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**

PETITION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR STAY PENDING APPEAL OF THE RED LAKE BAND OF CHIPPEWA AND THE WHITE EARTH BAND OF OJIBWE

December 17, 2020

CONTENTS

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") on November 25, 2020, moved 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 a number of consolidated certiorari appeals.[2] In response, by notice dated November 30, 2020, the Commission granted expedited review and required responses by other parties on December 2, 2020. Responses in opposition were filed by Enbridge; Shippers for Secure, Reliable, and Economical Petroleum Transportation ("Shippers"); Laborers' District Council of Minnesota and North Dakota ("LIUNA"); and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("UA"). Responses in support were filed by Friends of the Headwaters; Northern Water Alliance; Honor the Earth, and The Sierra Club, and separately counsel for the Mille Lacs Band of Ojibwe informed the Tribes that it also supported the motion. The parties that chose to take no position on the motion included the Fond du Lac Band of Lake Superior Chippewa and the Department of Commerce, Division of Energy Resources.

[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] 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").

Since the filing date of the Motion for Stay, the Tribes' understand that Enbridge has commenced construction of the L3RP.

On December 4, 2020, the Commission met to consider the motion and voted 4 to 1 to deny it. On December 9, 2020, the Commission issued its Order Denying Motion for Stay Pending Appeal ("Order Denying Stay"). Pursuant to Minn. Stat. § 216B.27, the Tribes hereby petition the Commission for reconsideration of this order based on the arguments herein and in the Tribes' Memorandum of Support for Motion to Stay, which is incorporated by reference.

ARGUMENT

I. THE COMMISSION SHOULD RECONSIDER ITS ORDER DENYING MOTION FOR STAY BECAUSE THE ORDER IS AN ABUSE OF DISCRETION

As more fully described in Tribes Memorandum in Support of Motion for Stay, the Supreme Court of Minnesota has stated that a "stay should be granted" if:

- it appears that without a stay the objects of the appeal may be defeated and the judicial appeal or the appeal become moot due to action taken under the agency order; or
- it is reasonably necessary to protect appellant from irreparable or serious injury in case of a reversal and it does not appear that appellee will sustain irreparable or disproportionate injury in case of affirmance; or
- where damages resulting from a stay can be met by a money award; or
- to preserve important questions of law that would, if decided in favor of appellant, require a reversal; or
- to avoid a multiplicity of suits; or

- to protect the appellate court's jurisdiction.[3]

The use of the word "or" in the Supreme Court's factor list makes clear that the Commission may order a stay if Tribes meet any one of the foregoing factors. Although the Commission need only analyze relevant factors based on the circumstances,[4] Minnesota's courts have made clear that the "most important" factor is preservation of the Court of Appeals jurisdiction to ensure that significant legal issues are not made moot during appeal,[5] and ensuring that the moving party can obtain effective relief, if it prevails, is a "crucial" consideration.[6]

Parties opposed to the Motion for Stay presented a number of arguments related to these factors, and in its Order Denying Stay the Commission adopted a number of these arguments. The Tribes seek reconsideration because the Commission's Order Denying Stay fails to provide a reasonable or lawful basis for denial of Tribe's motion for stay, and the parties in opposition also failed to provide reasonable arguments or evidence related to the stay factors, such that the Commission's order is an abuse of discretion.

A. A Stay Is Necessary to Preserve the Objects of Tribes' Appeal, to Prevent Their Appeal from Becoming Moot, and to Preserve the Court of Appeals' Jurisdiction Over It, and the Commission and Nonmoving Parties Have Failed to Present Any Rational Arguments Otherwise.

The Commission, Enbridge, the Shippers, UA, and LIUNA present a number of arguments that they assert are related to preservation of the objects of the Tribes' appeal, the potential for their appeal to become moot, and the risk that the Court of Appeals will lose its jurisdiction to resolve important questions of law. These arguments are discussed below; none of them are apposite or rational.

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[3] *State v. Northern Pac. Ry. Co.*, 22 N.W.2d 569, 574-75 (Minn. 1946); *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017).
[4] *Webster*, 891 N.W.2d at 293.
[5] *Id*.
[6] *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 145 (Minn. App. 2007).

1. **The Commission's Assertion that the Court of Appeals Could Grant Meaningful Relief After Construction Is Specious and Without Basis in Law.**

The Commission asserts in a single unsupported sentence that absent a stay, "the Court of Appeals would still be able to grant meaningful relief if the Project is already constructed; it could cease operation of the pipeline."[7] The Commission does not discuss any of the relief sought by Tribes' claims, provides no legal foundation for this argument, and simply asserts that an accidental oil spill would be the most serious potential impact. The Commission's rationale was suggested by LIUNA, whose response states: "the question of whether the pipeline operates is not necessarily made moot by its construction,"[8] which statement implies that the Court of Appeals would not lose jurisdiction because it could order Enbridge to stop operation of the L3RP. The Commission's rationale here is specious and without basis in law or fact.

The objectives of Tribes' claims to the Court of Appeals are to require that the Commission comply with the CN laws and MEPA before it approves construction of the L3RP. Allowing construction but stopping operation would not accomplish these objectives, because if the Court of Appeals reverses the Commission but construction is complete, there would be no utility in a remand to the Commission for further hearings on whether there is a need to construct the L3RP, the appropriate route for the L3RP, or to produce an adequate Environmental Impact Statement ("EIS") on which a decision to grant the CN and RP could be based. The L3RP would be constructed, and any further Commission evidentiary hearings on the need for, route of, or impact of the pipeline would be without practical result. Further, Tribes do not consider that an accidental oil spill is the most serious impact of the L3RP. The Commission once again

[7] Order Denying Stay at 5.
[8] LIUNA Memorandum in Opposition to Motion for Stay at 2.

disregards the Tribes' cultural, religious, and treaty rights that would be directly impacted by construction.

2. **The Timing of the Tribes' Motion to Stay Is Irrelevant to Preservation of the Appeal, and in Any Case Tribes Did Not Wait Too Long to File the Motion for Stay.**

Enbridge argues that the Tribes waited too long to bring their Motion to Stay.[9] Shippers discuss facts relating to the timing of the motion for stay, but do not appear to actually argue the point.[10] The UA and LIUNA responses do not appear to argue this point. For the reasons below, none of the arguments related to timing have merit.

First, the timing of the motion to stay has nothing to do with whether or not the objects of Tribes' appeal will be defeated and this action become moot, nor does it relate to the Court of Appeals' jurisdiction.

Second, construction was contingent on permit approvals by a number of agencies, including the Minnesota Pollution Control Agency ("MPCA"), the Minnesota Department of Natural Resources ("MDNR"), and the U.S. Army Corps of Engineers ("Corps"). Tribes and the environmental intervenors have been actively involved in these other permitting processes, including an evidentiary hearing over the summer. Until the last of these permits were issued, construction was not assured and the start date for construction, if approved, could not be known. The MPCA issued its 401 Water Quality Certification to the public on November 13 (as per its statutory deadline), as well as a number of other permits not subject to this deadline.[11] The MDNR issued its final eight permits on the same day, none of which were subject to deadline.[12]

[9] Enbridge Response to Motion to Stay at 3.
[10] Shippers Response to Motion to Stay at 1-2.
[11] https://www.pca.state.mn.us/regulations/enbridge-line-3-pipeline-replacement-project
[12] https://www.dnr.state.mn.us/line3/index.html

The Corps issued its Section 404 permit on November 23.[13] The press reported that the MPCA approved its final permit, the stormwater construction permit, on November 30 (it appears that the MPCA has not yet posted this permit online).[14] Other than the Section 401 permit, none of these permits had specific deadlines, and the agencies did not share their permit release target dates with Tribes. Tribes have appealed the MPCA Section 401 Water Quality Certification and may seek a stay from the MPCA, as well. A motion for stay pending appeal to the MPCA could not have been submitted until after issuance of this permit and the filing of an appeal. Tribes intend to seek an injunction against the Corps in federal court. A motion for injunction in federal court is not be ripe until issuance of the Section 404 Permit and release by the Corps of its decision documents, which it refused to provide to the Tribes until December 8. Accordingly, the Tribes' legal right and ability to seek stays or injunctions of other agency orders have only recently become ripe, and for practical reasons preparation of the required documents for stays and injunctions takes time.

The Commission and all parties are aware that Tribes appealed both the Commission and MPCA approvals separately to the Court of Appeals. Minnesota's courts have not addressed this situation, but the federal courts recognize that when permittees proceed despite the possibility of doing so in violation of the law, the courts consider injury from a stay as being "self-inflicted," which weighs against the nonmoving parties,[15] and that permittees assume the risk of taking actions before an injunction.[16] It seems likely that Enbridge understands these risks.

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[13] https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/Enbridge/2014-01071-CLJ%2020201123%20SPv.pdf?ver=_L5pcooMT1VLRbPnoujpAA%3d%3d

[14] https://www.mprnews.org/story/2020/11/30/minnesota-gives-final-green-light-to-disputed-oil-pipeline

[15] *See Davis v. Mineta*, 302 F.3d 1104, 116 (10th Cir. 2002); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (any alleged harm "resulted from [the agency's] failure to follow the law in the first instance").

[16] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (finding where permittees "'jump the gun' or 'anticipate[] a pro forma result' in permitting applications, they become

3. **Whether or Not a Stay Is Granted Depends on the Stay Factors Identified by the Supreme Court, Not on a General Rule that the Law Disfavors Stay Pending Appeal.**

Enbridge argues that "Minnesota law generally disfavors stays pending appeal." It does not appear that the Shippers, UA, or LIUNA make this argument. Enbridge argues that "[t]his is evident throughout Minnesota law," yet cites only Minn. Stat. § 216B.53, Minn. Stat. § 14.65, Minn. Stat. § 116D.04, subd. 10, and Minn. R. Civ. App. P. 108.01, subd. 1, none of which say anything about disfavoring a stay, and instead say that a stay is not automatic upon appeal but may be granted upon motion.[17] Tribes have not argued that a stay is automatic, only that as regards the relative importance of the *Northern Pacific* factors, that preservation of court jurisdiction is the "most important," as per language in this decision itself, and that ensuring that a party can obtain relief is "crucial".[18] Neither of the leading Supreme Court cases on stay of administrative action state that stays are disfavored,[19] and Tribes have been unable to locate any Minnesota judicial precedent stating that stays are generally disfavored. Instead, each motion for stay should be evaluated on its merits under the *Northern Pacific* stay factors. Therefore, it appears that Enbridge's argument here is without foundation in Minnesota law.

Moreover, Enbridge's unsupported argument that stays are disfavored bears no logical relationship to whether or not the absence of a stay would defeat the objects of Tribes' appeal, render it moot, and prevent Court of Appeals' jurisdiction to review the issues of law raised by Tribes.

'largely responsible for their own harm,'" even where company spent $800 million on plant construction before a permit was issued) (enjoining power plant permit where proponent "repeatedly ignor[ed] administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk").

[17] Enbridge Response to Motion to stay at 3-4.

[18] Tribes Memorandum in Support of Motion for Stay at 13-14.

[19] *See Northern Pacific*, 22 N.W.2d 569; *Webster*, 891 N.W.2d 290.

4. **Speculation that Movants Are Unlikely to Agree About Whether Their Appeals Are Mooted Absent a Stay Is Irrelevant and Inapposite.**

Enbridge argues that "it unlikely that the Movants or any other relators would agree their appeals are mooted—and thus subject to dismissal—now that construction of the Project has begun."[20] The Shippers attempt a similar argument by asserting that other opponents of the L3RP "may be surprised to learn that failure to grant a stay would make their appeals meaningless,"[21] and so speculate about how other parties might respond to Tribes' argument that completion of the L3RP would moot their claims. Tribes respond that speculation about Tribes' or other parties' positions on mootness are irrelevant to whether in the absence of a stay the objects of Tribes' appeal would become unattainable, this action would become moot, and Court of Appeals jurisdiction would be lost. Ultimately, the Court of Appeals will decide whether or not the claims of the Tribes and other relators are subject to remedy absent a stay.

5. **A Stay Would Preserve the *Status Quo* Because It Would Result in the Continued Operation and Maintenance of Existing Line 3, Which Is the *Status Quo*.**

Enbridge argues that a stay would not preserve the *status quo* because continued operation of its existing 34-inch diameter Line 3 pipeline ("Existing Line 3") would require ongoing maintenance.[22] This argument is nonsensical because Existing Line 3 is in fact currently operating and requiring ongoing maintenance, such that this is the "existing state of affairs" and therefore the *status quo*.[23] While Enbridge's argument relates generally to the public interest, it does not speak in the slightest to whether or not, in the absences of a stay, the Court of Appeals would lose jurisdiction to resolve Tribes' claims.

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[20] Enbridge Response to Motion to Stay at 4.
[21] Shippers Response to Motion to Stay at 8.
[22] Enbridge Response to Motion to Stay at 15-16.
[23] The dictionary definition of "*status quo*" is "the existing state of affairs." Available at: https://www.merriam-webster.com/dictionary/status%20quo

Thus, neither the Commission nor any of the nonmoving parties have presented apposite arguments that, in the absence of a stay, the Tribes could gain the objects of their appeal or that their appeal would not become moot and the Court of Appeals lose jurisdiction over Tribe's claims. Assuming a Court of Appeals decision is issued in June or July 2021, it is likely that construction of the L3RP will be finished or nearly finished by this time, such that a remand for further evidentiary hearings on need and route, and for the assessment of environmental effects before construction, would be without practical purpose.

B. The Record Contains Substantial Evidence that the Tribes Would Suffer Irreparable Harm, and Neither the Commission Nor the Nonmoving Parties Present Rational Arguments or Substantive Evidence Proving Otherwise.

The Commission argues that Tribes would not suffer irreparable harm because the impacts of an oil spill during operation would be greater than the impacts of construction, given mitigation, such that there is no irreparable harm because the Court of Appeals can order the pipeline to cease operation and avoid oil spills.[24] As argued above, stopping operation of the pipeline would not achieve the objects of Tribes' claims, which are to ensure Commission compliance with law. The Commission's reasoning that one form of irreparable harm is worse than another does not prove that the allegedly less worse harm of construction is irreparable. Instead, the Commission's assertion that the worse harm here would come from an oil spill ignores much of the record related to the types of harm that construction of the L3RP would inflict and disregards Tribes' cultural and religious rights, their treaty-protected usufructary rights, and their statutory right to ensure Commission compliance with law. With regard to mitigation, the Commission generally points at its tree replacement condition, the cultural properties survey, and undescribed conditions in other state agency permits to assert that all

[24] Order Denying Motion for Stay at 5-6.

harms from construction have been mitigated, such that Tribes will not be irreparably harmed. The Commission, however, does not describe how its mitigation conditions would eliminate the irreparable harm to the tribes expressly identified by the Administrative Law Judge ("ALJ) and the L3RP EIS. Instead, the Commission relies on generalized hand waving about mitigation, thereby demonstrating disregard for the cultural and religious harms that bulldozing a 338-mile right of way with a seven foot deep trench through some of the most ecologically intact lands and pristine waters in Minnesota, in which the Tribes have treaty-protected rights, would have on the Tribes and their environment. Therefore, the Commission has failed to prove that Tribes would not be irreparably harmed, disregarded the harms that the L3RP would inflict on Tribes, and failed to provide any rational basis for its finding that the Tribes would not suffer irreparable harm.

Enbridge presents a number of arguments that it purports relate to whether or not Tribes would suffer irreparable harm. First, Enbridge complains that Tribes' citation to the record describing these harms are "generally incomplete and taken out of context."[25] Tribes block quoted extensive text from ALJ O'Reilly's report and provide summaries of other of its findings, provided the eDocket document ID number for this report, and provided footnotes to the report page numbers on which these block quotes and findings are found.[26] Tribes also block quoted many sections of the EIS and include the Section numbers and EIS page numbers on which these quote are found.[27] Thus, the references are precise, even if they may not be in the particular form Enbridge wants, and allow the Commission to confirm the quotes and summaries. Enbridge provides no arguments about how these block quotes are taken out of context.

[25] Enbridge Response to Motion for Stay at 5.
[26] Tribes Memorandum in Support at 24-29.
[27] *Id*. at 29-32.

Enbridge also argues that the mere fact that the permits have been approved with mitigation mean that Tribes would not suffer irreparable harm.[28] The mere fact that a permit has been approved does not of logical necessity mean that actions under it would not cause irreparable harm. In all cases related to stay of agency action the agency has approved a permit, such that if permit approval alone was deemed evidence of a lack of irreparable harm to all interested parties, then irreparable harm could never be proven. Also, the mere fact that mitigation exists does not mean that all irreparable harms can and have been mitigated such that they do not exist. Rather, the meaning of "irreparable" harm means that it cannot be repaired by mitigation. The ALJ, expressly found that "irreparable" and "permanent" harm to the environment, including the land, water, and climate of Minnesota.[29] The EIS also expressly found that construction of the L3RP would cause permanent and irreparable harm to the environment and indigenous peoples.[30] Enbridge's response is generalized hand waving at mitigation with no discussion of any particular irreparable and permanent harm identified in the record and a general assertion that Tribes would suffer no irreparable harm. Such nonspecific argument fails to provide a rational basis for the Commission's finding that the specific irreparable harm identified in the record does not exist.

Enbridge also argues that if permanent impacts are considered "irreparable" then "a stay would always be granted for any ground-disturbing project."[31] This argument appears to be based on the premise that just because a party suffers irreparable harm, that such harm always results in a stay. Since the *North Pacific* stay standard requires balancing of harms, this premise is incorrect. Much ground disturbing activity does in fact cause irreparable damage to the

[28] *Id*.
[29] *Id*. at 29.
[30] *Id*.
[31] Enbridge Response to Motion for Stay at 5.

environment and other protected interests. For example, constructing a 338-mile pipeline including activities such clearcutting all timber and other vegetation, bulldozing the permanent 50-foot and temporary construction 95 to 120-foot right of way, removing all vegetation in it, laying construction timber mats along much of the route, digging a seven-plus-foot deep trench, stockpiling the removed earth, and then refilling in trench, causes permanent and irreparable damage to the environment that cannot be fully mitigated. This being said, the fact that irreparable harm exists does not mean, as contended by Enbridge, that a stay will result automatically. Enbridge has failed to provide any evidence or argument beyond hand waving that this major construction project would have no irreparable harm on Tribes, and the administrative record proves Enbridge wrong.

LIUNA argues that "the Commission should balance evidence concerning the serious and irreparable harms of halting construction only against claims of harm that relate specifically to construction activity and not against harms related to operations about which Courts will undoubtedly have their say."[32] This argument relates to LIUNA's incorrect assertion that the Court of Appeals can order Enbridge to cease operation of the pipeline following construction and that this would allow Tribes to achieve the objects of their appeal. It also suggests that the Commission should disregard all potential irreparable harm that would result from operation of the L3RP, including presumably the harm resulting from oil spill and increased greenhouse gas emissions, because it is likely that if Tribes prevail the pipeline would simply be shut down. LIUNA provides no citations that the Commission or the courts should disregard irreparable harm caused by operation of a project and no reasons for why irreparable harm from construction

[32] LIUNA Memorandum in Opposition to Motion for Stay at 2.

should be considered and irreparable harm from operations be disregarded. The Minnesota courts have found that irreparable harm caused by operation of a facility may be considered.[33]

Tribes would also suffer irreparable harm due to the failure of the Commission to comply with law. The federal courts have found that irreparable harm includes not only ground-disturbing activities, but also a failure of an agency to comply with law, because agency violation of law is a procedural injury that cannot be repaired after construction.[34]

Finally, the fact that Enbridge has a plan to limit the impact of the covid-19 pandemic on northern Minnesota communities does not mean that the l3rp will not cause irreparable harm to individuals or their communities. Enbridge's plan may reduce the risk of death and illness, but if even one Minnesota resident dies due to infection by a L3RP worker, that individual would suffer irreparable harm, as would their family. Acknowledging this risk of irreparable harm does not contravene any effort of the Governor, but rather recognizes the simple truth that importing many individuals to Minnesota during a pandemic, during which they will live, work, and shop with local residents will increase the risk of illness and death these local residents. Moreover, the pandemic situation has continued to worsen and may very well become critical. The Commission should acknowledge this risk. The mere fact that a plan exists does not mean that all risk of irreparable harm has been successfully eliminated.

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[33] *See Rockville Tp. v. Lang*, 387 N.W.2d 200, 203 (Minn. App. 1986) (injunction for operation of a fur farm).

[34] *See Colorado Wild, Inc. v. United States Forest Serv.*, 523 F. Supp.2d 1213, 2141-42 (D.Colo.2007) ("the irreparable injury threatened here is not simply whatever ground-disturbing activities are conducted in the relatively short interim before this action is decided, it is the risk that in the event the Forest Service's [decisions] are overturned and the agency is required to 'redecide' the access issue, the bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service towards its original, non-NEPA compliant access decision.")); *see also Save Strawberry Canyon v. Dep't of Energy*, 613 F.Supp.2d 1177, 1187 (N.D.Cal.2009) ("There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.") (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n. 7, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In summary, neither the Commission, Enbridge, LIUNA, nor any other party has provided any rational argument or substantive evidence showing that Tribes would not be irreparably harmed. In contrast, Tribes have identified multiple examples in the record summarizing the thousands of comments and detailed evidence in the record describing how the L3RP would harm the environment, Tribes' interest in the environment, and Tribes cultural and religious rights. Further, the existence of Enbridge's COVID-19 plan will not eliminate the risk of death to individual Minnesotans, which is irreparable, and this risk should be considered by the Commission. Therefore, the record shows that Tribes and their members will suffer irreparable harm if the Commission's L3RP Orders are not stayed and construction of the L3RP continues.

C. Tribes and Other Parties Seek Judicial Resolution of Important and Novel Matters of Law.

Enbridge argues that "the appeal does not raise substantial issues of fact or law . . ." because "the issues raised in the appeal are not unique" and they "have been addressed by the Commission multiple times over the years."[35] To support its argument that Tribes' issues of law are not unique, Enbridge generally cites to the Commission's past determinations of need and asserts that the Commission has addressed need issues many times.[36] Enbridge also says that the fact that the Commission has rejected Tribes' arguments means that they are not substantial.[37] The Shippers make a similar argument.[38] Their mistake is the same: the question is not whether the Commission has previously considered the questions raised by Tribes and other parties, but rather whether the Court of Appeals has, because this factor relates to judicial resolution of

[35] Enbridge Response to Motion for Stay at 13.
[36] *Id*. at 13-14.
[37] *Id*. at 14-15.
[38] Shippers Response to Motion for Stay at 5.

claims related to statutory interpretation. Here, the Court of Appeals has not considered the questions of law raised by Tribes and other parties; therefore they are novel to the court. Moreover, that the Commission has violated the law in the past is no reason for the Court of Appeals to decline to interpret the law as the Commission wishes.

Shippers provide a more extensive argument on whether Tribes raise important questions of law.[39] Shippers assert that "[w]hether the appeals raise important questions of law is nearly indistinguishable from consideration of likelihood of success on the merits."[40] Shippers are incorrect. A determination of the likelihood of success on the merits is a decision about whether or not a claim will likely succeed, a thumbs up or down. In contrast, a determination of whether a claim contains an important novel question of law is a judgment about the uncertainty of outcome on judicial review. The Shippers and Enbridge argue that Tribes' claims have no hope of success, but the Commission should consider the uncertainty and novelty of the legal questions raised from a more objective perspective, as will the court.

The federal courts recognize this distinction and the need for objective consideration of a need for appellate review. For example, the court in in *Securities and Exchange Commission v. BioChemics, Inc.*, 435 F. Supp.3d 281, 296 (Dist. Mass. 2020), stated:

> When the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather, . . . the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear. *See Exxon Corp. v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996); *Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983); *Evans v. Buchanan*, 435 F. Supp. 832, 844 (D. Del. 1977).

[39] *Id*. at 3-6.
[40] *Id*. at 3.

(Internal quotations omitted.) This reasoning is consistent with *Lakehead Pipe Line Co., Inc. v. Investment Advisors, Inc.*, 900 F. Supp. 234, 235 (Dist. Minn. 1995), in which the court considered the likelihood of success on the merits in the context of a stay pending appeal and held:

> Recognizing that even the most self-effacing of Courts would be reluctant to concede that a challenge to its ruling had a likelihood of success, the Courts have ameliorated the obduracy of this first criterion [likelihood of success on the merits]. . . . A district court, however, may properly stay its order pending appeal where such order involves the determination of substantial and novel legal questions.

(Citations and quotations omitted.)[41] Thus, the federal courts, which unlike Minnesota courts and agencies are obligated to consider the likelihood of success on the merits when considering stay of agency action, recognize that an appeal may raise an important question of law that should be reviewed by an appellate court even if the trial court rules against the appellant on the law and even if the trial court thinks it will not be overruled. The question here is not whether the Commission thinks itself correct, but rather whether Tribes have raised substantial questions of law on which no court has previously ruled and that could be decided by the Court of Appeals against the Commission. Shippers argument that "[w]hether the appeals raise important questions of law is nearly indistinguishable from consideration of likelihood of success on the merits"[42] is mere obfuscation that fails to address Tribes' statutory and regulatory arguments.

Shippers also argue that the issue of whether or not Enbridge submitted a forecast of demand under Minn. R. 216B.243 is a question of fact, not law "as contemplated by the CN statute and rules,"[43] because "[w]hat the parties disagree over is whether the Muse Stancil report

[41] The Eighth Circuit Court of Appeals also recognizes this distinction. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).
[42] Shippers Response to Motion for Stay at 3.
[43] *Id*. at 4.

constitutes a demand forecast." The Tribes disagree that their claim related to the required forecast of demand is a dispute about facts. The facts about the nature of Enbridge's forecasts and modeling are not in dispute. It is not in dispute that both the Enbridge's Muse Stancil model and apportionment forecast are based the 2016 CAPP supply forecast, the basis for which is fully described in the record and does not include evidence or estimations of consumer demand for petroleum products. It is not in dispute that both of Enbridge's forecasts assume that demand will exceed supply in all forecast years. What is in dispute is whether Enbridge's assumption that demand will exceed a forecast of supply is an "energy demand forecast," within the meaning of Minn. Stat. § 216B.243, subd. 3(1), and the definition of "demand" in Minn. R. 7853.0010, subd. 8. That is a matter of statutory and regulatory interpretation. Tribes also claim that Enbridge failed to include sufficient information under Minn. R. 7853.0520 with regard to the scope of the information necessary to allow the Commission to assess the "accuracy" of Enbridge's forecast, such that the Commission is unable to determine the accuracy of the forecasts Enbridge did provide. Again, the facts about the information provided by Enbridge are not in dispute. The issue is, given the facts in the record, whether Enbridge met the regulatory standard.

The Tribes also assert that the Commission impermissibly expanded the scope of the CN and RP analyses to include consideration of pipeline safety matters, over which the Commission has no express jurisdiction and judgments about which are preempted by federal law. Resolution of this dispute requires interpretation of the provisions in the CN and RP statutes under which the Commission considered pipeline safety issues in light of federal statutory language and federal court decisions that undeniably preempt state actions ordering "replacement" of existing pipelines for safety reasons. The Commission's statements regarding its consideration of

pipeline safety are written in the record and therefore are not in dispute. The fact that Enbridge introduced substantial evidence about pipeline safety into the record and that the Commission considered it and determined that it was an important factor in its decision making is not in dispute. The issue here is whether the Commission's statements show that the Commission acted outside of its jurisdiction and the scope of review allowed the Commission by state and federal law.

Therefore, Shippers arguments that Tribes' raise only questions of fact are incorrect, because the facts relevant to these laws are contained in the record and not subject to dispute. Tribes raise important questions about Commission violation of the language and intent of the legislature in Minn. Stat. § 216B.243 and MEPA. Resolution of these claims requires judicial interpretation of the meaning of these laws, pursuant to the Court of Appeals jurisdiction under law. Therefore, the Court of Appeals should stay the L3RP so that it may interpret these laws and exercise the jurisdictional role given to it by the legislature.

D. The Alleged Economic Harm That Might Result from a Stay Is Not Irreparable or Disproportionate

With regard to the alleged harm to nonmoving parties, Section C of the Commission's Order Denying Motion for Stay merely mentions Enbridge's unsupported claim that the costs of a six-month delay would be $314 million, and then asserts that "Enbridge maintains that it would not be able to recover losses caused by delayed construction through its federal tariffs."[44] To be clear, Enbridge nowhere states that it will not be able to recover the costs of a delay resulting from a stay. Instead it states that it is "at risk" for cost overruns beyond the negotiated rate increases agreed on in the privately negotiated "Issue Resolution Sheet" agreement with its

[44] Order Denying Motion for Stay at 6.

customers.[45] Being "at risk" in a private contract is not the same thing as never being able to recover the additional costs resulting from a stay. The Commission provides no further discussion of Enbridge's claims in Section C of its order, although it does describe Enbridge's allegation in its discussion of the parties' positions,[46] and it also provides no meaningful discussion of economic harm in its Conclusion, which includes just the following mention of alleged economic harm: "[t]he Commission also concludes that granting a stay would cause . . . significant economic impacts."[47] The Commission's order, therefore, provides only entirely conclusory statements of economic harm to Enbridge, with no meaningful discussion or investigation of Enbridge's allegations, such that the Order Denying Motion for Stay fails to show that a stay would irreparably or disproportionately harm Enbridge.

For its part, Enbridge starts its discussion of its alleged irreparable harm by asserting that a stay would result in 20 planned integrity digs and that these integrity digs would cause irreparable harm, though it does not describe where these digs might be, how much land will be disturbed within its existing previously bulldozed right-of-way, or what the adverse environmental and economic impacts of these integrity digs might be.[48] Enbridge's generalized and unsupported allegation that 20 integrity digs constitute substantial irreparable harm are unfounded, particularly since many integrity digs are typically tens of yards in length, and given that continued maintenance of Existing Line 3 is the *status quo*.

Enbridge also alleges that continued operation of Existing Line 3 would result in a greater risk of a crude oil spill relative to operation of a new pipeline and provides a number of pipeline safety arguments that Tribes have alleged are not within the State of Minnesota's jurisdiction or

[45] *Id*. at 11.
[46] *Id*. at 5.
[47] *Id*. at 7.
[48] Enbridge Response to Motion to Stay at 7 and n. 10.

expertise to consider.[49] Enbridge fails to mention that it has asserted multiple times in its testimony and directly to the Commissioners that it can continue to operate Existing Line 3 safely in compliance with federal law even given the challenges of maintaining this pipeline.[50] Enbridge has never said that it cannot operate Existing Line 3 in compliance with federal safety standards, which the Commission should consider to be adequate to ensure safety. Enbridge did not quantify the alleged higher risk of operating Existing Line 3 in accordance with federal law during the pendency of a stay relative to the risk of operating a new pipeline in accordance with this same law six months sooner. Therefore, Enbridge has provided no evidence that continued operation of Existing Line 3 is likely to result in its unsafe operation or a substantially greater likelihood of an oil spill during the pendency of a stay. As such, Enbridge has not proven any irreparable harm related to pipeline safety.

Enbridge also provides a bullet point list of alleged "potential harms," but none of these bullet points are related to specific harms.[51] Instead, they are a summary of the arguments Enbridge presents for replacement of Existing Line 3, including discussions about pipeline safety concerns that Enbridge states it is currently managing safely.[52] None of these statements assert any specific, imminent, and irreparable harm related to pipeline safety that will result during the pendency of a stay. Instead, a stay would mean that Enbridge would continue to operate Line 3 in accordance with federal safety standards, which is not an irreparable harm.

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[49] *Id*. at 9.
[50] *E.g*., Transcript of June 19, 2018, Commission Meeting, Volume 2, pages 59-60 (CN Record Index No. 3157 at 109054-55; Transcript of June 27, 2018, Commission Meeting, Volume 4 at 108 (CN Record Index No. 3155 at 108454); Direct Testimony Laura Kennett, Supervisor, Pipeline Asset Integrity Projects, at 4 ("An integrity management program ensures pipelines can be operated safely for their intended purpose and in accordance with the federal regulations. Enbridge has integrity management programs for its pipeline system, including Line 3.").
[51] *Id*. at 8-9
[52] *Id*. at 8.

Enbridge next assets that construction in the winter is required for approximately 16 miles through wetlands, and also mentions a number of seasonal restrictions and asserts that an immediate start to construction is necessary to fulfill these restrictions, but fails to mention that it could construct next winter.[53] These restrictions do not show irreparable harm, but rather a non-achievement of Enbridge's preferred construction schedule. An extension of the construction schedule to comply with law is not an irreparable harm, because Enbridge could undertake this construction in the future.

With regard to economic harm, Enbridge states that it estimates its costs for delay during a stay to be over $314 million, assuming a six-month stay.[54] Enbridge identifies categories of expenses and states that the estimate includes a one-time demobilization and remobilization cost of $20.4 million, but provides no detail for any of these figures. With regard to whether or not it will be able to recover the costs of delay during a stay, Enbridge says only that it is "at risk" to pay these costs.[55] Being "at risk" is not the same thing as being required to pay these costs or a statement that it will be impossible for Enbridge to ever recover these costs in the future. With regard to Enbridge's negotiated cost recovery through its Issue Resolution Sheet ("IRS"), Tribes note that this is a private agreement between Enbridge and its customers and could be subject to re-negotiation to pay additional costs, particularly if Enbridge is authorized by the Canadian and U.S. governments to convert the rate system for the Mainline System into a take-or-pay contract structure, as it is currently attempting to do, which take-or-pay contracts are negotiated based on many cost items. Enbridge also fails to mention that the negotiated terms in the IRS and resulting rates for shipment of Canadian crude oil through the U.S. portion of the Mainline System are subject to Federal Energy Regulatory Commission ("FERC") approval, for example

[53] *Id*. at 9-10.
[54] *Id*. at 10.
[55] *Id*. at 11.

in FERC Tariff No. 45.23.0 filed by Enbridge at FERC on May 28, 2020, which sets the International Joint Rates for the Mainline System. FERC has ultimate authority to approve or modify the rates applicable to use the Mainline System within the U.S. Ultimately, Enbridge's current cost recovery mechanisms are complex and subject to future negotiations, and its future cost recovery opportunities are similarly complex, undergoing review in Canada, and not set in stone, such that the Commission should not be assume that Enbridge could never recover the costs resulting from a stay. Even if Enbridge has no future opportunities to recover its costs, the fact that it failed to properly estimate project costs in negotiations with its customers should not be reason to find irreparable harm but rather should be seen as a risk of doing business.

Tribes assert that a stay of any major construction project will likely result in increased project costs, but this is a risk of doing business, should be evaluated relative to overall project costs and future revenues, and should not be an excuse to not comply with the law. Here, Enbridge's alleged costs should be seen in the context of overall project costs and Enbridge's financial resources and future revenue, should the L3RP be constructed. Enbridge states that the cost of the Canadian portion of the L3RP (which is finished) is CAN$ 5.3 billion (US$ 4.15 billion), and it estimates that the cost of the U.S. portion will be US$ 2.9 billion,[56] such that the total project cost will be approximately US$ 7 billion. As described in Tribes' Memorandum in Support of Motion for Stay, Enbridge stated to the FERC that its L3RP project costs may exceed $9 billion, but that such cost overruns would not "be material to its financial position and outlook."[57] This is not surprising given that Enbridge Inc.'s current market capitalization is approximately $68 billion.[58] Relative to these figures, the cost resulting from a stay is not disproportionate. Assuming this total cost and the $314 million increase alleged by Enbridge,

[56] https://www.enbridge.com/Line3ReplacementProgram.aspx
[57] Tribes Memorandum in Support of Motion for Stay at 39.
[58] https://finance.yahoo.com/quote/ENB/

the stay would increase total project costs by approximately 4.5 percent. The costs resulting from a stay alleged by Enbridge would increase the cost of the U.S. portion of the project by approximately 11 percent. However, Enbridge told FERC that the final total project cost could exceed US$ 9 billion, or $2 billion more than Enbridge's online cost estimate, in which case the cost of the stay would be approximately 3.5 percent of total project costs. Enbridge's future earnings from the L3RP will likely amount to tens of billions of dollars over the 30-plus year operational life of the project, should it be built, even assuming that Mainline System utilization drops as U.S. fuel demand drops. Therefore, the economic impacts of a stay would not be disproportionate to the size and cost of the project, to Enbridge's future earnings from the project, or material to Enbridge's overall financial position and outlook.

The federal courts have weighed the potential economic impacts of stays to non-moving parties in many decisions related to stays. They recognize that the risk of economic harm from procedural delay and industrial inconvenience "is the nature of doing business, especially in an area fraught with bureaucracy and litigation."[59] That a project might be delayed to comply with statutory or regulatory requirements is no more an injury than would have been required to comply with the law in the first place.[60] The federal courts have also found that harm to project proponents based on a short delay relative to project life and potential permanent impacts and should not weigh heavily in a court's decision.[61]

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[59] *Wild Earth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 n. 35 (D.D.C. 2019), *quoting Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F.Supp.3d 91, 104 (D.D.C. 2017).

[60] *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("'The substantial additional costs which would be caused by court-ordered delay' may well be justified by the compelling public interest in the enforcement of NEPA.") (citations omitted); *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (any alleged harm "resulted from [the agency's] failure to follow the law in the first instance").

[61] *See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F. 3d 1030, 1039 (8th Cir. 2016)(affirming district court finding that "the balance of harms favored granting the preliminary injunction," based in part on "its finding that the injunction would likely be short in duration").

Similarly, the federal courts have made clear that economic harm due to a stay is not necessarily irreparable and does not provide an adequate basis by itself for denying injunctive relief.[62] Even the fact that a company may have invested substantial funds is not reason to deny a stay,[63] as the courts understand the need to "stop[] a bureaucratic steam roller, once started."[64] Although a stay may delay when a project produces economic benefits, "there is no reason to believe that a delay in construction activities resulting from a stay will reduce significantly any future economic benefit that may result from the [project's] operation."[65]

Where a stay is the result of a decision to proceed despite the possibility that a permit will be found to be in violation of the law, the courts consider injury from a stay to be "self-inflicted," which weighs against nonmoving parties.[66] The federal courts have also found that project proponents assume the risk when they make outlays in time and capital before resolution of alleged violations of law,[67] such that the courts generally reject arguments that a stay would be inequitable because of economic loss due to delay.[68]

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[62] *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable).
[63] *See Bragg v. Robertson*, 54 F. Supp. 2d at 645 (entering preliminary injunction in NEPA case despite mining companies' substantial investment); *Alaska Ctr. for Env't v. West*, 31 F. Supp. 2d 714, 723 (D. Alaska 1998) (longer permit processing time was "not of consequence sufficient to outweigh irreversible harm to the environment").
[64] *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 995 (8th Cir. 2011) (holding that "steam roller" effect was proper consideration in determining whether to grant injunctive relief against permit where allegation was that environmental harm would occur through inadequate foresight and deliberation).
[65] *See Alaska Conservation Council v. U.S Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006), *rev'd on other grounds*, 129 S. Ct. 2458 (2009); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 528 F. Supp. 2d 625, 632 (S.D.W. Va. 2007) (enjoining project despite applicant's delay in reaping economic benefits).
[66] *See Davis v. Mineta*, 302 F.3d 1104, 116 (10th Cir. 2002); *see also Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014) (any alleged harm "resulted from [the agency's] failure to follow the law in the first instance").
[67] See *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (finding where permittees "'jump the gun' or 'anticipate[] a pro forma result' in permitting applications, they become 'largely responsible for their own harm,'" even where company spent $800 million on plant construction before a permit was issued) (enjoining power plant permit where proponent "repeatedly ignor[ed]

With regard to the balance of equities, where environmental injury is "sufficiently likely," the U.S. Supreme Court has held that "the balance of harms will usually favor the issuance of an injunction to protect the environment."[69] The U.S. Supreme Court has also expressly recognized that environmental injuries create a particular need to preserve the *status quo,* because they are often irreparable.[70] Therefore, the potential temporary harm to a project proponent's economic interests caused by a temporary stay is outweighed by the irreparable harm caused by project construction.[71] Also, the courts have consistently held that a "loss of anticipated revenues . . . does not outweigh irreparable damage to the environment."[72]

Any stay of a permit for a major project is likely to have economic impacts in the tens or hundreds of millions of dollars, but these economic impacts should not by themselves foreclose stays in such circumstances. Otherwise, project proponents could assume that stays would always be denied such that they would have confidence that they could construct their projects even if it was later determined that a permit was issued in violation of law.

To determine whether the additional economic costs resulting from a stay are substantial and irreparable, such costs should be considered in light of:

- total project costs;

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administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk").

[68] *See, e.g., Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970) (finding it "elementary that a party may not claim equity in his own defaults"); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 116-117 (D.D.C. 2003) (refusing to grant equitable relief where party's actions were "disingenuous at best," and finding that "any economic or emotional harm . . . falls squarely on the defendants' shoulders").

[69] *Amoco*, 480 U.S. at 545. *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (*citing The Land Council v. McNair*, 537 F.3d 981, 1004–05 (9th Cir. 2008).

[70] *See, e.g. Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.").

[71] *See, e.g., Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 528 F. Supp. 2d 625, 632 (S.D.W. Va. 2007).

[72] *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d at 766 (irreparable environmental injuries outweigh temporary economic harms).

- future project revenues and potential recovery of the costs of a stay;
- a project proponents' financial capacity;
- the public interest in enforcement of permitting laws; and
- the risk assumed by a project proponent when it proceeds with construction knowing that the legality of its permits has been challenged in court.

In light of these factors, the costs of a stay to Enbridge are not irreparable or disproportionate. Enbridge's claims that ongoing maintenance of Existing Line 3 and that it must construct the L3RP this winter would cause substantial irreparable harm are unfounded, and the economic harm it alleges is not irreparable or disproportionate.

E. The Most Important Public Interest Factor Is Preservation of the Court of Appeals Jurisdiction, and Not the Temporary Impact of a Stay on Enbridge's Workforce, the Continued Preventive Maintenance of Existing Line 3, or Enbridge's Conflicting Claims That Existing Line 3 Creates an Imminent and Excessive Safety Risk Yet Can Be Operated Safely.

The Commission's Order Denying Stay asserts that:

> Granting a stay would have a substantial negative effect on the public interest because it would necessitate the prolonged operation of Existing Line 3. There is substantial evidence in the record regarding the rapidly deteriorating condition of Existing Line 3, which increases the chances of an accidental oil spill on that pipeline, chances that will be greatly reduced with the construction of the state-of-the-art Project.[73]

Yet, neither the Commissioners nor its staff have any expertise in pipeline safety, and the field of pipeline safety is preempted by federal law, such that the Commission has no jurisdiction and is not qualified to make this judgment. Further, the Commission's order does not quantify the alleged increase in risk of continuing operation of Existing Line 3 during the pendency of the stay. Moreover, the Commission also ignores Enbridge's assertion that it can operate Existing

[73] Order Denying Motion for Stay at 6.

Line 3 in accordance with federal pipeline safety standards. It also ignores the fact that there is no evidence in the record that Enbridge has experienced a major spill from Existing Line 3 in the U.S. caused by a sudden failure of corroded pipe steel for almost two decades.[74] While a spill could happen from any pipeline at any time, the lack of recent spills from Existing Line 3 indicates that Enbridge is successfully maintaining this pipeline and operating it in accordance with federal safety standards. Therefore, the Commission's claim that the public interest in pipeline safety cannot wait for a Court of Appeals decision is based on the Commission's non-expert judgment, is not based on any meaningful risk analysis, ignores Enbridge's repeated claims that it can continue to operate and is in fact operating Existing Line 3 safely, and is not supported by any evidence of recent significant oil spills from Existing Line 3. The Commission should trust that Enbridge can continue to operate Existing Line 3 safely and in accordance with federal pipeline safety standards during the relatively short duration of a stay.

Next, the Commission argues that the public interest will be harmed because "[u]ntil the Project is complete, oil will be transported through Existing Line 3, by truck, or by rail—all of which carry substantially more risks than transportation through a new pipeline." Yet, the Commission should be aware that global crude oil demand has dropped dramatically due to the pandemic and is still more than 5 million bpd less than pre-pandemic levels and is not expected to recover during 2021.[75]

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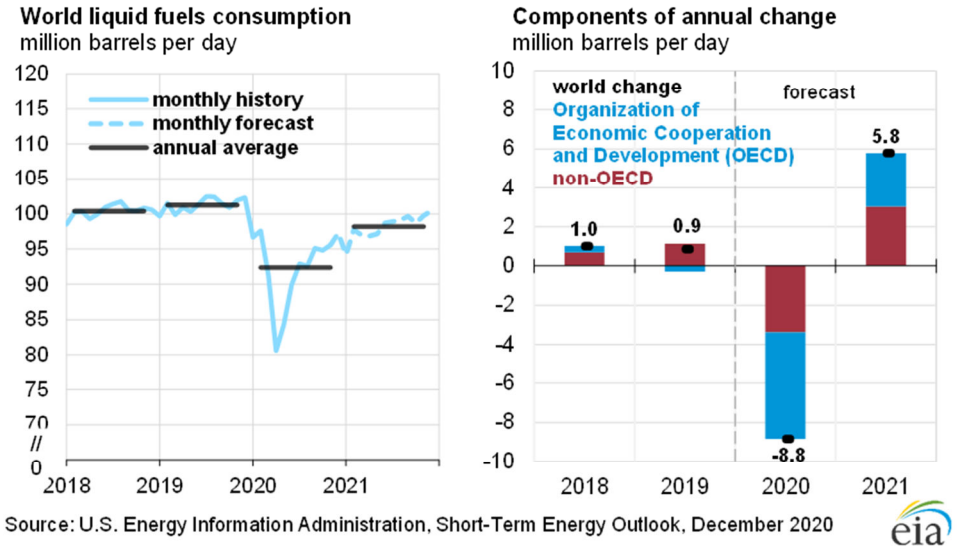
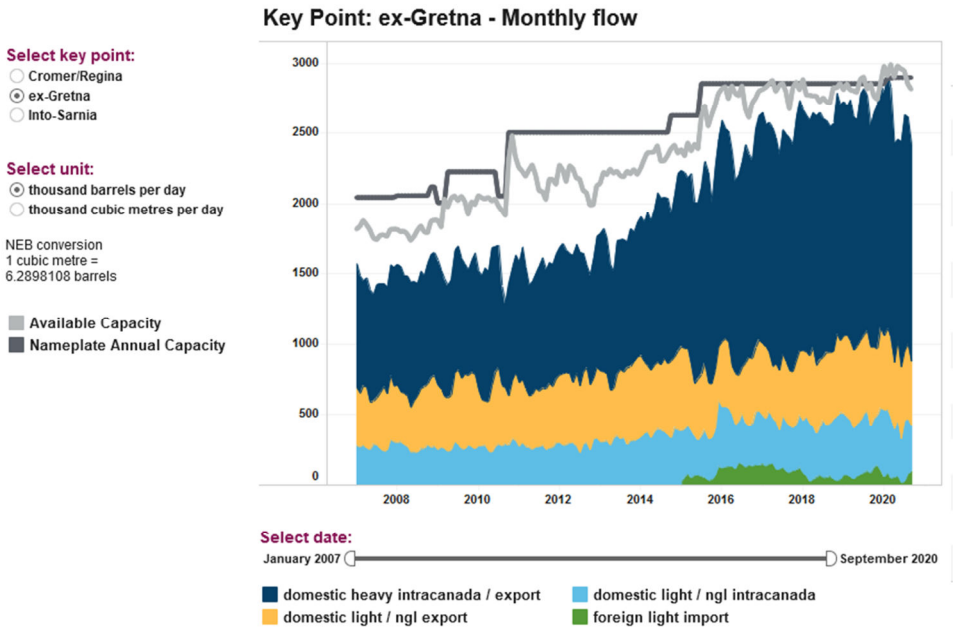
[74] Federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") oil spill data available at https://www.phmsa.dot.gov/data-and-statistics/pipeline/distribution-transmission-gathering-lng-and-liquid-accident-and-incident-data. Since 2010, Enbridge has experience 5 spills from Line 3, all of them less than 1 barrel in size, and all but one of these was in a pump station or terminal. In 2007, Line 3 spilled 325 barrels when the pipeline was mistakenly activated during repair. Also in 2007 Enbridge reported a spill of 2 barrels from a pinhole leak along a weld. In 2006, Line 3 leaked 5 barrels due to a leaking weld in a repair sleeve. In 2003, Enbridge recorded a spill of 125 barrels caused be a weld failure. In 2002 it recorded a spill of 6,000 barrels from Line 3 due to a longitudinal weld failure. Thus, the last major spill from Line 3 was in 2002.

[75] Chart data available at: https://www.eia.gov/outlooks/steo/data.php?type=figures

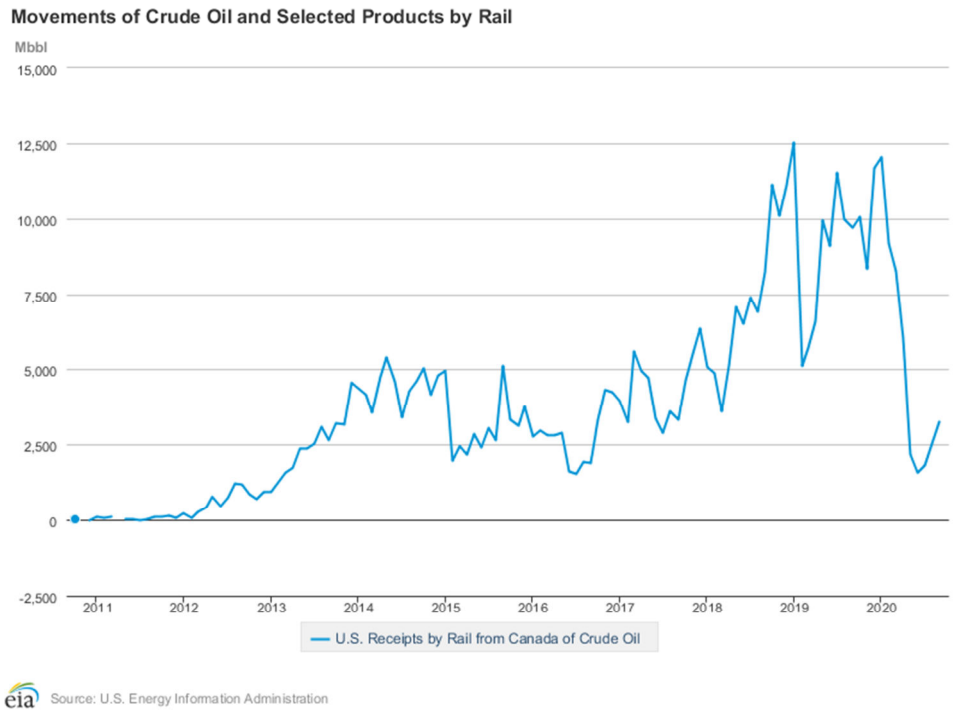


As a result, utilization of the Mainline System is down such that it has excess capacity.



Further, these market conditions mean that rail shipments from Canada have also dropped and are very low.[76]

[76] Rail data available at: https://www.eia.gov/dnav/pet/pet_move_railNA_a_EPC0_RAIL_mbbl_m.htm



Therefore, it is very unlikely that a stay would result in more crude oil being transported by rail, much less the by truck, during its pendency.[77] As such, the Commission's assertion that a stay would result in increased impacts due to use of other forms of transport during the pendency of a stay is completely unfounded.

The Commission further claims that "granting a stay would require Enbridge to conduct many more integrity digs to keep Existing Line 3 operable, which the Commission found impacts the land "in a manner that is comparable to new pipeline construction."[78] Enbridge estimates that approximately 20 additional integrity digs would result from a stay without describing the impacts of such digs or their approximate locations.[79] Since integrity digs investigate and repair specific locations on a pipeline and each likely involve just tens of yards of

[77] The U.S. Energy Information Agency does not provide data for crude oil imports by truck because it is so small as to be irrelevant. Truck importation of crude oil does not and cannot operate at the scale required to replace major crude oil pipeline, such that it has never been a serious alternative to Existing Line 3 or the L3RP.
[78] Order Denying Motion for Stay at 6.
[79] Enbridge Response to Motion for Stay at 7 n. 10.

trenching on an existing already bulldozed right of way, the impact of 20 integrity digs would be orders of magnitude less than the impact of clearing the land and digging a 338-mile trench through northern Minnesota. Therefore, the Commission's assertion that the 20 integrity digs would substantially harm the public interest is utterly unfounded.

The Commission also argues that the Leech Lake Band of Ojibwe would be irreparably harmed by continuing operation of Existing Line 3 and the "continued environmental impacts from that pipeline,"[80] without explaining how the Band would be irreparably harmed or what the environmental impacts of Existing Line 3 would be during the pendency of a stay. For example, it is not known whether Enbridge plans any integrity digs within the Leech Lake Reservation, and if it does what these impacts would be. Since Existing Line 3 has been operating on this reservation for decades without a significant spill there and Enbridge claims it can continue to operate Existing Line 3 safely in accordance with federal pipeline safety law, there is no evidence that the Band would face an increased risk of spill or an imminent harm during the pendency of a stay, and the Commission offers no such evidence. Therefore, the Commission's assertion that the Leech Lake Band of Ojibwe will be irreparably harmed likewise has no foundation in fact.

Next the Commission claims that a stay would harm Enbridge's workforce because it would force them to demobilize,[81] but the Commission provides no estimate of this cost and fails to investigate how Enbridge might mitigate this cost if a stay is ordered.

The unions also claim economic harm to their members, which is to be expected because the unions mission is to advance the economic interests of their members and not the public interest. Neither UA nor LIUNA mention any public interest and instead focus on the economic

[80] Order Denying Motion for Stay at 6.
[81] *Id*.

impacts of a stay on their members, who do not represent the public. No doubt, the union workers hired by Enbridge would gain economic advantage from employment, but these economic interests are not irreparable nor do they outweigh the irreparable harm that construction would cause, for the same reasons that economic impacts to Enbridge do not outweigh such irreparable harm.

Moreover, the potential costs to Enbridge's workforce do not outweigh the permanent impacts to the Tribes and the environment of northern Minnesota. If a stay is granted and Tribes prevail at the Court of Appeals, then the Commission would need to consider need in light of a forecast of demand and not an assumption of demand, and would need to exclude pipeline safety as a decision factor. In this case, the Commission might find that the need for additional capacity does not exist to the extent that a larger pipeline is needed, in which case the workers would not return to these jobs, but society would be spared the cost and environmental impacts of a new pipeline. On the other hand, if the Tribes do not prevail, then the workers can return. Ultimately, the temporary impacts of a stay to Enbridge's workforce do not outweigh the irreparable harm to the Tribes or the environment.

F. The Supreme Court of Minnesota Has Not Identified the Likelihood of Success on the Merits as a Factor for Use When Analyzing Motions for Stay.

Enbridge advises the Commission that it may consider whether Tribes' claims are likely to succeed on the merits.[82] Enbridge claims that the Supreme Court has not directly ruled on the scope of this analysis, even though it has twice identified a list of factors and twice declined to add the likelihood of success on the merits to this list in response to party arguments that it should.[83] Given this precedent. Enbridge essentially argues that the Supreme Court should

[82] Enbridge Response to Motion for Stay at 16.
[83] Tribes Memorandum in Support of Motion for Stay at 17-19.

expressly identify all of the possible factors that it does not wish to include in its stay analysis. Enbridge's legal argument has no merit, such that the Commission should not consider the likelihood of success on the merits.

II. THE COMMISSION SHOULD NOT IMPOSE A SECURITY BOND.

Enbridge makes a number of arguments as to why the Commission should use the imposition of a security bond as a tactic to prevent Tribes and other nonprofit intervenors from seeking relief in the Courts.[84] As described in Tribe's Memorandum in Support of Motion for Stay,[85] the law provides the Commission with ample reasons to not impose a security bond on Tribes, individuals, and nonprofit entities. The Commission should not act to limit justice to only the wealthy.

REQUEST FOR EXPEDITED DECISION

It is Tribes' understanding that Enbridge has started construction. Tribes appreciated the Commission's efforts to expedite review of their Motion for Stay and would appreciate its efforts with regard to this Petition for Reconsideration.

REQUESTED RELIEF

For the foregoing reasons, the Commission has failed to identify any rational reasons supporting its Order Denying Motion for Stay, such that the Commission has abused its discretion. Therefore, Tribes respectfully request that the Commission take the following actions:

1) reconsider its Order Denying Motion for Stay, and to grant Tribes' motion; and

[84] Enbridge's Response to Motion for Stay at 17-22.
[85] Tribes' Memorandum in Support of Motion for Stay at 55-60.

2) in the event that the Commission grants a stay, deny any request for a security bond that might be presented by Enbridge.

Dated: December 17, 2020

Respectfully submitted,

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