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State of Minnesota
In Court of Appeals

In re Applications of Enbridge Energy, Limited Partnership,
for a Certificate of Need and a Routing Permit
for the Proposed Line 3 Replacement Project in Minnesota
from the North Dakota Border to the Wisconsin Border

**BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL
OF RELATORS
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WHITE EARTH BAND OF OJIBWE**

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACT	4
A. The L3RP Construction Process.....	7
B. The Adverse and Irreparable Impacts of the L3RP on Land, Water, and Natural Habitats.	9
C. The Adverse and Irreparable Impacts of the L3RP on the Climate.	10
D. The Adverse and Irreparable Impacts of the L3RP on the Cultural, Religious, and Treaty Rights of the Tribes and Indigenous Peoples.	12
STANDARD OF REVIEW.....	14
ARGUMENT.....	14
I. THE COMMISSION ORDER DENYING TRIBES’ MOTION FOR STAY IS AN ABUSE OF DISCRETION.	15
A. The Standard Applicable in Minnesota to Review of Motions for Stay of Administrative Orders.....	15
B. Federal Precedent on the Balancing of Equities in Stays of Agency Permitting.	19
C. The Commission’s Denial of a Stay Is an Abuse of Discretion.....	23
1. Absent a Stay the Tribes Could Not Obtain the Objects of Their Appeal.....	24
2. Failure to Grant a Stay Would Cause Tribes Irreparable Harm.	30
3. Respondents Will Not Sustain Irreparable or Disproportionate Injury if the Commission’s Orders Are Stayed and the L3RP Orders Affirmed.....	34
4. Relators Have Raised Important Questions of Law That if Decided in Their Favor Require Reversal.....	36
5. A Stay Is Necessary to Protect the Court’s Jurisdiction	42
6. The Balance of Equities Favors a Stay.	44
II. THE COURT SHOULD NOT REQUIRE A SECURITY BOND	46
REQUESTED RELIEF	47

TABLE OF AUTHORITIES

Federal Statutes

49 U.S.C. § 60101, *et seq.* 26, 32, 39

State Statutes

Minn. Stat. § 116D.04, subd. 10 3, 14

Minn. Stat. § 116D.04, subd. 2a 5

Minn. Stat. § 116D.04, subd. 2a(a) and (j) 29

Minn. Stat. § 116D.04, subd. 2b(3) 29

Minn. Stat. § 14.65 3

Minn. Stat. § 14.69(b) 43

Minn. Stat. § 216B.243 40, 42, 45, 48

Minn. Stat. § 216B.243, subd. 3 28

Minn. Stat. § 216B.243, subd. 3(1) 28, 41

Minn. Stat. § 216B.53 3, 14, 50

Minn. Stat. § 562.02 50

Minn. Stat. ch. 13 16

State Regulations

Minn. R. 7853.0010, subp. 8 25, 37

Minn. R. 7853.0130 25

Minn. R. 7853.0130.A(1) 25, 37

Minn. R. 7853.0520 38

Federal Court Cases

Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097
 (9th Cir. 2006)..... 23

Alaska Ctr. for Env't v. West, 31 F. Supp. 2d 714 (D. Alaska 1998) 22

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 25

Bragg v. Robertson, 54 F. Supp. 2d 635 (S.D.W.Va 1999)..... 22

Colorado Wild, Inc. v. United States Forest Serv., 523 F. Supp.2d 1213
 (D.Colo.2007) 19

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002)..... 23

Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003) 24

League of Wilderness Defs. v. Connaughton, 752 F.3d 755 (9th Cir. 2014) 25

League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton,
 752 F.3d 755 (9th Cir. 2014)..... 24

Long v. Robinson, 432 F.2d 977 (4th Cir. 1970)..... 24

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)..... 20

Nat'l Parks Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) 24

Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers, 528 F. Supp. 2d 625
 (S.D. W.Va. 2007)..... 23, 25

Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977)..... 21

Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826 F. 3d 1030
 (8th Cir. 2016)..... 21

Sampson v. Murray, 415 U.S. 61 (1974)..... 22

<i>Save Strawberry Canyon v. Dep't of Energy</i> , 613 F.Supp.2d 1177 (N.D.Cal.2009)	19
<i>Sierra Club v. U.S. Army Corps of Engineers</i> , 645 F.3d 978 (8th Cir. 2011).....	22, 23
<i>Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers</i> , 282 F.Supp.3d 91 (D.D.C. 2017).....	21
<i>Swan View Coal. v. Weber</i> , 52 F. Supp. 3d 1160 (D. Mont. 2014).....	21, 23
<i>The Land Council v. McNair</i> , 537 F.3d 981 (9th Cir. 2008).....	25
<i>United States v. Bayko</i> , 774 F.2d 516 (1 st Cir. 1985).....	40
<i>United States v. Giancola</i> , 754 F.2d 898 (11th Cir. 1985).....	40
<i>United States v. Miller</i> , 753 F.2d 19 (3d Cir. 1985).....	40
<i>Wild Earth Guardians v. Zinke</i> , 368 F. Supp. 3d 41 (D.D.C. 2019).....	20

State Court Cases

<i>Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Com'rs</i> , 713 N.W.2d 817 (Minn. 2006).....	43
<i>City of North Oaks v. Sarpal</i> , 797 N.W.2d 18 (Minn. 2011)	14
<i>Coop. Power Ass'n v. Eaton</i> , 284 N.W.2d 395 (Minn. 1979)	50
<i>DRJ, Inc. v. City of St. Paul</i> , 741 N.W.2d 141 (Minn. App. 2007).....	passim
<i>In re Applications of Enbridge Energy</i> , 930 N.W.2d 12 (Minn. Ct. App. 2019).....	29, 44
<i>No Power Line, Inc. v. Minnesota Environmental Quality Council</i> , 262 N.W.2d 312 (Minn. 1977)	50
<i>Peoples Natural Gas Company v. Minnesota Public Utilities Commission</i> , 342 N.W.2d 152 (Minn. App. 1983).....	17

<i>State v. Northern Pac. Ry. Co.</i> , 22 N.W.2d 569 (Minn. 1946)	passim
<i>Stich v. Stich</i> , 435 N.W.2d 52 (Minn. 1989)	20, 49
<i>Webster v. Hennepin County</i> , 891 N.W.2d 290 (Minn. 2017)	passim

Additional Authorities

R. Civ. App. P. 108.02, subd. 2	45
R. Civ. App. P. 108.02, subd. 6	3
R. Civ. App. P. 115.03, subp. 2	14
R. Civ. P. 62.05.....	17

STATEMENT OF THE ISSUES

- 1) Did the Minnesota Public Utilities Commission abuse its discretion by not staying its orders approving a certificate of need, routing permit, and finding of EIS adequacy for the Line 3 Replacement Project?
 - Raised in Relators' November 25, 2020, Motion for Stay (Add. 0037-0039) and Memorandum in Support of Motion for Stay (Add. 0040-0103) of the Line 3 Replacement Project Final Orders;
 - The PUC denied these claims in its December 9, 2020, Order Denying Motion for Stay Pending Appeal (Add. 0258-0264) and Order Denying Reconsideration, December 23, 2020 (Add. 0331-0322).
 - Preserved for appeal in Relators' Petition for Reconsideration, December 17, 2020 (Add. 0265-0299).

Apposite Authority:

- Minn. Stat. § 14.69
- Minn. Stat. § 216B.243
- Minn. R. ch. 7853
- R. Civ. App. P. 108.02
- *State v. Northern Pac. Ry. Co.*, 22 N.W.2d 569 (Minn. 1946)
- *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017)
- *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. App. 2007)

STATEMENT OF THE CASE

On April 24, 2015, Enbridge filed separate applications for a certificate of need (“CN”) and a route permit (“RP”) for the proposed L3RP, an approximately 338-mile crude oil pipeline, along with associated facilities, extending from the North Dakota–Minnesota border to the Minnesota–Wisconsin border, intended to replace its existing Line 3 pipeline (“Existing Line 3”) in Minnesota.¹

Following a contested case hearing administered by the Minnesota Office of Administrative Hearings and preparation of an Environmental Impact Statement (“EIS”) pursuant to the Minnesota Environmental Policy Act, Minn. Stat. ch. 116D (“MEPA”), the Commission issued a series of orders in 2018 and early 2019 finding the EIS adequate and approving a CN and RP.² In August 2018, a number of parties appealed the adequacy of the EIS to this court, and on June 3, 2019, it found the EIS inadequate,³ which decision had the effect of vacating the CN and RP. On remand, the Commission

¹ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916 (need docket); *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/PPL-15-137 (routing docket).

² Order Granting Certificate of Need as Modified and Requiring Filings (Sept. 5, 2018); Order Approving Pipeline Routing Permit With Conditions (Oct. 26, 2018); Order Denying Reconsideration, Excluding Filings, and Granting Variance (Nov. 21, 2018); Order Clarifying Prior Order, Excluding Filing, and Denying Reconsideration (Jan. 18, 2019); Order Approving Compliance Filings as Modified and Denying Motion (Jan. 23, 2019); Order Denying Reconsideration (Mar. 27, 2019).

³ *In Re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from The North Dakota Border to the Wisconsin Border*, 930 N.W.2d 12 (Minn. App. 2019).

prepared a Second Revised Final Environmental Impact Statement (“2RFEIS”), and by order dated May 1, 2020, the Commission found the 2RFEIS adequate and also “reissued” its 2018-19 orders granting a CN and RP. (Add. at 0001-0030.) The Tribes together with Honor the Earth and The Sierra Club timely filed a petition for reconsideration of this order, as did a number of other parties. The Commission denied all of these petitions by order dated July 20, 2020 (Add. at 0031-0036), which denial constituted final agency action. On August 19, the Tribes together with Honor the Earth and The Sierra Club appealed this final action, as did the Minnesota Department of Commerce, the Mille Lacs Band of Ojibwe, Friends of the Headwaters, and the Youth Climate Intervenors. By order dated August 26, 2020, this court consolidated these appeals under A20-1071.

To preserve their rights on appeal, on November 25, 2020, Tribes moved the Commission for a stay of its final order pending appeal. (Add. at 0037-0039.) Subsequent to this motion, in early December 2020, Enbridge started construction of the L3RP, which construction is ongoing. (Add. at 0145.) On December 9, 2020, the Commission denied Tribes’ motion. (Add. at 0258-0264.) On December 17, 2020, the Tribes submitted a petition for reconsideration of this decision (Add. at 0265-0299), which the Commission denied on December 23, 2020. (Add. at 0331-0322). Now, pursuant to Minn. R. Civ. App. P. 108.02, subd. 6, and Minn. Stat. § 14.65, § 116D.04, subd. 10, and § 216B.53 (2020), Tribes move this court to find the Commission’s denial of Tribes’ motion for stay to be an abuse of discretion and to order a stay of the Commission’s final order pending appeal.

Tribes argue that a stay is necessary to preserve the objects of Tribes' claims on appeal and the status quo; to protect the Tribes and their environment and cultural, religious, and treaty rights from irreparable harm; to permit the court to resolve the important questions of law raised by Tribes; and to preserve the court's jurisdiction over Tribes' claims. Further, Tribes claim that any alleged economic harm to nonmoving parties is neither irreparable nor disproportionate to the irreparable harm that Tribes would suffer due to construction of the L3RP, or disproportionate to the overall cost of the L3RP or Enbridge's financial resources. Tribes assert that the Commission's order denying Tribes' motion for stay is an abuse of discretion because its findings are based on erroneous views of the law, unsupported by the record, and/or arbitrary and capricious. Therefore, the Tribes move the court to stay the Commission's final order.

STATEMENT OF FACT

With regard to the record available to the court, Rule 108.02, subd. 6, states in relevant part that Tribes' motion must:

- (b) include originals or copies of affidavits or other sworn statements supporting the facts that are subject to dispute; and
- (c) include a copy of any submissions to the trial court, any order entered by the trial court relating to security pending appeal, and any other relevant parts of the record in the trial court.

The facts in dispute relate to:

- Tribes' claim that they would suffer irreparable harm absent a stay and the types and degree of harm they would suffer; and

- the claims of irreparable harm made by the L3RP proponent, Enbridge Energy, Limited Partnership (“Enbridge”), its shippers, who are represented by Shippers for Secure, Reliable, and Economical Petroleum Transportation (“Shippers”), and two trade unions, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“United Association”) and the Laborers’ District Council of Minnesota and North Dakota (“LIUNA”), whose members are working to construct the L3RP.

Rather than provide affidavits to prove irreparable harm, Tribes rely on the administrative record prepared by the Commission for the L3RP, which record was provided to the court on December 18, 2020. The record contains extensive analysis of the harms that construction and operation of the L3RP would cause to Tribes and to the environment in Minnesota. The Tribes and other commenters provided a substantial volume of sworn and public comment testimony about these harms into the record during the evidentiary hearing and EIS preparation process. The EIS includes environmental impact analysis prepared by the Minnesota Department of Commerce (“DOC”), Minnesota Department of Natural Resources (“DNR”), and Minnesota Pollution Control Agency (“PCA”). The purpose of the EIS is to “analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented.” Minn. Stat. § 116D.04, subd. 2a. Therefore, the hearing record, including but not limited to the EIS, provides evidence of the irreparable harm that would result from construction and operation of the L3RP.

To prove irreparable harm, Tribes specifically cite to the following documents that identify, describe, and summarize the irreparable harms that would be inflicted on the Tribes and the environment in Minnesota by construction and operation of the L3RP:

- the L3RP EIS, which describes the adverse impacts of construction of the L3RP on the environment and Tribes' interests, including a number of irreparable harms (CNRI Nos. 3229 to 3486);
- the sworn expert testimony presented by Tribes, other Indian bands, and the Youth Climate Intervenors in the evidentiary hearing related to the adverse and irreparable impacts of the L3RP on the interests of the Tribes and indigenous peoples living in Minnesota, including: the testimony of Terry Kemper, witness for the Mille Lacs Band of Ojibwe (CNRI No. 1295); the testimony of Kade Ferris, witness for Red Lake Band of Chippewa Indians (CNRI No. 1301); the testimony of Nancy Schuldt, witness for the Fond du Lac Band of Lake Superior Chippewa Indians (CNRI No. 1559); the testimony of Sheila Lamb, witness for Youth Climate Intervenors (CNRI No. 1280); and the testimony of William Paulson, witness for Youth Climate Intervenors (CNRI No. 1279);
- the sworn testimony of other witnesses in the evidentiary hearing related to the greenhouse gas emissions of the L3RP, which emissions create irreparable harm, including: the testimony of Dr. John Abraham (CNRI No. 1340); the testimony of Paul Douglas (CNRI No. 1338); the testimony of Dr. Christie Manning (CNRI No. 1283); the testimony of Dr. Peter B. Reich (CNRI No.

- 1279); the testimony of Adam Scott (CNRI Nos. 1327-1229, 1341); the testimony of Dr. Bruce Snyder (CNRI Nos. 1284-1286, 1719); and the testimony of Anthony Swift (CNRI Nos. 1270, 1287); and
- the Findings of Fact, Conclusions of Law, and Recommendation of the Administrative Law Judge assigned to this matter (CNRI No. 2834, 2835) (“ALJ Report”), who referenced, footnoted, evaluated, and summarized the evidence collected during the evidentiary hearing, including evidence of the environmental and cultural harm resulting from construction and operation of the L3RP.

Since one of the purposes of the L3RP evidentiary hearing and environmental review was to identify and describe the adverse impacts and harms caused by construction and operation of the L3RP, Tribes request that the court consider this record evidence when evaluating the irreparable harm that Tribes would suffer absent a stay.

A. The L3RP Construction Process.

Enbridge proposes to construct an entirely new 36-inch diameter crude oil pipeline across Northern Minnesota, which it has named the “Line 3 Replacement Project.” Certificate of Need Record Index (“CNRI”) No. 2834 at 102175 (ALJ Report para. 38, page 20). Approximately 47 percent of this new pipeline would be in a new corridor. CNRI No. 2834 at 102176 (ALJ Report para. 42, page 21 and n. 87, 23). The L3RP requires a permanent right-of-way of 50 feet and an additional temporary construction easement of 70 feet in upland areas and 45 feet in wetland areas. CNRI No. 3318 at

117434-37 (2RFEIS at 2-14 to 2-17). In addition, Enbridge would need additional temporary workspace for open-cut road crossings, bored roads, foreign pipeline crossings, utility crossings, railroad crossings, water body crossings, horizontal directionally drilled waterbody crossings, and wetlands. CNRI No. 2834 at 102288 (ALJ Report para. 409, page 133). The additional temporary workspace easements requested are between 100 and 200 feet in addition to the temporary construction easement. *Id.*

With regard to the scope of impacts, construction of the L3RP requires that Enbridge clear and grade the land within its permanent and temporary rights-of-way; dig a minimum seven-foot trench in the permanent right-of-way; stockpile the removed earth in its temporary right-of-way; fabricate the pipeline and lower it into the trench; and then refill the trench. CNRI No.3318 at 117441-52 (graphics at 2RFEIS page 2-21 (Figure 2.7-1), 2-23 (Figure 2.7-2), and discussion at 2-22 to 2-32). All shrubs, trees and rocks in this right-of-way would be removed and disposed of. *Id.* at 2-24. During operation, Enbridge would continuously remove woody vegetation in the permanent easement to allow ongoing inspection. CNRI No. 3318 at 117460-61 (2RFEIS at 2-40 to 2-41).

The L3RP is a major construction project that will directly impact a strip of land 338 miles long and 95 to 120 feet wide, as well as a substantial amount of additional land needed for ancillary facilities. Construction would damage or destroy all of the natural habitat located within the construction footprint. Although Enbridge would fill in the trench and attempt restoration, after construction the natural habitat in the permanent right-of-way will no longer exist due to the intense disturbance caused by construction as well as ongoing clearing of the right-of-way to allow inspection during operation.

B. The Adverse and Irreparable Impacts of the L3RP on Land, Water, and Natural Habitats.

Both the ALJ Report and 2RFEIS found that the L3RP would have significant impacts, including the following:

- the loss of 2,202 acres of forests;
- permanent impacts to 46 acres of rare native plant communities;
- long-term/major impacts to 440 acres of forested and scrub/shrub wetlands;
- the potential to disrupt 23,198 acres of wildlife conservation lands and 17 wild rice lakes, 17 trout streams, 8 lakes of high and outstanding biological significance, and 4 tullibee lakes, all located within 0.5 miles of the L3RP, in the event of oil spills;
- damage to a total of 227 waterbodies including streams, lakes, wetlands, and accompanying resources that are generally of high quality, of which 174 are streams, six of them trout streams, most of which would be crossed using invasive and destructive open trenches;
- crossing of 25,765 acres of high vulnerability water table aquifers, 26,382 acres of land with high groundwater contamination susceptibility, and 87 acres of wellhead protection areas, that could be impacted by oil leaks and spills;
- impacts to 16,299 acres of lands with high pollution sensitivity;
- 38 miles of habitat fragmentation;
- crossing of 12,318 acres of unusually sensitive ecological areas;
- crossing of 2,443 acres of drinking water sources;

- crossing of 102,426 acres of biological areas of interest; and
- crossing of 3,704 acres of recreational/tourism areas of interest.

CNRI No. 2834 at 102370-72, 102394 (ALJ Report para. 763, 769, 855, pages 215-17, 239) (summary of impacts compiled by DNR). The L3RP is a major construction project that will permanently change and damage the natural environment, including the soils, vegetation, and related natural communities, through which it passes. Should the L3RP be constructed, all of these natural resources will be permanently changed and put at future risk from oil spills and potential future maintenance projects. The physical harm done to the impacted lands and waters cannot be undone and as such is irreparable. Specific references to statements of irreparable harm in the record are included in the Tribes' Memorandum in Support of Motion to Stay submitted to the Commission. (Add. at 0066-0074.)

C. The Adverse and Irreparable Impacts of the L3RP on the Climate.

In addition, construction of the L3RP would result in significant contributions to climate change. Its direct greenhouse gas ("GHG") emissions from construction would be nearly 376 tons of CO₂ equivalent ("CO₂E") per year, plus indirect GHG emissions from operation of project pumps of nearly 453,000 tons of CO₂E per year, with a resulting 30-year social cost of carbon from these emissions estimated to be \$673,365,150. CNRI No. 2834 at 102395 (ALJ Report para 858, page 240); CNRI No. 3266 at 11448489, CNRI No. 3265 at 114075. In addition, the incremental life-cycle GHG emissions from combustion of the petroleum that would be transported by the

Project are estimated at nearly 200 million metric tons of CO₂E per year, and the 30-year social cost of carbon for the incremental life-cycle GHG emissions is estimated at \$287 billion. CNRI No. 3265 at 114075-79. The L3RP is intended by Enbridge and the Canadian oil industry to facilitate development in the Tar Sands by lowering the cost of transportation of the extracted crude oil, CNRI No. 2834 at 102395 (ALJ Report para. 859, page 240), such that the L3RP would increase GHG emissions and exacerbate climate change. Climate change amplifies temperature extremes and drought/flood cycles; impacts the migration of living species; affects agriculture; raises the sea level; increases the frequency of wildfires, windstorms, and insect infestations; diminishes forest growth and health; increases the severity and frequency of storms and flooding, and has human health impacts, among other things. CNRI No. 2834 at 102395-96 (ALJ Report para. 861, page 240-41). In particular, climate change negatively impacts lands and resources that are particularly important to preserving traditional ways of life. Climate change induced impacts on the land and natural resources in the state would affect indigenous people's hunting, fishing, wild rice gathering, maple sugar gathering, and the collection of plants for medicines, spiritual and ceremonial purposes, shelter, and other needs – all critically important to the Anishinaabe peoples. CNRI No. 2834 at 102396 (ALJ Report para. 862, page 241). Due to the scope of its impacts and the long term persistence of greenhouse gases in the atmosphere, climate change impacts are significant and irreparable. *See* CNRI No. 3266 at 114482-83; CNRI No. 1338 (testimony of Paul Douglas); CNRI No. 1283 (testimony of Dr. Christie Manning); CNRI

No. 1279 (testimony of Dr. Peter B. Reich); CNRI Nos. 1327-1229, 1341 (testimony of Adam Scott); CNRI Nos. 1284-1286, 1719 (testimony of Dr. Bruce Snyder).

D. The Adverse and Irreparable Impacts of the L3RP on the Cultural, Religious, and Treaty Rights of the Tribes and Indigenous Peoples.

The ALJ Report summarizes the impacts of the L3RP on indigenous peoples and their culture, beliefs, and way of being, though this writing cannot do the impacts justice. CNRI No. 2834 at 102396-402 (ALJ Report para. 863-884, pages 241-247). The 2RFEIS identifies the following impacts to tribal resources:

- Water – the disruption of water bodies and the potential degradation of water quality impacts the Native Americans’ spiritual connectedness to water, a sacred element to Native culture.
- Hunting – the loss of natural resources and destruction of habitat caused by forest fragmentation associated with a new pipeline corridor; and the potential for contamination caused by release, all have the potential to impact hunting rights and activities of tribal members.
- Fishing – the potential loss of resources from contamination and habitat destruction have the potential to impact the fishing rights and activities of tribal members.
- Wild Rice – the potential impact to wild rice beds caused by contamination and habitat destruction have the potential to impact the health, vitality, and existence of wild rice, a resource of particular significance to the Anishinaabe people.
- Spiritual practices – construction activities and operation of the pipeline, as well as the potential for contamination related to release, have the potential to impact sacred sites, areas of religious or cultural significance, and natural resources used or worshiped in spiritual practices.
- Medicinal and traditional plants and food – a loss of resources that could occur from contamination and habitat destruction have the potential to impact plants used by the Natives for food, medicine, and spiritual practices.

- Community health and mental well-being – the loss of tribal connections to natural resources; the potential for contamination of natural resources; and the use of tribal land for an oil pipeline can cause tribal members to experience “cultural trauma” reminiscent of historical actions that stripped Native Americans of their land, rights, and access to natural resources.

CNRI No. 2834 at 102397 (ALJ Report para. 867, page 242-43). These impacts are more fully detailed in the testimony of the following witnesses:

- Youth Climate Intervenors’ witness Sheila Lamb, who describes the health impacts, loss of medicinal and ceremonial plants and cultural practices, the importance of water for Anishinaabe people, and the disparities suffered by indigenous peoples due to “historical trauma;” CNRI No 1280;
- Mille Lacs Band of Ojibwe witness Terry Kemper, who describes the importance of water, wild rice, medicinal plants, and wildlife to the language, customs, and beliefs of the Anishinaabe; CNRI No. 1295;
- Red Lake Band of Chippewa Indians witness Kade Ferris, who describes the Project’s potential to interfere with and diminish treaty-ceded rights to hunt, fish, and gather; CNRI No. 1301; and
- Fond du Lac Band of Lake Superior Chippewa witness Nancy Schuldt, who describes the critical importance of Manoomin to the Anishinaabe people, as well as the fact that restoring wild rice beds to harvestable stands, once impacted, is extremely difficult; CNRI No.1559.

The irreparable harms resulting from construction and operation of the L3RP are further described in the Tribes’ Memorandum in Support of Motion for Stay to the

Commission on pages 24 to 32 (Add. at 0066-0074), including multiple quotes identifying the specific irreparable and/or permanent harm caused by the L3RP.

STANDARD OF REVIEW

A agency order denying a motion for stay is reviewed under an abuse-of-discretion standard. *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017). Under this standard, the court may grant a stay when an agency decision on a motion for stay is based on an erroneous view of the law or unsupported by the record. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011). Even if an agency decision is free of legal or factual errors, the court may overturn the agency if it exercised its discretion in an arbitrary or capricious manner. *Id.*

ARGUMENT

Tribes move for a stay because the Commission's order denying a stay was an abuse of discretion. A stay is necessary to preserve the objects of Tribes' appeal, to protect the Tribes from irreparable harm, to preserve the court's jurisdiction to resolve important questions of law, and to protect the public's interest in Minnesota's natural and human environment. These factors all clearly weigh in favor of a stay and outweigh the alleged economic impacts that a stay might cause to nonmoving parties. Moreover, the Commission's reasoning in its Order Denying Motion for Stay is either contrary to law, unsupported by the record, or irrational and arbitrary and capricious. Therefore, the Order Denying Motion for Stay is an abuse of discretion.

I. THE COMMISSION ORDER DENYING TRIBES' MOTION FOR STAY IS AN ABUSE OF DISCRETION.

The court may review the Commission's order denying stay, find it to be an abuse of discretion, and order a stay and the terms of such stay. Minn. Stat. §§ 14.65, 216B.53, 116D.04, subd. 10; Minn. R. Civ. P. 62.03; Minn. R. Civ. App. P. 108.02, Minn. R. Civ. App. P. 115.03, subp. 2.

A. The Standard Applicable in Minnesota to Review of Motions for Stay of Administrative Orders.

The Supreme Court of Minnesota established the standard applicable to motions for stay of agency decisions in *State v. Northern Pac. Ry. Co.*, 22 N.W.2d 569 (Minn. 1946). The Court quoted the following standard from the *Corpus Juris Secundum*, 4 C.J.S. Appeal and Error § 636 (1937):

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

22 N.W.2d at 574-75 (emphasis omitted). In *Webster v. Hennepin County*, 891 N.W.2d 290, 292 (Minn. 2017), the Supreme Court again quoted the foregoing standard, thereby confirming it. Consistent with the repeated use of the word "or" in this standard, the

Webster court clarified that an agency need not consider all of the stay factors contained therein and rather “need only analyze the relevant factors” based on “individualized judgments” of the specific facts of each case. *Id.* at 293.

With regard to the weight given to these stay factors, the *Webster* decision found the “most important” factor there to be “preserv[ation of] the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal.” *Id.* The court recognized that an agency should consider not just the relative impacts of a stay on the parties, but also on:

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

Id. The court noted the ALJ ‘s finding there that if an order to release information under the Data Practices Act, Minn. Stat. ch. 13 (2020) (“DPA”), was not stayed, the information in dispute would be made public, such that there would be no “live controversy” for the court to consider and the court would lose jurisdiction. *Id.* at 292. The court agreed with this finding and held that the stay would be upheld because “issuing a stay would preserve the court of appeals' jurisdiction by preventing a significant legal issue from becoming moot during appeal.” *Id.* at 293.

The Supreme Court’s concern to preserve appellate jurisdiction indicates that agencies and courts should consider not just the risk that a court would lose jurisdiction over a particular case, but also whether the broader circumstances require a stay. Where

a law authorizes action that cannot be undone or redressed via monetary compensation,⁴ the courts should favor a stay because otherwise the role of the courts in resolving important questions of law would be lost. *See Northern Pacific*, 22 N.W.2d at 574. The decision in *Webster* to grant a stay did more than preserve the status quo in that particular case. It also created precedent that the Court of Appeals will generally grant a stay where an agency appeals an order to release documents, the confidentiality of which cannot be recovered. This precedent reduced the potential for future litigation and preserved the role of appellate review in such DPA cases. *Webster*, 891 N.W.2d at 293 (“granting the stay would reduce future litigation regarding Data Practices Act requests.”). The courts should favor a stay of an agency order under law that authorizes irreversible action that, if not stayed, would render judicial review moot.

The Court of Appeals in *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. App. 2007), described the balancing of the *Northern Pacific* factors as follows:

When determining whether or not to grant a stay pending appeal, the trial court or governmental unit must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain “secure in victory” while the appeal is pending.

(Citations omitted.) The court recognized that ensuring the availability of effective relief may require preservation of the status quo, and that this need is balanced against the need

⁴ Reversible actions include those related to Commission action on rates, because rate issues may be resolved via refunds or future rate increases. *See Peoples Natural Gas Company v. Minnesota Public Utilities Commission*, 342 N.W.2d 152, 155 (Minn. App. 1983) (finding that the Commission could order a refund in a rate matter).

for the prevailing party to remain “secure in victory.” The court emphasized the need to preserve matters for judicial review when it stated: “[e]nsuring that the appealing party can obtain effective relief, if it prevails on appeal, is a crucial consideration in determining whether and on what terms to grant a stay pending appeal.” *Id.* at 145 (emphasis added). This holding is consistent with Minn. R. Civ. P. 62.05 which states that an appellate court may “make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”

Therefore, when a stay is necessary to preserve the status quo, to ensure that effective relief is available in the event of reversal, or to preserve appellate review of important questions of law, an administrative agency should deny a motion to stay only when irreparable harm to the non-moving party is so great, irreparable, and disproportionate as to clearly justify rendering the appeal moot. Otherwise, the agency would abuse its discretion by preempting juridical review of important questions of law and preventing relators from obtaining relief, in the event they prevail.

With regard to consideration of the public interest, the courts recognize that a stay may be necessary to protect the public interest or that a stay may put the public at risk. *Webster*, 891 N.W.2d at 293 (stay necessary to protect the public’s interest in appellate jurisdiction); *cf. DRJ*, 741 N.W.2d at 144 (a stay determination may “focus in part on the risk to others, including the public . . .”).

In addition, irreparable harm arises from the failure of an agency to comply with law, because agency violation of law is a procedural injury that cannot be repaired after construction. *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 [agency 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 [agency] 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)).

Finally, an agency’s findings must be “sufficiently detailed to demonstrate that all relevant factors were actually considered.” *DRJ*, 741 N.W.2d 141, 145, *quoting Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989).

B. Federal Precedent on the Balancing of Equities in Stays of Agency Permitting.

Minnesota’s courts have not published opinions that balance the equities in review of stays of agency orders approving major construction projects that irreparably harm the environment and result in delay to construction. In contrast, many federal court decisions

have done so, albeit in the context of the federal injunction standard.⁵ Therefore, federal precedent is instructive and should be considered by the court.

The federal courts 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.” *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). That a project might be delayed to comply with statutory or regulatory requirements is no more an injury than if the project would have been required to comply with the law in the first place. *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”). The federal courts have also found that harm to project proponents based on a short delay should not weigh heavily in a court’s decision. 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”).

⁵ The federal courts consider: “(1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest.” *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng’rs*, 826 F. 3d 1030, 1036 (8th Cir. 2016).

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. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable). Even the fact that a company may have invested substantial funds is not reason to deny a stay. *See Bragg v. Robertson*, 54 F. Supp. 2d 635, 645 (S.D.W.Va 1999) (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"). The federal courts understand the need to "stop[] a bureaucratic steam roller, once started." *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). 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." *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).

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 federal courts consider injury from a stay to be “self-inflicted,” which weighs against nonmoving parties. *See Davis v. Mineta*, 302 F.3d 1104, 116 (10th Cir. 2002); *see also Swan View*, 52 F. Supp. 3d at 1161-62. 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. *See Sierra Club*, 645 F.3d at 997 (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). Also, the federal courts have consistently held that a “loss of anticipated revenues . . . does not outweigh irreparable damage to the environment.” *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 755, 766 (9th Cir. 2014) (irreparable environmental injuries outweigh temporary economic harms).

Therefore, the federal courts generally reject arguments that a stay would be inequitable because of economic loss due to delay. *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”).

With regard to balancing 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.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *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). 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. *See, e.g. Amoco*, 480 U.S. at 545 (“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.”). Therefore, the potential temporary harm to a proponent’s economic interests caused by a temporary stay is outweighed by the irreparable harm caused by project construction. *See, e.g., Ohio Valley*, 528 F. Supp. 2d at 632.

Any stay of a permit for a major project is likely to have substantial economic impacts, but these economic impacts should not by themselves foreclose stays in such circumstances. Otherwise, project proponents could assume that stays would generally be denied such that they would have confidence that they could construct their projects knowing that an appeal can be made moot.

C. The Commission’s Denial of a Stay Is an Abuse of Discretion.

The Commission identified the following relevant factors for consideration in its review of Tribes’ Motion for Stay:

- whether the Tribes could obtain meaningful relief on appeal;
- whether the Tribes would suffer irreparable harm;
- the irreparable or disproportionate harm that a stay would cause to Enbridge;
- and
- the public interest in granting a stay.

Order Denying Motion for Stay at 5-6 (Add. at 0262-0263). For the reasons below, the Commission’s analysis of these factors is contrary to law, unsupported by substantial evidence, and/or arbitrary and capricious. While Tribes agree that these factors are relevant, they assert that the Commission should also have considered whether Tribes have raised important questions of law that should be resolved by the court, such that a stay is necessary to protect the court’s jurisdiction. The Commission’s failure to consider the need to preserve court jurisdiction over important questions of law is also an abuse of discretion, because this factor is relevant and important.

1. Absent a Stay the Tribes Could Not Obtain the Objects of Their Appeal.

The first *Northern Pacific* stay factor is whether, in the absence of a stay, “it appears that without it the objects of the appeal or writ of error may be defeated” *Northern Pacific*, 22 N.W.2d at 574. The *DRJ* decision further described this standard to include consideration of whether a stay is necessary to preserve the status quo so that effective relief will be available if the appeal succeeds. 741 N.W.2d at 144.

The Commission’s entire analysis of the first *Northern Pacific* factor is contained in just three sentences:

Movants argue that their appeal would be rendered meaningless absent a stay, because the issue of whether to allow construction of the pipeline would become moot if the pipeline is built before the appeals are resolved. However, 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. This would remove the risk of an accidental oil spill from the Project, which is the most serious potential impact raised by opponents of the Project.

Order Denying Motion for Stay at 5 (Add. at 0262). The Commission’s reasoning here is contrary to law, unsupported by the record, and arbitrary and capricious because:

- it incorrectly asserts that stopping operation of the L3RP is the relief sought by Tribes’ appeal, when it is not;
- a post-construction judicial order ceasing operation would not preserve the status quo or protect the Tribes and Minnesota’s environment from irreparable harm;
- the Commission’s unfounded assertion that the potential risk of an oil spill “is the most serious potential impact,” relative to the inevitable harmful impacts that would result from construction, is irrational, unsupported by substantial evidence, and arbitrary; and
- allowing completion of construction and then, if Tribes prevail, ordering decommissioning of the new pipeline would harm the Tribes, the environment, Enbridge, and the Shippers, such that the Commission’s proposed relief could cause greater harm than ordering a stay now.

Each of the foregoing arguments is discussed in more detail, below.

i. Tribes Claims Seek Commission Compliance with Law Before Approval of a CN, RP, and EIS, and Not to Stop Pipeline Operations Following Construction.

The record shows that the object of the Tribes' claims is a court order directing the Commission to take the following actions, before a CN, RP, and EIS are approved and construction is authorized:

- evaluation of the accuracy of a long-range energy demand forecast based on end user demand for energy, as required by Minn. Stat. § 216B.243, subd. 3(1), and its implementing regulations at Minn. R. 7853.0130.A(1) and Minn. R. 7853.0010, subp. 8, and not based on a forecast of Canadian crude oil supply and an assumption of end user demand;
- evaluation of the need for the L3RP based on factors the legislature included in Minn. Stat. § 216B.243, subd. 3, and Minn. R. 7853.0130, and not based on pipeline safety issues over which the Commission has no jurisdiction or expertise, because state-ordered replacement of an interstate crude oil pipeline for safety reasons is expressly preempted by the federal Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.*;
- analysis of the potential impact of an oil spill from the L3RP on Lake Superior, the St. Louis River Estuary, and the Duluth-Superior Harbor, as required by Minn. Stat. § 116D.04, subd. 2a(a) and (j), before determining the adequacy of the L3RP EIS, which Minn. Stat. § 116D.04, subd. 2b(3) requires must be done before a final decision on a CN and RP; and

- compliance with this court’s order in *In re Applications of Enbridge Energy*, 930 N.W.2d 12 (Minn. Ct. App. 2019), *review denied*, 38 (Minn. Sept. 17, 2019), which requires analysis of the potential impacts of an oil spill from the L3RP on Lake Superior and waters in its watershed of concern to Tribes, including the St. Louis River Estuary and Duluth-Superior Harbor, before determining the adequacy of the EIS and issuance of a CN or RP.

These claims are more fully described and argued in the December 7, 2020, Brief and Addendum of Relators Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and The Sierra Club, A20-1071 (con). All of Tribes’ claims seek compliance with law before approval of the CN, RP, and EIS, and therefore before construction. Therefore, a post-construction court order directing Enbridge to cease operation would not preserve the objects of Tribes’ appeals.

ii. A Post-Construction Judicial Order Stopping Operation of the L3RP Would Not Preserve the Status Quo or Protect the Tribes and Minnesota’s Environment From Irreparable Harm.

The Commission’s finding that a post-construction order stopping operation would provide meaningful relief is an abuse of discretion because the Commission failed to consider whether such order would maintain the status quo to ensure that effective relief is available, as counseled by the *DRJ* decision. 741 N.W.2d at 144. Completion of construction of the L3RP would not maintain the status quo, because construction would cause the irreparable harm claimed by Tribes and result in an operational pipeline. Once the L3RP is constructed, it would be pointless for the court to remand this matter to the

Commission for supplementary evidentiary hearings on the need to construct a pipeline that had already be constructed, or to establish a new route that had already been bulldozed through the state, or to supplement the EIS to inform Commission decision making before approval of a CN and RP, the purposes of which would already have been accomplished. Once construction of the L3RP is finished or nearly finished there would be no “live controversy” with regard to Tribes’ claims. Therefore, a stay is necessary to preserve the status quo and prevent irreparable harm.

iii. The Commission’s Reasoning that the Impacts of an Oil Spill Are the Only Impacts that Need Be Considered Is Unsupported by the Record and Arbitrary.

The Commission asserts that an order stopping operation would provide meaningful relief because it would “remove the risk of an accidental oil spill from the Project, which is the most serious potential impact raised by opponents of the Project.” Order Denying Stay at 5 (Add. at 0262). This reasoning is unsupported by substantial evidence, because the Commission entirely fails to provide any evidence comparing the potential harm of a spill relative to the inevitable harm that would result from construction. Moreover, even if the Commission could compare the evidence of harm from spills to evidence of harm from construction, such effort would be irrational and arbitrary, because whether or not one set of irreparable harms is worse than another is not proof that the allegedly less-worse irreparable harms may be disregarded. The fact that operational risks exist is no reason to disregard the inevitable harm resulting from construction. The *Northern Pacific* standard should be understood to require that

agencies and courts weigh all irreparable harm and not address just those that an agency claims are the worst. Therefore, the Commission's reasoning that a post-construction stay would preserve Tribes' claims and adequately address the irreparable harm of the L3RP is unsupported by substantial evidence, contrary to law, and arbitrarily ignores proven irreparable harm.

iv. A Post-Construction Order to Stop Operation Would Not Avoid Harm to Either Moving or Nonmoving Parties, and Instead Would Have the Practical Effect of Bootstrapping Completion and Operation of the L3RP.

The Commission essentially reasons that a stay of construction is less preferable than allowing Enbridge to spend money to complete the pipeline and then, if the Tribes prevail, ordering it to cease operation. This outcome would risk the worst of all worlds: defeat of the Tribes' objects of appeal, irreparable damage to the environment and Tribes' cultural, religious, and treaty rights, and a tremendous waste of the financial and fiscal resources that would have been committed to construct the L3RP. Rather than provide meaningful relief to Tribes, the practical effect of anticipating a post-construction stay of operation would likely be to bootstrap construction and operation. If the pipeline is completed and Tribes prevail in their claims, Enbridge would likely claim it would be inequitable to idle a brand-new pipeline and waste all of the resources needed to construct it. Therefore, whether or not an order to cease operation would ever be issued by the court is at best speculative. The Commission's assertion that a post-construction order stopping operation would preserve the objects of Tribes' claims is irrational and without merit.

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

The administrative record is replete with evidence of the irreparable harm the L3RP would inflict on Tribes, *supra* at 9-13, and the Tribes and other parties identified this irreparable harm. Tribes' Memorandum in Support of Motion for Stay to the Commission (Add. at 0066-0074); Honor the Earth and The Sierra Club Answer to Petition for reconsideration (Add. 0314-0321).

The Commission's order denying stay includes just two sentences describing, in very generalized terms, the irreparable harms alleged by Tribes:

Movants argued that failing to stay construction of the Project would cause them irreparable harm, citing the potential impacts of the Project as discussed in the Administrative Law Judge report and the Second Revised FEIS, including impacts to Tribal resources.

Order Denying Motion for Stay at 3 (Add. at 0260).

Primarily, Movants point to the potential impacts that construction and operation of the Project could have on natural and Tribal resources along the Project route as potential irreparable harm.

Order Denying Motion for Stay at 5 (Add. at 0262). Thus, the order language includes no meaningful discussion of the types or degree of irreparable harm that Tribes and the environment would suffer. The order then reasons as follows:

The potential harms of construction, however, appear to be less than the alleged harms of operation. A stay would have little impact on the potential harms of operating the Project because it would still be subject to the jurisdiction of the Court of Appeals and any decisions it makes on these matters.

Order Denying Motion for Stay at 5 (Add. at 0262). Thus, in its consideration of irreparable harm, the Order repeats the flawed reasoning used to find that the objects of Tribes' appeal would not be defeated.

Next, the Order finds that while construction would harm the environment, such harms have been "partially mitigated" by a number of permit conditions, with only two being expressly mentioned, the tree replacement program and the tribal cultural properties survey. *Id.* at 5 (Add. at 0262). The order does not discuss how these or other mitigation conditions might redress the irreparable harms identified by the Tribes, nor does the Order actually conclude that these mitigation conditions are sufficient to reduce or eliminate the irreparable harm caused by construction. This conclusion is merely implied. Moreover, the Commission's claim that mitigation will reduce or eliminate irreparable harm is contrary to the findings by the EIS and ALJ Report of irreparable and permanent harm, which findings were made knowing possible mitigation conditions. In the Order's conclusion, the Commission provides the following statement about how it balanced the harms identified by Tribes against other interests:

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.

Order Denying Motion for Stay at 7 (Add. at 0264). Essentially, the Order finds that: (a) the risk of continuing to operate Existing Line 3 due to the potential for it to spill is so great that it outweighs all of the potential irreparable harm caused by construction; (b) undescribed permit mitigation conditions “should reduce the negative impacts of construction and operation;” and (c) that a stay would cause its own environmental impacts, presumably referencing the risk of spills from Existing Line 3 and rail and truck shipments and the impacts of the integrity digs needed during the pendency of a stay. *Id.* at 6, 7 (Add. at 0263, 0264).

The Order Denying Motion to Stay is contrary to law, unsupported by the record, irrational, and arbitrary and capricious, because it:

- fails to adequately identify or discuss the irreparable harm identified by Tribes, thereby making its balancing of harms entirely vague and conclusory;
- asserts that mitigation would reduce the L3RPs impacts but fails to discuss how mitigation might impact the irreparable harm specifically identified by Tribes, and instead just implies that it would, such that the Commission’s reliance on mitigation to reduce or eliminate irreparable harm is not supported by substantial evidence;
- disregards Tribes’ irreparable harm on the irrational grounds that the irreparable harm from a potential oil spill during operation of the new pipeline would be worse than the inevitable harm that would result from construction, and thereby arbitrarily disregards construction-related irreparable harm;

- asserts that the risk of an oil spill from Existing Line 3 during a stay is so great that this alleged potential irreparable harm outweighs the inevitable irreparable harm resulting from construction, but the Commission makes this claim: (a) without any support in the record that an oil spill from Existing Line 3 is imminent or likely to occur during a stay; (b) against Enbridge's express claims that it is operating Existing Line 3 safely and in accordance with federal safety standards, which standards are intended to prevent oil spills, *see* PSA; and (c) without the expertise or jurisdiction needed to make a judgment about the safety of an existing interstate crude oil pipeline and in violation of the PSA's preemption of such judgment; such that the Order Denying Stay is not supported by substantial evidence and is based on an erroneous view of the law; and
- alleges that a stay would result in environmental harm without providing any evidence of the sources, likelihood, or degree of such harm during the pendency of a stay, such that this finding is unsupported by substantial evidence and provides no basis for a reasoned weighing of this risk.

In short, the Commission has entirely failed to show that the Tribes would not suffer irreparable harm, or that this harm is not substantial. Further, all of the reasons provided by the Order Denying Motion for Stay that the irreparable harm to Tribes is not substantial are either irrational, not based on substantial evidence, or contrary to law, such that the Commission's denial of Tribes' Motion for Stay is an abuse of discretion.

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

The Supreme Court requires that the Commission consider whether the respondents “will sustain irreparable or disproportionate injury in case of affirmance” of the L3RP Orders. *Northern Pacific*, 22 N.W.2d. at 574. In addition, this court has considered the interests of “the prevailing party in enforcing the decision and ensuring that they remain “secure in victory” while the appeal is pending. *DRJ*, 741 N.W.2d at 144. Should the court affirm the L3RP Orders, the Commission would not suffer irreparable or disproportionate injury and neither would Enbridge, the oil industry, or the Unions. Construction and operation of the L3RP would proceed such that these parties would remain “secure in victory.”

With regard to the alleged harm that might impact Enbridge, the Shippers, and the Unions, the Order Denying Stay states:

Enbridge estimated the costs of a 6-month stay at \$314 million, and it stated that it would not be able to recover those costs through its federal tariffs, nor could it be made whole through payment of damages from Movants. It also emphasized the importance of starting construction now in order to meet the winter construction requirements contained in its other permits. Enbridge cited other impacts of delays to the Project, including lost property taxes to communities along the route and lost wages for workers on the Project.

* * *

UA and LIUNA argued that the most significant harm from a stay would be lost wages and job prospects for the hundreds of workers who have been preparing to work on the Project for months. They argued that the last-minute nature of the Motion exacerbated the harm to these workers whose lives would be upended by a stay. They stated that some workers

had already moved to the area, invested in preparations and equipment for the Project, and/or passed up job opportunities that may no longer be available.

* * *

[Shippers] maintained that apportionment continues to be a problem on Enbridge's system and a stay would harm Enbridge's customers and the public by forcing more crude oil to be transported by rail at greater expense and risk.

Order Denying Motion for Stay at 4 (Add. at 0261). The Order does not expressly describe any of these harms as "irreparable" or "disproportionate". The Commission's finding of irreparable harm to nonmoving parties in the Order Denying Motion for Stay is contained in just two sentences:

Enbridge estimates the costs of a six-month stay at \$314 million. Contrary to Movants claim, Enbridge maintains that it would not be able to recover losses caused by delayed construction through its federal tariffs.

Order Denying Stay at 6 (Add. at 0263). Therefore, the Order does not discuss whether Enbridge's alleged harms are "irreparable" or "disproportionate," and it does not describe the Shippers' or Unions' claims as "irreparable" or "disproportionate" harms, but rather treats them as public interest concerns. *Id.* at 6 (Add. at 0263). In its conclusion, the Order provides a one-sentence summary of the potential adverse impacts of a stay on nonmoving parties:

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.

Order Denying Stay at 7 (Add. 0264). Again, the Order does not discuss whether the alleged “environmental impacts” are likely or what these impacts specifically might be, or whether the alleged economic impacts are irreparable or disproportionate.

The Order’s finding that nonmoving parties would suffer irreparable harm is an abuse of discretion because it:

- fails to contain any meaningful discussion of the veracity or weight of the economic harm alleged by Enbridge;
- does not mention or analyze whether the alleged economic harm to Enbridge is disproportionate to the harm that Tribes would suffer, or to the overall cost of the L3RP or Enbridge’s financial resources; and
- fails to consider any of the federal precedent finding that economic harm is generally not irreparable and that it should be given less weight than harm to the environment, which is irreparable.

Therefore, the Order’s apparent (though not expressly stated) finding that Enbridge would suffer irreparable harm, and that this alleged economic harm outweighs the irreparable harm to Tribes and the environment in Minnesota, is an abuse of discretion.

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

The court should stay the Commission’s final L3RP order because the Tribes have raised a number of important questions of law. The *Northern Pacific* standard states that a stay “should be granted . . . where important questions of law are raised, which, if

decided in favor of appellants . . . will require reversal.” *Northern Pacific*, 22 N.W.2d at 574, quoting 4 C.J.S. Appeal and Error § 636 (1937). The Minnesota courts have not fully described what constitutes an “important question of law” but the federal courts have interpreted the phrase “substantial question of law or fact” to mean a question that is “close” or could be decided either way. *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985); see also *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985). The Third Circuit has interpreted “substantial question” to mean “one that is novel, has not been decided by controlling precedent, or is fairly doubtful.” *United States v. Miller*, 753 F.2d 19, 22-24 (3d Cir. 1985). Either interpretation supports the grant of a stay here. Tribes have raised the following important questions of law, all of which are novel and lacking any controlling precedent, such that the court should grant a stay to preserve its jurisdiction over these questions.

i. Whether the Commission Violated Minn. Stat. § 216B.243, Subd. 3, Minn. R. 7853.0010, subp. 8, and Minn. R. 7853.0130.A(1) by Failing to Require a Forecast of Demand For Crude Oil Within the Meanings of These Laws.

This issue strikes at the heart of the purpose of the certificate of need requirements in Minn. Stat. § 216B.243. Specifically, the issue raised is whether the Commission must base a finding of need on demand by energy end users, as opposed to the Canadian oil industry’s desire for transportation capacity based on industry forecasts of crude oil extraction and supply. Moreover, this issue relates not just to oil pipelines, but to need decisions for electric power plants, high-voltage transmission lines, and intrastate natural gas facilities, because the need for all such new facilities is determined pursuant to Minn.

Stat. § 216B.243. The Commission's disregard for energy end user demand in favor of using crude oil supply data coupled with an assumption of demand establishes a dangerous precedent that would allow the state's electric and natural gas utilities to construct new infrastructure based not on consumer demand for energy but on industry growth aspirations and development plans, either within or outside of Minnesota.

The plain meaning of Minn. Stat. § 216B.243, subd. 3(1), requires the Commission to focus on consumer demand, not industry commercial expansion plans. This focus protects the public interest. The court should interpret Minn. Stat. § 216B.243, subd. 3(1), Minn. R. 7853.0130.A(1), and Minn. Rule 7853.0010, subd. 8, and resolve whether a determination of need must be based on the accuracy of a forecast of demand for energy by its end users, or whether such determination may be based on a forecast of energy supply and an assumption of end user demand.

ii. Whether the Commission Violated Minn. R. 7853.0520 by Allowing Enbridge to Substitute an Assumption of Demand for Crude Oil Rather Than Provide the Data and Calculations Needed to Determine the Accuracy of its Forecast.

This claim asks whether the Commission may rely on oil industry forecasts that are unsupported by release of underlying data and calculations. Specifically, it is undisputed that the forecast relied on by Enbridge in the L3RP CN docket was produced by the Canadian Association of Petroleum Producers, which does not release any of the data or calculations used to create its forecast, thereby making it impossible to quantifiably verify or manipulate the forecast using different data and assumptions, as required by Minn. R. 7853.0520. The Commission's reliance on an unverifiable industry

forecast creates precedent that other energy facility proposals subject to Minn. Stat. § 216B.243, including electric and natural gas proposals, need not release the forecast data, calculations, and assumptions used to create their forecasts of demand, thereby allowing the Commission to rely on self-serving industry black-box forecasts. The court should interpret Minn. R. 7853.0520 to determine whether it requires disclosure of the data, assumptions, and calculations for forecasts of demand, or whether the Commission may instead rely nontransparent forecasts.

iii. Whether the Commission May Base Its Decision to Replace Existing Line 3 on Pipeline Safety Concerns, Even Though Pipeline Safety Is Not a Decision Criterion Under Minn. Stat. § 216B.243, Subd. 3, or Minn. R. 7853.0130.

This claim raises an important question about the proper scope of analysis and decision factors that may be considered under the CN statute and regulations in Minn. Stat. ch. 216B and Minn. R. Ch. 7853. Tribes claim that the legislature did not intend for the Commission to determine the need for a new pipeline based on pipeline safety concerns, and that the Commission has no express jurisdictional authority over pipeline safety and therefore no expertise to make safety-based determinations. Yet, the record shows that the Commission gave pipeline safety concerns great weight in its decision to grant a CN, to the point that pipeline safety was the Commission’s primary reason. The Court should determine whether the Commission relied on a decision factor “not intended by the legislature,” *Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Com'rs*, 713 N.W.2d 817, 832 (Minn. 2006), and therefore “in excess of the statutory authority or jurisdiction of the agency” Minn. Stat. § 14.69(b).

iv. Whether the Commission’s Decision to Replace Existing Line 3 for Pipeline Safety Reasons Is Preempted by the Federal Pipeline Safety Act, 49 U.S.C. § 60101, et seq.

This claim raises an important question about whether the Commission violated federal law by issuing an order to replace an interstate crude oil pipeline due to safety concerns, because “replacement” of such pipelines is expressly within the scope of and preempted by the PSA. 49 U.S.C. §§ 60101; 60112(d); 60117(l); *see also* Brief and Addendum of Relators Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and The Sierra Club at 28-33. The State of Minnesota could not enact a statute that authorizes the Commission or any other agency to order the replacement of an interstate crude oil pipeline due to safety concerns, as such legislation would be preempted by the PSA. Yet, this is exactly what the Commission did. The Court should determine whether the Commission’s order to replace Existing Line 3 based on safety concerns is in violation of federal law.

v. Whether MEPA Requires Analysis of Impacts to Particular Critical and Unique Resources, or Whether Agencies May Use a “Representative” Impact Methodology That Fails to Analyze Such Impacts.

The record shows that the L3RP creates a potential risk of oil spills into Lake Superior, the St. Louis River Estuary, and the Duluth-Superior Harbor, from a number of potential spills sites in Wisconsin that are close to these waters, and that the spread of oil from such spills would put critical and unique resources at risk. Yet, the EIS rejected analysis of oil spills from such nearby sites in favor of a “representative” site over 30 miles upstream from Lake Superior. Since oil spill impacts are attenuated over

geographical distance, the “representative” site chosen by the Commission to evaluate a spill into the Lake, Harbor, and Estuary is simply too far upstream to model the potential adverse impacts to these resources. The Court should determine if MEPA and its regulations requires analysis of impacts to specific critical resources that the record shows are at risk.

vi. Whether the 2RFEIS Complies With *In re Applications of Enbridge Energy*, Which Required the Commission to Analyze “How an Oil Spill From Enbridge’s Line 3 Project Would Impact Lake Superior and Its Watershed,” Including the “Specific Concerns” Raised By Relators.

Tribes claim that the 2RFEIS failed to comply with this court’s decision in *In re Applications of Enbridge Energy*, 930 N.W.2d at 27, 36, because it chose a single oil spill modeling location in the Lake Superior watershed too far upstream to analyze the potential impacts of an oil spill from the L3RP on Lake Superior, the St. Louis River Estuary, and Duluth-Superior Harbor, rather than analyze one of a number of potential spill locations much nearer to these critical waters. The court should determine if the 2RFEIS complies with its prior opinion.

Accordingly, the Tribes have raised multiple important questions of law that strike at the heart of the legislative purpose and meaning of the statutory and regulatory language under which the Commission approves large energy facilities, including Minn. Stat. § 216B.243, Minn. R. ch. 7853 and MEPA. Such decisions are among the most important and controversial decisions made by the Commission, such that it is in the public interest to ensure that the Commission implements these laws in accordance with legislative intent. If any one of these questions of law is decided in Tribes’ favor, the

Commission's error would be significant and require remand for additional hearings in accordance with law. A stay pending resolution of judicial appeal is necessary to preserve these issues for judicial review.

5. A Stay Is Necessary to Protect the Court's Jurisdiction

The Supreme Court has twice stated that a stay "should be granted . . . to protect the appellate court's jurisdiction." *Northern Pacific*, 22 N.W.2d at 75; *Webster*, 891 N.W.2d at 292. Yet, the Order Denying Motion to Stay did not consider this issue. While the reason for such omission is not certain, during their deliberations on the Motion for Stay at least two of the Commissioners expressly stated that they deferred a decision on this factor to the court:

Commissioner Tuma: "when it comes to the question of protecting their jurisdiction and the mootness of appeal, the Court of Appeals . . . know how to . . . stay our orders and permits. And so if you're going to be in front of them within a few weeks, I don't know what they need me to do to protect their authority."

Commission Meeting Transcript, December 4, 2020, at 18 (Add. at 0188); *see also* Commissioner Tuma statements at 19, 64 (Add. at 0189, 0234).

Commissioner Sullivan: "[t]he second part of my decision is are we making the Court of Appeals' decision, future decision moot. And I look at that very basically and pragmatically as we expedited this request. . . . [W]e are doing this as fast as humanly possible. We are doing this so that the Court of Appeals has time to review our decision and make their own determination."

Commission Meeting Transcript, December 4, 2020, at 63 (Add. at 0233). Accordingly, the court should not reject consideration of this factor based on an assumption that the Commission did not find it relevant.

The court should stay the Commission's Order Approving the CN, RP, and 2RFEIS because doing so is necessary to preserve the court's jurisdiction over the important questions of law raised by Tribes. The situation here is similar to that in *Webster*, because it too concerns actions that cannot be undone. A pipeline cannot be unconstructed any more than publicly disclosed confidential information can be made unpublic. Without a stay, Enbridge will construct the L3RP under authority of the Commission's L3RP Order, and complete this construction within six to nine months. (Add. at 0039). Absent a stay, by the time of a court order in June or July 2021, construction would be finished or nearly finished; the Tribes' environment, resources, and rights would be damaged or destroyed; and the Tribes' claims rendered moot, such that a judicial opinion would be without practical effect. A remand next summer would be pointless, because there is no utility in determining whether a pipeline should be constructed that has already been constructed; there is no ability for a *post hoc* MEPA Lake Superior oil spill analysis to influence the Commission's decisions on the CN and RP before a decision on need is made; and no use in determining that the Commission is barred by law from ordering the replacement of existing Line 3 for safety reasons if it has already been replaced.

The legislature has assigned this court the responsibility to interpret the laws under which the Commission issues certificates of need and environmental impact statements.

Minn. Stat. §§ 14.63, 116D.04, subd. 10, 216B.52. Absent a stay, Tribes claims would become moot and the court would not exercise its responsibility under law. Therefore, the court should preserve its jurisdiction and stay the L3RP Order.

6. The Balance of Equities Favors a Stay.

The court should grant a stay because doing so would: (a) prevent Tribes' appeal from becoming moot, (b) protect Tribes from irreparable harm, (c) not cause respondents irreparable or disproportionate injury in the case of affirmance, (d) preserve important questions of law, and (e) serve the public interest by protecting the court of Appeals' jurisdiction over Tribes' claims. All of these factors weigh heavily in Tribes' favor.

If no stay issues, the L3RP would almost certainly be substantially complete by the time of a court decision in approximately June or July of 2021, at which time the Tribes will have suffered substantial irreparable injury and remand to the Commission for hearings on the need for the project and its environmental impacts would be hypothetical and pointless. Moreover, a failure to grant a stay would prevent this court from exercising its jurisdiction over the important legal questions raised by Tribes.

With regard to irreparable harm, there is no doubt that construction of the L3RP would cause irreparable harm to the Tribes. Irreparable harm is shown by the administrative record including: (a) the findings of irreparable and permanent harm expressly identified in Administrative Law Judge's findings of fact; (b) the identification of permanent, irreparable, and significant harm by the 2RFEIS; and (c) the extensive

testimony of indigenous people and others of the irreparable harm that would be caused by the L3RP.

The Tribes also raise multiple serious and difficult questions of law that strike at the heart of the Minn. Stat. § 216B.243 need analysis, the Commission's scope of jurisdiction over pipeline safety, and the efficacy of the Commission's environmental impact analysis for oil spill threats to Lake Superior, Duluth-Superior Harbor, and the St. Louis River Estuary. Should the court find the Commission in error on any of these claims, the remedy would be remand to the Commission for additional hearings in accordance with law. The court should fulfill its jurisdictional role under Minn. Stat. §§ 14.65, 116d.04, subd10, and 216B.52 by considering and issuing a decision on all of these issues. Since the Tribes have raised serious and difficult questions of law, this factor also weighs in their favor.

Tribes have also proven that a stay is necessary to protect the Court's jurisdiction, because without a stay Enbridge will construct and likely finish the project before a court decision on Tribes' claims, rendering such decision moot and irrelevant.

Finally, the Commission has failed to cite substantial evidence that a stay would irreparably harm Enbridge and other parties, or harm them disproportionately relative to the damage that construction would inflict on Tribes, or disproportionately relative to overall project costs and Enbridge's financial resources. The Commission's lack of specificity in its findings of irreparable harm to Tribes and nonmoving parties means that its order is not "sufficiently detailed to demonstrate that all relevant factors were actually considered." *DRJ*, 741 N.W.2d 141, 145, *quoting Stich*, 435 N.W.2d at 53. Moreover,

should the Tribes not prevail, Enbridge and other parties in opposition would be secure in their victory and construction could resume, followed by operation of the L3RP, potentially for decades. See *id.*

Therefore, all of the *Northern Pacific* criteria weigh heavily in Tribes' favor, such that the court should stay the Commission's order approving the CN, RP, and EIS.

II. THE COURT SHOULD NOT REQUIRE A SECURITY BOND

The court should not impose a security bond on the Tribes because:

- R. Civ. App. P. 108.02, subd. 2, exempts “governmental bodies,” including Tribes, from security bonds;
- Minn. Stat. § 216B.53 authorizes bonds only against “public utilities,” which Tribes are not;
- MEPA authorizes bonds only under Minn. Stat. § 562.02, which is not applicable here; and
- the circumstances here are very similar to those in *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977), such that it is in the public interest to not impose a security bond. See also *Coop. Power Ass'n v. Eaton*, 284 N.W.2d 395, 399 (Minn. 1979) (requiring no supersedeas bond for stay of district court order condemning property for high-voltage transmission line).

For a more detailed discussion of the foregoing arguments related to security bonds, see Tribes' Memorandum in Support of Motion for Stay at 55-58 (Add. at 0097-0102).

REQUESTED RELIEF

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

- 1) find the Commission's December 9, 2020, Order Denying Motion for Stay Pending Appeal, to be an abuse of discretion;
- 2) stay the Commission's Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified; and
- 3) deny any request for a security bond that might be proposed.

Dated: December 29, 2020

Respectfully submitted,

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