

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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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

**PETITIONERS’  
STATEMENT OF THE CASE**

Court of Appeals

No: \_\_\_\_\_

Red Lake Band of Chippewa Indians,  
White Earth Band of Ojibwe,  
Honor the Earth, and  
The Sierra Club

Minnesota Public Utilities  
Commission No:  
PL-9/CN-14-916

Relators,

**Date of Decisions:**  
Order Approving  
Certificate of Need:  
September 5, 2018

vs.

Minnesota Public Utilities Commission,

Order Denying  
Petition for Reconsideration:  
November 21, 2018

Respondent.

Order Approving  
Certificate of Need Modifications:  
January 23, 2019

Order Denying  
Petition for Reconsideration of  
Certificate of Need Modifications  
Order:  
March 27, 2019

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**1. Court or agency of case origination and name of presiding judge or hearing officer:**

The case originated with the Minnesota Public Utilities Commission (“Commission”):

Hon. Dan Lipschultz  
Hon. Matthew Schuerger

Vice-Chair  
Commissioner

Hon. John Tuma  
Hon. Katie Sieben

Commissioner  
Commissioner

**2. Jurisdictional statement:**

**a. Statute, Rule, or Other Authority Authorizing Certiorari Appeal.**

Certiorari appeal is authorized by Minn. Stat. § 216B.52 (2019) in accordance with the Minnesota Administrative Procedure Act, Minn. Stat. §§ 14.63 – 68 (2019). Minnesota Statutes § 14.63 states that an aggrieved person is entitled to judicial review of an agency decision by filing a writ of certiorari with the Court of Appeals not more than 30 days after the party receives the final decision and order of the agency. In addition, Minnesota Statute § 216B.27, subd. 2, (2019) states that “[n]o cause of action arising out of any decision constituting an order or determination of the [Minnesota Public Utilities Commission] or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made.”

**b. Authority Fixing Time Limit for Obtaining Certiorari Review.**

The Commission issued and served its Order Granting Certificate of Need as Modified and Requiring Filings on September 5, 2018 (“CN Approval Order”). This order stated that it would not “become effective on the day Commission issues its order approving the modifications required herein.” Due to ambiguity with regard to the timing of appeal, Relators Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, and Honor the Earth pursuant to Minn. Stat. § 216B.27 timely filed and served

on all parties a Joint Petition for Reconsideration on September 25, 2018. The Commission denied this Petition for Reconsideration on November 21, 2018. On December 20, 2018, Relators appealed these orders to the Minnesota Court of Appeals, which case was docketed as No. A18-2092. By order dated February 5, 2019, the Court dismissed No. A18-2092 together with Nos. A18-2093, A18-2019, and A18-2010. The Court held that the Commission's September 5, 2018, order would not become effective until the Commission issues its order approving modifications to the certificate of need, and also held that this order and the Commission's November 21, 2018, order denying petitions for its reconsideration, were not final and appealable. Accordingly, the Court ruled that No. A18-2092 was premature but ordered that Relators may obtain review of the September 5, 2018, and November 21, 2018, orders in a timely appeal following issuance of the Commission's final order in its certificate of need docket. The Court also waived the filing fees for a subsequent appeal.

On January 23, 2019, the Commission issued and served its Order Approving Compliance Filings as Modified and Denying Motion ("CN Modifications Order"), which order approved the modifications to the certificate of need. On February 12, 2019, Relators timely filed a petition for reconsideration of the Commission's September 5, 2018, November 21, 2018, and January 23, 2019, orders. On March 27, 2019, the Commission issued and served its Order Denying Reconsideration, which order is the final order in Docket No. PL-9/CN-14-916. Relators file the appeal here within the 30-day window following issuance of the March 27 order, as required by Minnesota Statutes § 14.63.

**c. Finality of Order or Judgment.**

By order dated February 5, 2019, the Court of Appeals held that the Commission action in Docket No. PL-9/CN-14-916 would become final after issuance of Commission orders approving required modifications to the certificate of need and denying any petitions for reconsideration. The Commission issued its modifications order on January 23, 2019, and order denying petitions for its reconsideration on March 27, 2019.

**3. State type of litigation and designate any statutes at issue:**

Appeal from Commission decision approving a certificate of need under Minn. Stat. § 216B.243 for a crude oil pipeline.

**4. Brief description of claims, defenses, issues litigated, and result below:**

On April 24, 2015, Enbridge Energy, Limited Partnership (“Enbridge”), applied to the Commission for a certificate of need (“CN”) and a route permit (“RP”) for a new pipeline to carry crude oil from the Canadian tar sands region across Minnesota to Enbridge’s terminal in Superior, Wisconsin (“Project”). Enbridge stated that the Project was intended to replace its existing Line 3 crude oil pipeline. By orders dated August 8, 2015, and February 2, 2016, the Commission referred Enbridge’s Application for a CN (“CN Application”) to the Office of Administrative Hearings (“OAH”) for a contested case hearing. Following a contested case hearing, the Administrative Law Judge (“ALJ”) issued her Findings of Fact, Conclusions of Law, and Recommendation on April 23, 2018 (“ALJ Report”). The ALJ Report recommended approval of the CN Application but only if the Project was placed in the route of the existing Line 3 Pipeline.

On September 5, 2018, the Commission issued its Order Granting Certificate of Need as Modified and Requiring Filings (“CN Approval Order”) (attached), in which it rejected substantial portions of the ALJ Report as well as its overall recommendation and instead granted the CN for the Project. Page 39 of the CN Approval Order states that it will become effective on the day the Commission issues its order approving modifications of the Certificate of Need. This condition on the effective date of the CN Approval Order created a question about whether or not the CN Approval Order was a final order that could be the subject of a petition for reconsideration. To gain clarity about the impact of the delayed effectiveness of the CN Approval Order on the timing of petitions for reconsideration, Friends of the Headwaters filed a Motion for Clarification with the Commission, and Honor the Earth filed a response to this motion. The Commission elected to not hear this motion.

Due to the ambiguity created by the effective date of the September 5 order and the Minn. R. § 216B.27, subd. 2, requirement that petitions for reconsideration of any order issued by the Commission are a prerequisite to appeal of such order and must be filed within 20 days of the service of the order, Honor the Earth, the Mille Lacs Band of Ojibwe, the White Earth Band of Ojibwe, the Red Lake Band Of Chippewa, the Minnesota Department of Commerce, Division of Energy Resources (“Department”), Friends of the Headwaters (“FOH”), and Youth Climate Intervenors (“YCI”), timely filed petitions for reconsideration of the CN Approval Order on September 25, 2018 and served all parties. On November 21, 2018, the Commission issued its order denying these petitions for reconsideration. The Sierra Club filed its Petition for Reconsideration

on September 26, 2018, and the Commission subsequently struck its Petition. The Sierra Club disputed the Commission's decision to exclude its Petition and also asserts that because the Commission's CN Approval Order did not come into effect until the filing of a subsequent order containing modifications to the Certificate of Need, it was not a final order subject to a petition for reconsideration.

As described above, this Court's February 5, 2019, order determined that the Commission's September 5 order did not come into effect until issuance of the Commission's January 23 order approving modifications. As such, both the September 5 and January 23 orders were subject to petitions for reconsideration upon issuance of the latter. Relators filed a timely joint petition for reconsideration of these orders on February 12, which petition the Commission denied on March 27.

Relators claim that the CN Orders are in violation of law, not supported by substantial evidence, and arbitrary and capricious for the following reasons:

Issues Related to the Commission's Failure to Base Approval of the CN on a Forecast of Demand for Energy

The State's certificate of need law requires that the Commission determine the "need" for a large crude oil pipeline as a prerequisite to its construction. An applicant for a certificate of need has the burden to prove "need" by providing a "long-range energy demand forecast." Minn. Stat. § 216B.243, subd. 3 (2019); *see also* Minn. R. 7853.0130.A(1) (2019). As part of its "need" analysis, the Commission must evaluate the "accuracy" of such forecast. *Id.* In support of this determination of accuracy, an applicant must provide and the Commission must consider the information required by

Minn. R. 7853.0520 (2019). The Commission must also consider any potential adverse impacts that a denial of a CN would have on the energy needs of an applicant, an applicant's customers, and "the people of Minnesota and neighboring states . . . ." Minn. R. 7853.0130.A (2019). Thus, Minnesota law defines "need" in terms of energy demand by those that consume it. It does not define "need" in terms of a commercial desire to transport additional crude oil that is unsupported by a proven need for energy by energy consumers.

Enbridge did not provide and the Commission did not consider a forecast of demand for energy. Instead, Enbridge provided a forecast of a potential increase in crude oil production in western Canada (a supply forecast) and used this supply forecast directly and also mathematically modified it into a so-called apportionment forecast to justify a finding of need for the Project. Rather than provide a direct forecast of demand for energy, Enbridge assumed that future global demand for crude oil would be sufficient to consume the production of crude oil in western Canada forecast by Enbridge. However, Enbridge failed to provide any evidence supporting the validity of this assumption. No other party to the administrative proceeding introduced evidence into the record showing that demand for crude oil in Minnesota, neighboring states, the U.S. or globally will steadily increase at a rate sufficient to demand all of Enbridge's forecasted increase in western Canadian crude oil supply. Instead, the evidence in the record related to future consumer demand for crude oil in Minnesota, neighboring states, the U.S., and globally consists of evidence showing that demand for crude oil during the forecast period will decrease in Minnesota, neighboring states, the U.S., and globally.

The Commission failed to require that Enbridge provide a forecast of demand of energy and failed to consider the evidence in the record related to declining demand for crude oil and instead justified its decision based its reliance on crude oil supply forecasts in prior pipeline need determinations. The Commission’s failure to require and rely upon a forecast of demand for energy violated the language of Minn. Stat. § 216B.243, subd. 3, and Minn. R. 7853.0130.A(1) to determine need based on demand for energy.

Even if the law allows the Commission to substitute an oil supply forecast for an energy demand forecast, Enbridge failed to provide quantified evidence that allows a determination of the accuracy of its crude oil supply forecast, as required by Minn. R. 7853.0520. This regulation requires that an applicant provide a quantified forecast of demand for energy that includes a “list of the annual and peak day quantities expected, using the appropriate units of measure . . . .” *Id.* To allow the Commission to evaluate the accuracy of such forecast, an applicant must also provide “a discussion of the methods, assumptions, and factors employed for purposes of estimation . . . .” and “a discussion of the effect on the forecast of possible changes in the key assumptions and key factors . . . .” *Id.* A quantified verifiable forecast is required to allow consideration of how changes in forecast methodology, assumptions, and key factors would impact the forecast. The Commission may not rely on a forecast in which none of the underlying calculations, methodologies, or key assumptions are quantified.

Enbridge relies on a forecast of western Canadian crude oil supply provided by the Canadian Association of Petroleum Producers (“CAPP”). Enbridge failed to provide the data, assumptions, or detailed methodology underlying this forecast of supply, such that



the CAPP forecast is neither transparent nor verifiable. Enbridge justified this omission based on the argument that CAPP's forecast data is proprietary and non-public, and not subject to disclosure. As such, the accuracy of Enbridge's supply forecast cannot be assessed except by the reputation of the trade association that produced it. Enbridge did not provide a transparent and verifiable forecast of western Canadian crude oil supply and did not assert that it could not provide such forecast. The Commission's failure to require a transparent verifiable forecast violates Minn. R. 7853.0520.

Issues Related to Consideration of Pipeline Safety as a Decision Factor, Consideration of which Is Not Allowed by Minn. Stat. § 216B.243 or Minn. R. Chapter 7853, and Is Preempted by the Federal Pipeline Safety Act, 49 U.S.C. § 60104(c).

Minn. Stat. § 326B.243, subd. 3, and Minn. R. 7853.0130 do not include consideration of pipeline safety as a factor in pipeline certificate of need decisions. Although Minn. R. 7853.0130.D allows the Commission to consider whether “it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments,” this provision allows the Commission to consider whether or not a proposed facility will fail to comply with other law. It does not allow the Commission to consider whether an existing facility should be replaced. Enbridge also provided testimony stating that it could continue to operate existing Line 3 in compliance with federal law if a certificate of need for the Project is denied. No Minnesota law or regulation authorizes the Commission to regulate pipeline safety nor does it in practice regulate pipeline safety. As a result, neither the

Commissioners nor the Commission staff have special expertise to make judgments about pipeline safety. Moreover, the federal Pipeline Safety Act, 49 U.S.C. § 60101 *et seq.* (2019), in Section 60104(c), expressly preempts state regulation of interstate pipeline safety, and Section 60102(a)(2)(B) authorizes the U.S. Secretary of Transportation to regulate “replacement” of interstate crude oil pipelines. Therefore, the Commission has neither the jurisdiction, statutory authority, nor the expertise to determine that there is a need to replace an existing interstate crude oil pipeline because it is unsafe or would be less safe than a new pipeline. Instead, the Commission’s decision making role is defined strictly by the criteria included in Minn. Stat. § 216B.243, subd. 2, and Minn. R. 7853.0130.

Yet, the CN Orders found need for the Project based primarily on pipeline integrity and safety concerns related to the existing Line 3 Pipeline, and not on demand for the energy that would be provided by additional crude oil imports resulting from constructing the Project. Therefore, the Commission’s CN Orders should be vacated because:

- they are in excess of statutory authority and beyond the jurisdiction of the Commission, Minn. Stat. § 14.69(b), and infringe on exclusive federal authority over pipeline safety and replacement of interstate crude oil pipelines, 49 U.S.C. §§ 60102(a)(2) and 60104(c);
- the Commission considered pipeline safety extensively throughout the contested case hearing such that the CN Order was made upon unlawful procedure, Minn. Stat. § 14.69(c); and

- the Commission misapplied Minn. Stat. § 216B.243, subd. 3, and Minn. R. 7853.0130 by considering decision criteria not identified by these laws, such that its orders are affected by an error of law, Minn. Stat. § 14.69(d), and are arbitrary and capricious, Minn. Stat. § 14.69(f).

Issues Related to a Failure to Consider a Complete Tribal Cultural Properties Survey for All Alternatives Considered

Minnesota Rule 7853.0130.B(3), C(2), and D require that the Commission consider the consequences to society of granting or denying a certificate of need. Here, Enbridge proposes to construct the Project along a new pipeline corridor crossing lands where the Anishinaabe fished, hunted, harvested, and gathered wild rice in the region for hundreds of years. The construction and operation of a new petroleum pipeline would impact these ecologically and culturally sensitive lands and an oil spill could be devastating. Therefore, impacts to the Ojibwe Tribes and individual Ojibwe are consequences that must be considered by the Commission. The Commission is required to consider the relative effects of all alternatives on the Ojibwe under Minn. R. 7853.0130(B)(3).

Here, a tribal cultural properties survey for each alternative considered under Minn. R. 7853.0130(B)(3) is necessary to understanding the potential effects of approval of the Project on the Ojibwe Tribes and Ojibwe individuals. The Commission failed to perform such survey of all route alternatives, such that there is insufficient evidence in the record to conduct a meaningful comparison of the impacts on cultural resources of the various routes or to weigh the consequences of granting or denying the Certificate of

Need under Minn. R. 7853.0130.B(3), C(2), and D. Therefore, the Commission's CN Orders are in violation of law and arbitrary and capricious.

Issues Related to a Failure to Include Evidence Related to State and Federal Petroleum Conservation Plans

The CN law requires that the PUC “evaluate . . . the effect of existing or possible energy conservation programs under . . . federal or state legislation on long-term energy demand . . . .” Minn. Stat. § 216B.243, subd. 3(2) (2019). Rather than consider the effect of such programs on “long-term energy demand,” the Commission considered only the efficiency of operation of the Project's electrical pumps, which do not operate on petroleum fuels. Minnesota Statute § 216B.243, subd. 3(2), requires that the Commission evaluate the potential impact of petroleum conservation measures on crude oil demand, because conservation of petroleum is related to the underlying purpose of the certificate of need law. In contrast, electricity conservation resulting from the use of newer pumps does not relate to or impact consumer demand for petroleum products. By failing to consider the impact of petroleum conservation measures on the need for the Project, the Commission failed to comply with Minn. Stat. § 216B.243, subd. 3(2).

Issues Related to the Commission's Failure to Consider the Effect of Upgrades to Existing Pipelines

The Certificate of Need statute requires that the Commission “evaluate . . . possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy . . . transmission facilities . . . .” Minn. Stat. § 216B.243, subd. 3(6) (2019). Similarly, the Commission's CN regulations require that the Commission “consider[] . . . the ability

of current facilities and planned facilities not requiring certificates of need, and to which the applicant has access, to meet the future demand . . . .” Minn. R. 7853.0130.A(4) (2019). Relators presented evidence that Enbridge plans to expand a number of its existing pipeline facilities that together would provide more capacity than the net increase that would be provided by the Project. In response, the Commission failed to discuss the potential effect of all of these proposed upgrades and instead dismissed them out-of-hand, stating: “[t]he ALJ also found that Enbridge’s planned projects on the Mainline System would not meet the future demand for crude oil, and the Commission agrees with that assessment.” CN Approval Order at 17. The ALJ’s report and the Commission orders failed to consider all of Enbridge’s proposed expansion projects and incorrectly considered only whether or not some of these individual expansion project could by themselves provide the same capacity as the Project, rather than consider the “ability” of these expansion projects to meet part of a possible future demand for additional crude oil. By failing to evaluate the ability of Enbridge’s existing crude oil pipelines to meet a possible need for energy, the Commission violated Minn. Stat. § 216B.243, subd. 3(6) and Minn. R. 7853.0130.A(4).

Issues Related to the Commission’s Failure to Consider the Full Impacts of the Greenhouse Gas Emissions That Would Result From Construction of the Project

Minnesota Rule 7853.0130.C requires that the Commission consider the effects of the Project on the natural and socioeconomic environment of the state compared to not building it. The Administrative Law Judge found that the Project would result in incremental life-cycle greenhouse gas emissions of 193 million tons of carbon dioxide,

with a cost to society of \$287 billion. The Commission dismissed the Administrative Law Judge's findings because of variability in the estimates of emissions and costs, and as a consequence decided to entirely disregard most of the climate change impacts of the Project. The Commission cited no record evidence supporting its factual conclusions that estimates are too unreliable to consider in the balancing required by Minn. R.

7853.0130.C. The Commission's decision to disregard this evidence is also contrary to Minnesota policy that expressly recognizes climate change and its economic and environmental costs to the people within Minnesota, including the Anishinaabe peoples who claim a right to continue to live on their lands in accordance with their beliefs and culture, which is their human and legal right to do. Accordingly, the Commission's unsupported decision to disregard the lion's share of the climate change effects of the Project is unsupported by substantial evidence in view of the entire record as submitted and is arbitrary and capricious.

The foregoing issues being presented to the Commission, by approving the CN, the Commission rejected all of the foregoing arguments.

**5. List specific issues proposed to be raised on appeal.**

- a. Whether the Commission violated the law by failing to provide a forecast of demand for crude oil as required by Minn. Stat. § 216B.243, subd. 3 (2019), and Minn. R. 7853.0130.A(1) (2019).
- b. Whether the Commission violated the law by substituting an assumption of demand for crude oil rather than providing a transparent verifiable forecast of demand for crude oil, as required by Minn. R. 7853.0520 (2019).

- c. Whether the Commission's reliance on Enbridge's assumption of unlimited crude oil demand is not based on substantial evidence, in that all or almost all of the evidence in the record shows that demand for crude oil in Minnesota, neighboring states, the U.S., and globally will decrease over the forecast period.
- d. Whether the Commission's failure to require disclosure of the detailed methodology, key assumptions, key factors, and data underlying Applicant's forecast of demand violated Minn. R. 7853.0520 (2019).
- e. Whether the Commission's consideration of pipeline safety issues as a basis for its CN Orders is in violation of law because pipeline safety is not a decision criteria under Minn. Stat. § 216B.243, subd. 3, or Minn. R. 7853.0130 (2019).
- f. Whether the Commission's determination that the Project is needed to replace existing Line 3 to improve pipeline safety is preempted by the Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.* (2019).
- g. Whether the Commission violated Minnesota Rule 7853.0130.B(3), C(2), and D (2019) by failing to require completion and consideration of a tribal cultural properties survey for all alternative routes.
- h. Whether the Commission violated Minn. Stat. § 216B.243, subd. 3(2) (2019), by failing to consider the impact of petroleum conservation measures on the need for the Project.

- i. Whether the Commission violated Minn. Stat. § 216B.243, subd. 3(6) (2019) and Minn. R. 7853.0130.A(4) (2019) by failing to adequately consider the ability of upgrades to applicant's existing infrastructure to meet demand for energy.
- j. Whether the Commission's decision to disregard evidence of the impacts of greenhouse gas emissions was without foundation in substantial evidence.

**6. Related appeals:**

On August 9, 2018, Relators Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe together with the Fond Du Lac Band of Lake Superior Chippewa (which subsequently withdrew) and Mille Lacs Band of Ojibwe, filed a joint appeal of the Commission's order finding adequate the Environmental Impact Statement ("EIS") for its CN hearing for the Project, which appeal was docketed by the Court as A18-1291. Relator Honor the Earth appealed this same order on August 8, 2018, which appeal was docketed as No. A18-1283. The Court of Appeals consolidated appeal A18-1283 and A18-1291 with A18-1292, an action on this matter filed by Friends of the Headwaters. The Court heard oral argument on this case on March 20, 2019, and is scheduled to issue a decision by June 18, 2019.

On February 12, 2019, Relators Friends of the Headwaters, Honor the Earth, and The Sierra Club filed a joint appeal of the Commission's RP Order, which was docketed by the Court as No. A19-0267. To date, the Commission has not filed a record index for this case, nor has the Court issued a scheduling order.



**7. Contents of record.**

Is a transcript necessary to review the issues on appeal? Yes ( ) No (X)

If a transcript is unavailable, is a statement of the proceedings under Rule 110.03 necessary? Yes ( ) No (X)

**8. Is oral argument requested?** Yes (X) No ( )

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes ( ) No (X)

**9. Identify the type of brief to be filed:**

Formal brief under Rule 128.02

**10. Names, addresses, and telephone numbers of attorney for appellant and respondent.**

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White Earth Band of Ojibwe,  
Honor the Earth, and  
The Sierra Club

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