection of court jurisdiction in litigation involving construction of major energy projects will always require a stay of challenged Commission orders if judicial review of serious legal questions is to proceed before construction, and that this is part of the governmental process established by the legislature, which process the Commission should not prevent.

In comparison, a stay of the L3RP Orders would not irreparably harm Enbridge or its customers (shippers), because: (a) ongoing low oil prices caused in part by the global reaction to the COVID-19 pandemic have substantially reduced demand for crude oil and Enbridge's transportation services through at least 2021; (b) Enbridge has already increased the capacity of the Mainline System by more than the capacity that would be provided by the L3RP, and is currently implementing additional capacity expansions; and (c) if Enbridge prevails at the Court

of Appeals, the project would be built and any economic losses experienced by it during the pendency of the appeal can be recovered via its federal tariff structure over the 30 or more years that it claims the L3RP would operate, such that its economic losses during the stay would not be permanent or irreparable. A delay in construction to accommodate judicial review is not an irreparable harm, nor are the impacts of delay disproportionate to the serious irreparable harm that construction would inflict on the Tribes and their environment.

Therefore, all of the *Northern Pacific* criteria weigh heavily in Tribes' favor, such that the Commission should stay its L3RP Orders.

II. THE COMMISSION MAY NOT REQUIRE A SECURITY BOND

The Commission may not impose a security bond on the Tribes because: (a) Minn. Stat. § 216B.53 authorizes bonds only against "public utilities;" (b) MEPA authorizes bonds only under Minn. Stat. § 562.02, which is not applicable here; (c) Minnesota Rule of Civil Appellate Procedure 108.02, subd. 2, exempts "governmental bodies" from security bonds; and (d) the unique circumstances here make it in the public interest to order a stay without a bond. When interpreting these statutes, the Commission should also consider the impact of Minn. Stat. 645.17(5), which states: "[i]n ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . (5) the legislature intends to favor the public interest as against any private interest."

A. The Minnesota Rules of Civil Appellate Procedure Do Not Allow the Courts to Impose Bonds When Otherwise Provided by Statute

The requirement for a security bond in Rule of Appellate Procedure 108.02, subd. 2, does not apply when "otherwise provided by rule or statute." This rule recognizes that the legislature may for reasons of public policy limit the requirement for a security bond, and that such

legislative act supersedes the rule's general security bond requirement. As discussed above, both Minn. Stat. § 216B.53 and Minn. Stat. § 116D.04, subd. 10, specify particular circumstances in which bonds are required upon stay, which circumstances do not exist in the present appeal. Therefore, the general security bond requirement in Rule 108.02, subd. 2, is superseded by statute and is not here applicable. Since the legislature has determined to scope of security bonds under these statutes, the Commission may not create new circumstances in which such bonds are required.

1. The Tribes Are Exempt from the Minn. R. Civ. App. P. 108.02, subd. 2, Security Bond Requirement, Because Minn. Stat. § 216B.53 Allows Security Bonds Only When the Moving Party is a Public Utility

Minn. Stat. § 216B.53 authorizes security bonds only against "public utilities." This section states: "In case the order of the commission is stayed or suspended, the court shall require a bond with good and sufficient surety, conditioned that the public utility petitioning for review shall answer for all damages caused by the delay . . . ." The plain meaning of this language is that the bonding conditions identified in the second paragraph of Minn. Stat. § 216B.53 apply only to "the public utility petitioning for review" and not to other types of petitioners. That the legislature would require a bond in actions under Minn. Stat. ch. 216B between public utilities makes sense, because most if not all actions between public utilities can be resolved financially, and public utilities likely can afford the bonds in such actions. However, other parties that might petition for judicial review of Commission decisions include individual ratepayers, small businesses, governments, and nonprofit intervenors with little to no capacity to post a bond of the magnitude that might be required to compensate a public utility for the costs of a stay pending appeal. Imposition of a general bonding requirement on parties other than public utilities would, as a practical matter, preclude grants of stays when action is brought by

individuals, small businesses, governments, and nonprofit corporations – regardless of whether or not they would suffer irreparable harm and the importance of the questions raised on appeal. The language of Minn. R. § 216B.53 suggests a legislative intent to allow judicial appeal by such parties and avoid inequity.

If the Commission were to stay construction, Enbridge may allege tens of millions if not hundreds of millions of dollars in damages due to delay and seek a security bond for these damages. Requiring that the Tribes pay such bond under Minn. Stat. § 216B.53 would as a practical matter mean that even if a stay were granted it would never come into effect because the bond required could never be afforded. The practical result of extending a security bond requirement to Tribes would be a lack of judicial review of important questions of law and fact they raise under Minn. Stat. § 216B.243 and Minn. R. ch. 7853. Fortunately, when a stay is sought under Minn. Stat. § 216B.53, it allows bonds only as against public utilities. Since the Tribes are not public utilities, the Commission may not require them to pay a security bond.

2. The Tribes Are Exempt From the Minn. R. Civ. App. P. 108.02, subd. 2, Security Bond Requirement, Because MEPA Does Not Allow Security Bonds Except in Accordance with Minn. Stat. § 562.02, Which Is Not Applicable Here

MEPA limits security bonds to only those authorized by Minn. Stat. § 562.02, which allows governments to seek bonds in actions related to "the course of the authorization or sale, issuance or delivery of bonds, the making of a contract for public improvement or the validity of any proceeding to alter the organization of a school district . . . ." Since the Tribe's claims do not fall within any of these categories of actions, MEPA does not authorize the Commission to require a security bond to stay Tribe's MEPA claims.

B. The Tribes are Exempt from the Minn. R. Civ. App. P. 108.02, subd. 2, Security Bond Requirement, Because they Are "Governmental Bodies"

Minn. R. Civ. App. P. 108.02, subd. 2, does not allow the imposition of security bonds in "cases in which a governmental body is the appellant."[101] Rule 108.02, subd. 2, recognizes that governments should not be required to post bonds so that they may protect the interests of the citizens they serve through judicial appeal.

The Commission should find that the Tribes are exempt from a security bond requirement because the Tribes are "governmental bodies".[102] Although the Tribes are not subdivisions of the State of Minnesota, they are sovereign governments, such that under the plain language of Minn. R. Civ. App. P. 108.02, subd. 2, they are exempt from its requirement. As do State of Minnesota governmental entities, Tribes have a duty to protect their citizens and are unable to afford large security bonds. Therefore, imposition of a security bond on Tribes would prevent them from protecting their citizens in court. Accordingly, the Commission should find that the Tribes are "governmental bodies" and therefore exempt from paying a security bond.

C. The Circumstances Show That Requiring the Tribes to Pay a Security Bond Is Not in the Public Interest

Further, under the holding in *No Power Line*, where a bond is allowed by law (and here it is not), the courts may also permit a stay without a security bond "when [the court] is satisfied that the unique circumstances of a particular case make it in the public interest to order such a

[101] While Rule of Civil Procedure 62.04 more narrowly limits this rule to Minnesota State subdivisions, Rule 62.03 makes clear that Rule 108 applies to appellate court cases.
[102] *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L. Ed. 2d 706 (1975) (holding that Indian tribes are more than "private voluntary organizations" and that Congress has "consistently guarded the authority of Indian governments over their reservations"); *United States v. Lara*, 541 U.S. 193, 204-205 (2004) (holding the understanding of tribes are independent and distinct governments).

stay."[103] It appears that the circumstances here are very similar to those in *No Power Line*. Relators here also include citizen nonprofit organizations[104] that claim agency error of law in the approval of an energy infrastructure corridor[105] and raise a number of important questions of law related to agency jurisdiction,[106] non-compliance with applicable statutes including MEPA[107] and the same certificate of need statute,[108] and the scope of alternatives considered.[109] Thus, it appears that the same "unique circumstances" related to the public interest that existed in the *No Power Line* case also exist here.

Moreover, the presence of the Tribes in this appeal raises even more public interest concern due to: (a) the irreparable harm that the L3RP would inflect on Tribal members and the resources on which they depend; (b) the disproportionate impact of the L3RP on the Tribes and their members that raises environmental justice concerns; (c) the State of Minnesota's historical state-sanctioned theft of Tribal resources and brutality toward indigenous peoples; (d) the risk of severe oil spill impacts on Tribal resources; and (e) the threat that climate change, caused in part by increased Canadian crude oil extraction, will fundamentally alter the natural world on which tribal wellbeing, culture, and religion are founded.

In the *No Power Line* concurrence, Justice Yetka stated:

> One point is obvious to me: We cannot stand much more highway and above-ground power line construction without permanently destroying and impairing our environment. The question is where do we stop?
>
> * * *

[103] 262 N.W.2d at 330-331; *see also Coop. Power Ass'n v. Eaton*, 284 N.W.2d 395, 399 (Minn. 1979) (requiring no supersedeas bond for stay of district court order condemning property for high-voltage transmission line).
[104] *No Power Line* at 316-317.
[105] *Id*. at 317.
[106] *Id*. at 319-322, 330.
[107] *Id*. at 324-26.
[108] *Id*. at 326.
[109] *Id*. at 327.

> The more the public generally is exposed to what is being done to our environment, the better they will be able to participate in the decision-making process of determining whether or not they wish to pay the cost both in dollars and in destruction to the environment involved in a project such as this.[110]

Forty-three years after the *No Power Line* decision, humanity's destruction of our environment has worsened and the need for rigorous public engagement in decisions related to large energy projects is stronger now than it has ever been. A security bond requirement here would as a practical matter close the courthouse to the Tribes and other nonprofit public interest relators and rollback public participation and protection of the public interest at a time when citizen participation in agency decision making, including via judicial appeal, is more important than ever. Therefore, the public interest here requires that the Commission stay its L3RP Orders pending appeal and deny any request for a security bond.

REQUEST FOR EXPEDITED DECISION

Enbridge has stated that it intends to start construction on approximately November 30th, 2020. While the Tribes are uncertain of the status of the final L3RP permits, and of course have no knowledge of Enbridge's internal plans, it is possible that L3RP construction could soon begin. Therefore, the Tribes request that the Commission consider this motion to stay on an expedited basis.

[110] *No Power Line* at 333, Justice Yetka concurring specially.

REQUESTED RELIEF

For the foregoing reasons, the Tribes request that the Commission take the following actions:

1) Stay its L3RP Orders pending an Order in the 2020 Appeals; and

2) Deny any request for a security bond that might be presented by Enbridge.

Dated: November 25, 2020

Respectfully submitted,

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