

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Katie Sieben
Valerie Means
Matthew Schuerger
Joseph K. Sullivan
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**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**

MPUC Docket No. PL-9/CN-14-916 and
PL-9/PPL-15-137

**In the Matter of the Application of
Enbridge Energy, Limited Partnership
for a Pipeline Route Permit for the Line 3
Replacement Project in Minnesota from
the North Dakota Border to the
Wisconsin Border**

**ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S
ANSWER TO 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**

INTRODUCTION

Enbridge Energy, Limited Partnership (“Enbridge”) submits this answer in opposition to the Petition for Reconsideration of Order Denying Motion for Stay Pending Appeal (“Petition”) submitted by the Red Lake Band of Chippewa and the White Earth Band of Ojibwe (together, “Movants”). Because the Petition lacks legal and factual merit, Enbridge respectfully requests that the Minnesota Public Utilities Commission (“Commission”) deny the Petition.

BACKGROUND

Enbridge filed applications for a Certificate of Need and Route Permit for the Line 3 Replacement Project on April 24, 2015. The Commission issued a Certificate of Need and Route

Permit for the Project on May 1, 2020, and appeals followed. On November 25, 2020—more than four months after the Commission denied reconsideration¹ and more than three months after they commenced their appeals—Movants filed their Motion for Stay of the Line 3 Replacement Project Final Orders (“Motion”). The Commission granted expedited consideration of the Motion, requiring that any responses to the Motion be filed by December 2, 2020. The Commission met to consider the Motion on December 4, 2020 and hear argument from the parties. On December 9, 2020, the Commission issued its Order Denying Motion for Stay Pending Appeal (“Order”). The Order explains the factors the Commission considered with respect to the Motion and then sets forth the Commission’s specific findings with respect to each factor it considered. The Order’s conclusion summarizes the Commission’s analysis:

Considering the submissions on the Motion and the entire record in these proceedings, the Commission concludes that the potential harms of granting the Motion are greater than the potential harms of denying it. The Commission carefully considered the potential negative impacts that the construction and operation of the Project could have on the environment and the public throughout this proceeding and concluded that the risks of continuing to transport oil through Existing Line 3 are greater than those caused by construction and operation of the Project. The Commission’s prior decisions establish significant mitigation measures that should reduce the negative impacts of construction and operation of the Project. The Commission also concludes that granting a stay would cause its own environmental impacts that must be weighed against those of construction, along with significant economic impacts. Considering all these factors, the Commission concludes that the balance of harms weighs against the Motion.

On December 17, 2020, Movants filed the current Petition. Pursuant to Minn. R. 7829.3000, subp. 4, answers to the Petition would have been due by December 28, 2020. However, also on December 17, 2020, the Commission issued its Notice of Timing Variances and

¹ See Order Denying Reconsideration (July 20, 2020), at which time Movants could have commenced their appeals immediately and moved for a stay pending appeal.

Establishing Deadline for Answers to Petition and of Special Commission Meeting on Petition for Reconsideration. In that notice, the Commission varied its rules, shortening the timeframe for answers and requiring any answers be submitted by 12:00 p.m. on December 22, 2020.²

LEGAL STANDARD

A petition for reconsideration or rehearing must be timely filed and specifically set forth the grounds for rehearing.³ The Commission may decide such a petition with or without a hearing and oral argument.⁴ The Commission “may reverse, change, [or] modify” its decision only if “the original decision, order, or determination is in any respect unlawful or unreasonable.”⁵ In proceedings before the Commission “in which modification or vacation of any order of the Commission is sought, the burden of proof shall be on the person seeking such modification or vacation.”⁶

DISCUSSION

- I. The Petition should be denied because Movants have not shown the Order is unlawful or unreasonable, and the record demonstrates the Order is both lawful and reasonable.**
 - A. The Petition applies the wrong legal standard and attempts to inappropriately shift the burden to other parties and/or the Commission.**

With respect to the current Petition, Movants bear the burden of demonstrating that reconsideration is warranted.⁷ Movants fail to meet this burden and, instead, inappropriately attempt to shift the burden to other parties and the Commission.

² Similarly, the Commission previously varied its rules and shortened the timeframe to respond to the Motion, issuing a notice on November 30, 2020, that required responses be filed by December 2, 2020. Without such variance, responses to the Motion would have been due by December 9, 2020. *See* Minn. R. 7829.0410, subp. 2.

³ Minn. Stat. § 216B.27, subd. 2.

⁴ Minn. R. 7829.3000, subp. 6.

⁵ Minn. Stat. § 216B.27, subd. 3.

⁶ Minn. Stat. § 216B.56.

⁷ *See id.*

First, much of the Petition appears to be in reply to Enbridge’s and other parties’ responses to the Motion.⁸ This is improper. Having requested expedited review, Movants were nonetheless afforded ample opportunity to present their positions to the Commission and fully reply to the responses filed to their Motion at the December 4, 2020 meeting. They could have—and did—raise these arguments previously, and yet Movants now largely seek to reiterate their attempts to rebut and reply to other parties’ prior responses rather than address the Commission’s reasoning for denying their Motion.

Second, Movants repeatedly refer to the Commission not having “proven” a particular factor. This argument does not make sense. The Commission is tasked with identifying the relevant factors, carefully weighing and considering each of those factors, evaluating the arguments presented, and then soundly exercising its experienced and expert judgment and discretion.⁹ The record and Order demonstrate that is exactly what the Commission did in denying the Motion.¹⁰

⁸ *E.g.*, Petition at 5 (stating that “Enbridge argues . . .” and “Shippers discuss . . .”); *id.* at 10 (“Enbridge presents a number of arguments . . .”).

⁹ *See Webster v. Hennepin Cnty.*, 891 N.W.2d 290, 293 (Minn. 2017) (internal citations omitted) (“Webster also takes issue with *DRJ*’s statement that a trial court ‘must balance’ the interests of the parties and the public. But that is what the trial court should do: identify relevant factors, weight each factor, and then balance them, applying the court’s sound discretion. That is what the ALJ did here.”).

¹⁰ Throughout their Petition, Movants cite various federal court decisions. *E.g.*, Petition at 6, 13, 15, 23. These citations are inapposite because federal courts apply a different analysis than the Commission. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Further, to the extent Movants imply that a federal court would impose a stay of the Project as a matter of course, that implication is incorrect. *See, e.g., Sierra Club v. Bostick*, 539 F. App’x 885 (10th Cir. 2013) (affirming district court’s denial of injunctive relief, noting that it “is an extraordinary remedy”, holding that it was proper to consider both environmental and economic harm, and rejecting notion of “self-inflicted harm” where project proponent did not proceed with construction until all applicable permits had been received); *Backcountry Against Dumps v. Abbott*, No. 10-cv-1222, 2011 WL 3567963 (S.D. Cal. Aug. 12, 2011) (denying motion for injunction pending appeal, acknowledging that some environmental harm could occur, but determining that benefits of energy infrastructure project and maintaining jobs weighed against injunction).

B. The Commission’s Order carefully considered the appropriate factors.

Movants again brief their arguments regarding the factors which the Commission should consider with respect to a stay pending appeal. The Commission’s Order specifically identified the factors it considered:

As directed by the Supreme Court, the Commission’s task in deciding whether to grant a request for a stay is to “identify the relevant factors, weight each factor, and then balance them, applying the [Commission’s] sound discretion.” The Commission considers the relevant factors in this case to be the likelihood that denying the stay would render the appeal meaningless, the likelihood that denying the stay would cause irreparable harm to Movants, the likelihood that granting the stay would cause irreparable or disproportionate harm to Enbridge, and the impact of this decision on the public interest, including impact to non-moving parties.¹¹

The Commission further explained that it was not considering “the likelihood of success on appeal.”¹² It appears that the factors considered by the Commission in denying the stay are generally consistent with those identified in Movants’ Petition, and Movants do not specifically raise a disagreement with the factors considered by the Commission. As such, reconsideration is not warranted on an alleged failure to consider the relevant factors. Likewise, having carefully considered each factor, the fact that the Commission reached a different conclusion than Movants would have liked does not render the Order unreasonable or unlawful and, as such, also does not warrant reconsideration.

1. Meaningful relief on appeal.

The Commission considered the issue of meaningful relief on appeal and concluded that denying a stay would not prevent the Court of Appeals from granting meaningful relief on appeal,

¹¹ Order at 5.

¹² Order at 5 n.7.

if appropriate.¹³ Movants generally do not address the Commission’s specific conclusions and, instead, attempt to reargue their Motion. None of these arguments have merit, and they do not demonstrate that the Order was unlawful or unreasonable.

Movants assert that they seek “to require that the Commission comply with the CN laws and MEPA before it approves construction” of the Project.¹⁴ Movants fail to acknowledge that this logic would hold true with respect to most appeals of agency decisions; yet, Minnesota law specifically and repeatedly provides that a stay pending appeal is the exception, not the rule.¹⁵

Movants further assert their own delay in bringing their Motion (months after the Commission issued the CN and route permit for the Project) does not preclude a stay.¹⁶ While Movants’ months-long delay was unnecessary and inexplicable, this argument is ultimately irrelevant. The Commission’s Order does not identify the timing of Movants’ Motion as a basis for its denial with respect to this factor, so Movants’ argument is irrelevant. Similarly, Movants state that they disagree with other parties that Minnesota law generally disfavors a stay pending appeal.¹⁷ But Movants do not appear to dispute the general proposition that stays are not automatic or granted as a matter of course. Regardless, this too is a straw man debate because the Order does not identify this proposition as a basis for the denial of the Motion.

¹³ Order at 5.

¹⁴ Petition at 4 (emphasis in original). Similarly, Movants assert that “speculation that Movants are unlikely to agree about whether their appeals are mooted absent a stay is irrelevant and inapposite.” (Petition at 8.) The Commission’s Order does not address this issue, and Movants are, instead, attempting to reargue their response to other parties. As such, this argument is irrelevant for the purposes of deciding the Petition.

¹⁵ See, e.g., Minn. Stat. § 216B.53; Minn. Stat. § 14.65; Minn. Stat. § 116D.04, subd. 10; Minn. R. Civ. App. P. 108.01, subd. 1.

¹⁶ Petition at 5.

¹⁷ Petition at 7.

Next, Movants assert that 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.”¹⁸ Here again, Movants appear to be responding to arguments made in prior comments by Enbridge, rather than addressing the Commission’s analysis, so the relevance of this argument is limited, at best. Regardless, with respect to a separate factor – the public interest – the Commission specifically determined that, based on the record before it, a stay would have a “substantial negative effect on the public interest because it would necessitate the prolonged operation of Existing Line 3.”¹⁹ Movants do little to address the Commission’s careful analysis of the record and exercise of discretion and judgment, other than to simply disagree. That is not a basis for reconsideration (or to grant a stay), and the Petition should not be granted on that basis.

2. Irreparable harm to Movants.

Movants next assert that “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.”²⁰ This argument is yet another example of Movants’ misapplication of the proper legal standard and mischaracterization of the Commission’s analysis. The Commission was not required to present substantive evidence that Movants would not suffer irreparable harm; rather, the Commission was required to consider and evaluate the evidence in the record before it and rely on that evidence to weigh the relevant factors. The Commission’s Order plainly demonstrates this is exactly what the Commission did in determining irreparable harm.²¹

¹⁸ Petition at 8.

¹⁹ Order at 6.

²⁰ Petition at 9.

²¹ Here again, Movants also spend much time rearguing their responses to arguments made by other parties in response to the Motion. (*E.g.*, Petition at 10 (beginning a paragraph with, “Enbridge presents a number of arguments. . . .”).) It

The Commission specifically considered Movants' claims of irreparable harm and concluded, based on the Commission's expertise in evaluating the record before it, that any such harm was not a sufficient basis for granting a stay because, among other reasons, "the Commission has mitigated the harms of construction by placing important conditions on the certificate of need and routing permit" and, "those harms have been partially mitigated by these conditions and other permits."²² While Movants disagree with the Commission's measured judgment and conclusions, this does not render the Order unlawful or unreasonable, and it is not a basis for reconsideration.

With respect to Movants' arguments related to COVID-19, again, the Commission specifically considered these arguments and determined that, in its judgment, this did not weigh in favor of granting a stay:

Movants also argue that Project workers could spread COVID-19 in rural communities along the Project route, particularly Tribal communities that have been disproportionately impacted by COVID-19. But Enbridge, UA, and LIUNA represent that there are plans in place to prevent the spread of COVID-19 during construction, and that individuals involved in the construction will follow all relevant health and safety guidelines enacted by federal, state, local, and Tribal governments. Furthermore, the governor's executive orders relating to COVID-19 have designated petroleum pipeline construction as a Critical Sector that should continue to operate throughout the pandemic, and the Commission declines to second guess that determination.²³

is not procedurally proper to treat their Petition as a form of surrebuttal, and Movants' attempt to do so misapplies the relevant legal standard.

²² Order at 5.

²³ Order at 5-6 (citing Minn. Emergency Exec. Order No. 20-48 at 9 (April 30, 2020) https://mn.gov/governor/assets/EO%2020-48%20Final_tcm1055-430499.pdf (incorporating guidance from the U.S. Cybersecurity and Infrastructure Security Agency that identifies the following as essential critical infrastructure workers: "Supporting new and existing construction projects, including, but not limited to, pipeline construction.")).

Again, while Movants disagree with the Commission’s conclusion, there is nothing in the Petition that demonstrates the Order was unlawful or unreasonable. Reconsideration on this basis is not warranted.²⁴

3. Irreparable or disproportionate harm to Enbridge.

Movants next assert that any harm to “nonmoving parties” is just “a risk of doing business” and “would not be disproportionate” or “material.”²⁵ There are multiple problems with this argument. Once again, Movants simply disagree with the Commission’s judgment and exercise of discretion in weighing the evidence in the record as to this factor. Such a difference in opinion as to the Commission’s conclusions is not a basis to argue the Order was unreasonable or unlawful. Further, Movants’ nearly exclusive focus on the harm a stay would cause to Enbridge is misplaced. Movants fail to acknowledge that, although the Order sets forth potential economic harm to Enbridge, such economic harm to Enbridge does not appear to have significantly influenced the Commission’s decision to deny a stay.²⁶ In any event, Movants have *no* basis to assert whether any such economic harms are “disproportionate” or “material” to Enbridge or any of the other nonmoving parties. Indeed, the unrebutted record plainly shows that a stay would, in fact, result in disproportionate and material harm to nonmoving parties, including LIUNA and the UA. Movants brush these issues away without explanation or acknowledgement.

²⁴ In their Petition, Movants next argue extensively about whether they have raised substantial issues of law in their appeal, responding to arguments previously made by other parties. (Petition at 14-18.) However, the Commission did not rely on this factor in its Order, and nowhere in the Petition do Movants assert that the Commission erred in this regard. As such, Movants have failed to demonstrate (or even assert) that the Order is unlawful or unreasonable on this basis.

²⁵ Petition at 18, 22, 23.

²⁶ See Order at 7 (summarizing analysis of Motion).

4. Public interest.

Finally, Movants assert that “the most important public interest factor is preservation of the Court of Appeals jurisdiction.”²⁷ In making this argument, Movants apparently take the position that the Commission should have blindly prioritized “preservation of appellate jurisdiction” over:

- Record evidence demonstrating substantial and irreparable harm to the workforce in a time of already heightened economic anxiety and unemployment;
- Record evidence showing continued environmental impacts related to the existing Line 3 pipeline; and,
- Record evidence demonstrating the benefits of replacing the existing Line 3 expeditiously, now that all proper permits and approvals have been obtained.²⁸

Movants’ arguments in this regard lack any merit. The Commission specifically detailed its findings with respect to the public interest, and the Order explains that the Commission determined that a stay was *not* in the public interest because it would result in: prolonged operation of the existing Line 3 pipeline, which increases the chance of a spill;²⁹ further transportation of oil by truck or rail, which is riskier than pipeline transportation; further integrity digs on the existing Line 3, with corresponding environmental impacts; the “potential to inflict irreparable harm on the Leech Lake Band of Ojibwe”; “significant” harm to members of the UA and LIUNA; and harm to communities along the Project route.³⁰

²⁷ Petition at 26.

²⁸ *E.g.*, Petition at 26-27.

²⁹ Despite arguing extensively in this proceeding about the potential risk of a release, Movants now back away from this position, apparently because it is not convenient to the current Petition. For example, they assert that “[t]he Commission should trust that Enbridge can continue to operate Existing Line 3 safely and in accordance with federal pipeline safety standards....” (Petition at 27.) Similarly, Movants state that they “do not consider that an accidental oil spill is the most serious impact” of the Project. (*Id.* at 4.)

³⁰ Order at 6.

Instead of meaningfully addressing these issues, Movants again attempt to reargue their theories regarding, among other things, utilization of the Enbridge Mainline System, at times relying on information outside the record.³¹ These theories lack merit and do not warrant reconsideration. The Commission has rejected these theories multiple times before, and it should do so again.

Because Movants fail to demonstrate that the Commission's careful identification of relevant factors, weighing of those factors, and reasoned exercise of discretion related to the public interest was unlawful or unreasonable, Movants' arguments should be rejected.

C. The Commission's Order reasonably and lawfully balanced the relevant factors.

After analyzing the factors it identified as relevant, the Commission carefully considered and balanced those factors, concluding:

Considering the submissions on the Motion and the entire record in these proceedings, the Commission concludes that the potential harms of granting the Motion are greater than the potential harms of denying it. The Commission carefully considered the potential negative impacts that the construction and operation of the Project could have on the environment and the public throughout this proceeding and concluded that the risks of continuing to transport oil through Existing Line 3 are greater than those caused by construction and operation of the Project. The Commission's prior decisions establish significant mitigation measures that should reduce the negative impacts of construction and operation of the Project. The Commission also concludes that granting a stay would cause its own environmental impacts that must be weighed against those of construction, along with significant economic impacts. Considering all these factors, the Commission concludes that the balance of harms weighs against the Motion.³²

³¹ Petition at 28-29.

³² Order at 7.

Movants' Petition does not engage with this analysis by the Commission. Although they disagree with the Commission's conclusions, they fail to identify any way in which the Order is unlawful or unreasonable with respect to the relevant factors identified or the Commission's consideration of the record evidence related to those factors. The Petition should be denied.

II. Movants' argument regarding a security bond is moot.

Because the Petition should be denied, the Commission need not consider Movants' further re-argument of issues related to a security bond. For the reasons set forth in Enbridge's prior response,³³ those arguments also fail on their merits.

CONCLUSION

For these reasons, Enbridge respectfully requests that the Commission deny the Petition.

Dated: December 22, 2020

Respectfully submitted,

/s/ Christina K. Brusven

Christina K. Brusven (#0388226)

Patrick D.J. Mahlberg (#0388028)

Haley Waller Pitts (#0393470)

FREDRIKSON & BYRON, P.A.

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402-1425

Telephone: (612) 492-7000

Fax: (612) 492-7077

**Attorneys for Enbridge Energy, Limited
Partnership**

³³ See Enbridge Response to Motion at 17-22.