

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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Chair
Commissioner
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Commissioner

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

MPUC Docket No. PL-9/CN-14-916

**THE MINNESOTA DEPARTMENT OF COMMERCE,
DIVISION OF ENERGY RESOURCES'S
REQUEST FOR RECONSIDERATION**

May 21, 2020

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In June 2019, the Minnesota Court of Appeals reversed the Minnesota Public Utilities Commission’s decision on the adequacy of the Final Environmental Impact Statement (FEIS) for Enbridge Energy’s Line 3 Replacement Project.¹ The court subsequently dismissed consolidated appeals of the Commission’s January 2019 decision to issue a Certificate of Need (CN) for the project, concluding that “the decision in the FEIS appeals has rendered the CN invalid.”²

After commencing additional proceedings on remand, the Commission issued a new order on the adequacy of the Second Revised FEIS, CN, and Route Permit on May 1, 2020.³ This new order incorporated by reference the Commission’s previous CN orders,⁴ which the Commission also reissued on May 1.⁵ Commissioner Schuerger dissented, finding that Enbridge failed to meet its burden of proof, in part because it “failed to provide an accurate forecast of demand for the type energy that would be supplied by the proposed facility.”⁶

¹ *In re Applications of Enbridge Energy, Ltd. P’ship, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minn. from the N.D. Border to the Wis. Border*, 930 N.W.2d 12 (Minn. Ct. App. 2019).

² *In re Application of Enbridge Energy, Ltd. P’ship, for a Certificate of Need for the Line 3 Replacement Project in Minn. from the N.D. Border to the Wis. Border*, Nos. A19-0510, A19-0599, A19-0602, A19-0617 (Minn. Ct. App. Oct. 29, 2019) (Attachment). The Court of Appeals ordered that “[n]othing in this order shall preclude subsequent appeals from a decision by the commission issuing a CN after completion of additional environmental review required by this court’s FEIS decision.” *Id.* at 4.

³ *In re Applications of Enbridge Energy, Ltd. P’ship, for a Certificate of Need and Routing Permit for the Proposed Line 3 Replacement Project in Minn. from the N.D. Border to the Wis. Border*, MPUC Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, ORDER FINDING ENVIRONMENTAL IMPACT STATEMENT ADEQUATE, GRANTING CERTIFICATE OF NEED AS MODIFIED, AND GRANTING ROUTING PERMIT AS MODIFIED (May 1, 2020) [hereinafter May 2020 Order].

⁴ *Id.* at 14.

⁵ *See In re Applications of Enbridge Energy, Ltd. P’ship, for a Certificate of Need and Routing Permit for the Proposed Line 3 Replacement Project in Minn. from the N.D. Border to the Wis. Border*, MPUC Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, REISSUANCE NOTICES (May 1, 2020); *Id.*, ORDER GRANTING CERTIFICATE OF NEED AS MODIFIED AND REQUIRING FILINGS (Sept. 5, 2018) [hereinafter September 2018 Order]; *Id.*, ORDER APPROVING COMPLIANCE FILINGS AS MODIFIED AND DENYING MOTION (Jan. 23, 2019).

⁶ May 2020 Order at D-1.

The Minnesota Department of Commerce requests that the Commission reconsider its decision to grant Enbridge a CN, pursuant to Minn. Stat. § 216B.27 (2018) and Minn. R. 7829.3000 (2019), because the decision is affected by legal errors. The Commission should address two legal deficiencies. First, Minnesota law requires that the Commission consider the accuracy of an applicant’s long-range energy demand forecast for the type of energy that would be supplied by the proposed project.⁷ Because Enbridge did not submit a long-range demand forecast, the Commission did not evaluate the accuracy of a demand forecast. Enbridge instead relied on a pipeline utilization forecast that merely assumed that demand would continue at 2016 refinery capacity for the forecast period. Enbridge’s failure to introduce a demand forecast is a material error that cannot be cured by other evidence in the record. Second, despite Enbridge’s obligation to support its application with a demand forecast, the Commission shifted the burden of proof to other parties to introduce a long-range demand forecast and provide evidence of lower future demand. Therefore, the Commission’s decision is affected by legal errors, and the Department requests that the Commission reconsider. When applying the correct legal standards, the Commission should deny the CN.

ARGUMENT

I. BASIS FOR RECONSIDERATION REQUEST

A petition for reconsideration must identify the specific grounds relied upon and claimed errors.⁸ The Commission has generally reconsidered a decision when it finds there are new

⁷ Minn. Stat. § 216B.243, subd. 3(1) (2018).

⁸ Minn. R. 7829.3000, subp. 2 (2019); *see also* Minn. Stat. § 216B.27, subd. 2 (2018).

issues, new and relevant evidence, or errors or ambiguities in the prior order, or when the Commission is otherwise persuaded that it should reconsider the decisions set forth in its order.⁹

The Department requests that the Commission reconsider its decision to grant Enbridge a CN because it contains legal errors. First, the Commission granted a CN for a crude oil pipeline without evaluation, or consideration, of a long-range demand forecast of crude oil as required by Minn. Stat. § 216B.243, subd. 3(1), and Minn. R. 7853.0130 A(1). This error is material and cannot be corrected with other evidence in the record. Second, the Commission shifted the burden of proof to parties other than Enbridge to provide evidence of lower future demand for the type of energy that would be supplied by the proposed project. The Commission’s May 2020 Order does not cure these legal errors.

II. THE COMMISSION MATERIALLY ERRED BY FAILING TO EVALUATE A STATUTORILY REQUIRED DEMAND FORECAST FOR THE TYPE OF ENERGY THAT WOULD BE SUPPLIED BY THE PROPOSED FACILITY.

The Commission should reconsider its CN decision because it did not evaluate a demand forecast for energy to be supplied by the proposed project. Minnesota statute requires the Commission to evaluate “the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based”¹⁰ The Commission’s rules similarly require it to consider a demand forecast, stating “A certificate of need shall be granted to the applicant if it is determined that:

- A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant’s customers, or to the people of Minnesota and neighboring states, considering:

⁹ See, e.g., *In re Application of Minn. Power for Auth. to Increase Rates for Electric Serv. in Minn.*, MPUC Docket No. E-015/GR-16-664, ORDER GRANTING RECONSIDERATION IN PART, REVISING MARCH 12, 2018 ORDER, AND OTHERWISE DENYING RECONSIDERATION PETITIONS at 2 (May 29, 2018).

¹⁰ Minn. Stat. § 216B.243, subd. 3(1).

(1) the accuracy of the applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility”¹¹

Repeated references to “demand” throughout the CN statute and rules underscore the fundamental importance of energy demand to the Commission’s evaluation of need for a proposed facility.¹² The evaluation of the project rests on the Commission’s critical inquiry of “demand forecasts.”¹³ “Demand,” in relation to crude oil pipelines, means “that quantity of a petroleum product from the applicant’s facilities for which there are willing and able purchasers.”¹⁴ The Commission’s rules define “forecast” as “a prediction of future demand for some specified time period.”¹⁵

The Commission cannot dispense with the statutory requirement that a CN applicant must provide a long-range energy demand forecast for the Commission’s evaluation. Yet the Commission concluded that Enbridge met its burden under Minn. R. 7853.0130 A(1).¹⁶ Because the Commission reached this conclusion without evaluating a demand forecast for crude oil, it erred.

A. Because the Applicant’s Forecasts Are Not Demand Forecasts, the Commission’s Decision to Grant a CN Based on Those Forecasts Was Legal Error.

Minnesota law requires that the Commission evaluate a long-range energy demand forecast in deciding to grant a CN.¹⁷ But here the Commission did not evaluate a demand

¹¹ Minn. R. 7853.0130 A(1) (2019).

¹² See Minn. Stat. § 216B.243, subd. 3(1)–(2), 3(4), 3(6); see also Minn. R. 7853.0130 A(1), A(3)–(4).

¹³ See Minn. Stat. § 216B.243, subd. 3(1); Minn. R. 7853.0130 A(1).

¹⁴ Minn. R. 7853.0010, subp. 8 (2019).

¹⁵ *Id.*, subp. 9.

¹⁶ May 2020 Order at 14; see Minn. R. 7853.0130 A.

¹⁷ Minn. Stat. § 216B.243, subd. 3(1); Minn. R. 7853.0130 A(1).

forecast for energy (crude oil) that would be supplied by the proposed project. The Commission, in its May 2020 Order, appears to recognize the absence of a demand forecast, noting that it “relied on the several forecasts in the record showing that oil supply would continue to increase throughout the forecast period, as well as evidence that oil supply would continue to be equal to or less than demand during the forecast period.”¹⁸ But in its reissued September 2018 Order, the Commission incorrectly stated that “Enbridge forecasted crude oil demand over the next 15 years in the Muse Stancil Report”¹⁹ The Muse Stancil Report does not forecast crude oil demand, nor does it incorporate crude-oil demand forecasts.²⁰ It therefore is not the demand forecast required by Minn. Stat. § 216B.243, subd. 3(1), and the Commission cannot rely on it to fulfill its statutory obligation to evaluate a demand forecast.²¹

The Muse Stancil Report is based primarily on forecasts of *supply* of heavy crude oil from Western Canada, as the Commission recognized.²² Instead of including a demand forecast as an input to its modeling, the Muse Stancil Report uses 2016 refinery capacity as a static input for each year until 2035.²³ More specifically, the Muse Stancil Report assumes that refineries operating in 2016 will not only continue to operate through 2035, but also will refine at capacity

¹⁸ May 2020 Order at 12.

¹⁹ September 2018 Order at 13.

²⁰ *See, e.g.*, Ex. EN-15, sched. 2 at 60 (Earnest Direct). Mr. Earnest’s identification of inputs used in his model to forecast utilization show that he did not include a demand forecast. *See id.* In Rebuttal Testimony, Mr. Earnest indicated that he did not include in his modeling a forecast of demand for refined products. *See* Ex. EN-37 at 3 (Earnest Rebuttal). As Dr. Fagan testified, it is a mistake to ignore global refined product demand. Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17 (Fagan).

²¹ Enbridge also introduced an apportionment forecast, which relied on the Muse Stancil Report and is therefore also not a demand forecast. *See* Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 56 (Glanzer). Enbridge’s apportionment forecast is discussed in section II.B below.

²² September 2018 Order at 13 (“A key input into the model is the CAPP 2016 crude oil supply forecast . . .”).

²³ *See* Ex. EN-15, sched. 2 at 60 (Earnest Direct) (listing the inputs to the model, including “[t]he crude oil capacity of each refinery as well as refinery specific constraints”).

for the entire period.²⁴ The Muse Stancil Report’s modeling also allocates any crude that exceeds U.S. and Canadian refinery capacity to be exported to modeled refineries in Northeast Asia, Europe, and India, which are also assumed to operate at capacity.²⁵ That is, the Muse Stancil Report assumes that refineries will demand all the crude oil they are capable of refining until 2035 regardless of the level of global demand for refined products.

Rather than assisting the Commission in determining whether the energy supplied by the proposed project will be needed during the forecast period, the Muse Stancil Report’s assumption of continuous high demand assumes the project is needed. A model that assumes refinery customers will demand all the oil they are capable of refining cannot also forecast that same demand.

The statute and rule require that Enbridge provide a long-range demand forecast and that the Commission review that forecast for its accuracy. The Department urges the Commission to reconsider its CN decision and determine that Enbridge has not provided the requisite long-range energy demand forecast and therefore has not met its burden of proof.

B. The Commission’s Failure to Evaluate a Long-Range Energy Demand Forecast Is a Material Error that Cannot Be Cured with Other Evidence.

An applicant’s obligation to submit a long-range energy demand forecast is central to the statute’s and rule’s purpose and language, and the forecast is a central component of assessing

²⁴ Ex. EN-15, sched. 2 at 69 (Earnest Direct). Mr. Earnest explains that for the U.S. refineries, the report used crude capacities from the Energy Information Agency’s *Refinery Capacity 2016 Report*, adjusted to incorporate known refinery capacity expansions, and non-U.S. refinery capacity was obtained from the Oil & Gas Journal’s *2016 Worldwide Refining Survey* and supplemented with “information from company and other public sources.” *See id.*

²⁵ Ex. DER-4, sched. 1 at 18 (Fagan Direct); Ex. EN-15, sched. 2 at 59 (Earnest Direct). While the model does contain some constraints on the amount of oil available for refineries and export, specifically the confines of “existing and expected pipeline, rail loading and unloading, barge, and refinery capacity constraints,” these constraints do not transform it into a demand forecast. *See* Ex. EN-15, sched. 2 at 59 (Earnest Direct).

the need for a large energy facility. The failure to consider a long-range energy demand forecast is therefore a material legal error. The Commission cannot cure its failure to evaluate a demand forecast with other evidence in the record, including through (1) evidence that oil supply will continue to be equal to or less than demand during the forecast period, (2) a forecast of future apportionment; or (3) evidence of past apportionment.

The Commission concluded erroneously that Enbridge’s inclusion of supply forecasts, but not demand forecasts, is sufficient to meet the requirements of Minn. Stat. § 216B.243, subd. 3(1), and Minn. R. 7853.0130 A(1). The September 2018 Order states: “In previous pipeline proceedings it was considered reasonable to rely on supply forecasts to establish that demand for refined product, and therefore demand for crude oil, would continue to increase, or at least not decrease for the foreseeable future.”²⁶ Similarly, the Commission’s recent justification in its May 2020 Order that supply forecasts plus evidence that “oil supply would continue to be equal to or less than demand during the forecast period,” is legally flawed and cannot substitute for a demand forecast.²⁷ In making this determination, the Commission not only fails to apply the plain language of the statute, which requires a demand forecast—not a supply forecast plus other evidence—but also reaches an unreasonable interpretation that is not supported by the evidence.²⁸

²⁶ September 2018 Order at 14. Although this order does not identify the timing of these previous proceedings, it should be noted that a key change in federal law in late 2015 allowed export of U.S. crude oil to global markets. The Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, div. O, title I, § 101, 129 Stat. 2242 (2015) (codified at 42 U.S.C. § 6212a).

²⁷ May 2020 Order at 12.

²⁸ See *In re Temporary Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 45 (Minn. Ct. App. 2010) (“We decline to give judicial deference to an administrative decision interpreting statutory language when the interpretation contravene[s] plain statutory language, or where there are compelling indications that the agency’s interpretation is wrong.” (quotation omitted)).

The Commission did not identify the record evidence it believes constitutes “evidence that oil supply would continue to be equal to or less than demand during the forecast period.”²⁹ But even Enbridge’s witness Mr. Earnest admitted, “it is the future demand for crude oil that will drive the utilization of the Enbridge Mainline.”³⁰ Also, ample record evidence established that global oil gluts can and do cause oil supply to exceed demand, sometimes for sustained periods. For example, Dr. Fagan testified that ignoring the possibility of global refined-product gluts was a mistake because gluts may cause less-efficient refineries to close.³¹ Mr. Earnest summarily dismissed Dr. Fagan’s concern as “a rather apocalyptic scenario whereby U.S. refined product demand is weak, refined product cannot be easily exported, and there is a simultaneous glut of refined products globally.”³² But Dr. Fagan supported her conclusion with historical periods of prolonged low demand: First, the 2008 global financial crisis, which reduced the number of refineries operating in the U.S.³³ Second, weak demand for refined products triggered by the late-1970s/early-1980s oil crisis resulted in a “large overhang of refining capacity,” which took the industry decades to work off.³⁴ The Commission should not dismiss the likelihood of global

²⁹ May 2020 Order at 12. The Commission must state the facts on which it relies with a reasonable degree of specificity. *Hibbing Taconite Co. v. Minn. Pub. Serv. Comm’n*, 302 N.W.2d 5, 12 (Minn. 1980).

³⁰ Ex. EN-37 at 5 (Earnest Rebuttal). Mr. Earnest criticized Dr. Fagan for emphasizing the importance of global demand for refined products. But Dr. Fagan agreed that demand for crude oil will drive utilization for the new Line 3. Dr. Fagan simply took her analysis one degree further, pointing out that to determine how much oil refineries would consume (demand), it was prudent to review demand for the products those refineries produce. As Dr. Fagan explained, “no one consumes crude oil except a refinery; and a refinery does not consume crude oil unless refined products are expected to be sold profitably” and therefore “[d]emand for refined products drives demand for crude oil.” Ex. DER-7, sched. 1 at 5 (Fagan Surrebuttal).

³¹ See DER-4, sched. 1 at 30 (Fagan Direct).

³² EN-37, sched. 1 at 46 n. 42 (Earnest Rebuttal).

³³ See Ex. DER-7, sched. 1 at 5 (Fagan Surrebuttal).

³⁴ See *id.* at 5-6.

oil and refined-product gluts, or even “apocalyptic” scenarios, as gluts have occurred in the past and will likely occur again during the forecast period.

In addition to stating that supply forecasts can substitute for a demand forecast, the Commission found that the “evidence of significant, persistent apportionment” demonstrated that Enbridge satisfied Minn. R. 7853.0130 A.³⁵ Again, the Department disagrees. Enbridge’s apportionment forecast cannot compensate for its failure to submit a demand forecast under criteria A of the rule because this forecast was based on the Muse Stancil Report, and thus also assumed crude oil demand would remain at the level of 2016 refinery capacity for the forecast period.³⁶ Enbridge’s apportionment forecast, which is based on the Muse Stancil Report utilization forecast, therefore also suffers from the same failings of the Muse Stancil Report.

The Commission similarly cannot rely on evidence of past apportionment to make a finding under part A of the rule, as it did in finding that “there has been and likely will continue to be apportionment on Enbridge’s system, indicating that the current capacity of the system is not sufficient and the Project is needed to alleviate that apportionment.”³⁷ Part A requires the Commission to determine that “the probable result of denial would adversely affect the *future* adequacy, reliability, or efficiency of energy supply”³⁸ The Commission should also reconsider this conclusion.

³⁵ September 2018 Order at 15. The Commission’s May 2020 Order similarly states that “there has been and likely will continue to be apportionment on Enbridge’s system.” May 2020 Order at 14.

³⁶ Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 56 (Glanzer).

³⁷ May 2020 Order at 14. The September 2018 Order similarly stated, “[T]he forecasts in the record, together with the evidence of significant, persistent apportionment, shows that denial of the Project would adversely impact the adequacy, reliability, and efficiency of delivery of crude oil to all of Enbridge’s customers by continuing and possibly exacerbating the significant levels of apportionment of heavy crude oil on the Mainline System.” September 2018 Order at 15.

³⁸ Minn. R. 7853.0130 A (emphasis added); *see also* Minn. R. 7853.0010, subp. 9 (defining a forecast as a “prediction of future demand”).

The CN statute’s demand-forecast requirement cannot be supplanted by supply forecasts plus evidence that oil supply will not exceed demand during the forecast period, by an apportionment forecast, or by evidence of past apportionment. By determining that other non-demand forecast evidence could supplant the CN statute’s clear requirement, the Commission failed to apply the plain language of the statute and instead applied a standard that is neither a reasonable interpretation of Minn. Stat. § 216B.243, subd. 3(1), nor supported by the record.

III. THE COMMISSION IMPROPERLY SHIFTED ENBRIDGE’S BURDEN TO OTHER PARTIES TO PROVIDE A DEMAND FORECAST.

The CN statute places the burden of proving need for the facility on the applicant.³⁹ “[T]he burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.”⁴⁰ An applicant therefore has the burden of producing a long-term demand forecast for crude oil because it is a statutory obligation to support a justification of need.⁴¹ Likewise, the CN rule clearly recognizes this burden of production, by requiring consideration of “the accuracy of the *applicant’s* forecast of demand for the type of energy that would be supplied by the proposed facility.”⁴²

The Commission’s May 2020 Order appears to recognize that the Commission did not evaluate a demand forecast in making its decision, by stating that it instead relied on supply

³⁹ Minn. Stat. § 216B.243, subd. 3 (“No proposed large energy facility shall be certified for construction . . . unless the applicant has otherwise justified need.”); *see also* Minn. R. 1400.7300, subp. 5 (2019) (“The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.”).

⁴⁰ McCormick on Evidence § 337, Vol. 2 at 648 (7th Ed. 2013).

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

⁴² Minn. R. 7853.0130 A(1) (emphasis added).

forecasts plus evidence that supply would not exceed demand for the forecast period.⁴³ But the September 2018 Order found that intervenors failed to introduce into the record “sufficient evidence of the extent to which [] forces could reduce demand during the forecast period.”⁴⁴ In so finding, the Commission inappropriately shifted the burden to other parties to prove that demand would decrease to show the project is not needed.⁴⁵ Enbridge’s failure to provide a long-range energy demand forecast as required by Minn. Stat. § 216B.243, subd. 3(1) is Enbridge’s failure to meet its burden of production, not other parties’ failure to sufficiently persuade the Commission on the ultimate merits.⁴⁶

Because Enbridge has failed to introduce a demand forecast, Enbridge has failed to meet its burden of production. The Commission essentially applied a rebuttable presumption that “demand for crude oil, would continue to increase, or at least not decrease, for the foreseeable future.”⁴⁷ Such a presumption has no basis in the CN statute or rule.⁴⁸ By creating a rebuttable presumption of static crude oil demand throughout the forecast period, the Commission shifted the burden from Enbridge to intervenors. Because the regulatory framework does not require intervenors to produce evidence showing that an applicant’s project is not needed, this burden shifting is legal error and the Commission should reconsider its CN decision to correct it.

⁴³ See May 2020 Order at 12. As discussed above, Enbridge’s utilization forecast (the Muse Stancil Report) includes as inputs crude oil supply forecasts and assumes that refineries will operate at 2016 capacity through the forecast period.

⁴⁴ September 2018 Order at 14.

⁴⁵ See *id.* at 14–15; see also Minn. Stat. § 216B.243, subd. 3.

⁴⁶ The burden of production is “[a] party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or directed verdict.” *Burden of Production*, Black’s Law Dictionary (11th Ed. 2019).

⁴⁷ September 2018 Order at 14.

⁴⁸ Minn. R. 7853.0130 A(1).

CONCLUSION

The Commission committed legal error by failing to apply the plain language of Minn. Stat. § 216B.243, subd. 3(1) and Minn. R. 7853.0130, which require an applicant for a CN for large energy facility to provide a demand forecast for the Commission to evaluate. The demand-forecast requirement lies at the core of the CN statute and rule and cannot be substituted with other evidence. The Commission instead shifted the burden to other parties to produce evidence showing that demand would decrease during the forecast period, compounding its legal error. The Department respectfully requests that the Commission reconsider its decision to grant a CN to Enbridge.

Dated: May 21, 2020

Respectfully submitted,

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DEPARTMENT OF COMMERCE,
DIVISION OF ENERGY RESOURCES

FILED

October 29, 2019

**OFFICE OF
APPELLATE COURTS**

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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.

ORDER

**A19-0510
A19-0599
A19-0602
A19-0617**

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Jesson,
Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

These consolidated certiorari appeals are taken from an order by respondent Minnesota Public Utilities Commission (the commission) granting a certificate of need (CN) to respondent Enbridge Energy Limited Partnership (Enbridge) in relation to Enbridge's Line 3 pipeline project. Four other appeals have been taken in relation to the project, three (A18-1283, A18-1291, A18-1292) from the commission's decision determining adequate a final environmental-impact statement (FEIS) for the project, and one (A19-0267) from the commission's decision issuing a routing permit (RP) for the project.

On June 3, 2019, this court issued a decision reversing the commission's decision determining adequate a final environmental-impact statement (FEIS) for the project. *See In re Enbridge Energy, Ltd. P'ship*, 930 N.W.2d 12, 17 (Minn. App. 2019). And on June 28, 2019, we issued an order staying this appeal, pending further order of this court, on the ground that judicial economy would be served by waiting for the resolution of any proceedings in the supreme court on the FEIS appeals before proceeding with these appeals. We noted that:

The certificate of need granted by the commission will no longer be valid should (a) no party file a petition for further review; (b) the supreme court deny the petition for further review; or (c) the supreme court grant further review and affirm this court's decision reversing the FEIS adequacy decision. *See* Minn. Stat. § 116D.04, subd. 2b (2018) (precluding issuance of permits before EIS determined adequate). Moreover, should the supreme court grant further review and determine that the commission's FEIS adequacy decision was not erroneous, this court can resume review of the certificate of need decision. And finally, should the supreme court's grant of further review be limited in scope, this court may revisit the issue of the continuing propriety of the stay.

On September 17, 2019, the supreme court issued an order denying the petitions for further review in the FEIS appeals.

On October 11, 2019, Enbridge moved to dismiss these appeals as moot. The commission and relators Friends of the Headwaters and Honor the Earth filed responses agreeing that the appeals should be dismissed; Honor the Earth requests that fees for future appeals be waived. Relator Minnesota Department of Commerce (the department) filed a response requesting that this court remand to the commission for rescission of the CN, and

relator Youth Climate Intervenors supports that request. Relator Sierra Club has not filed a response to the motion.

The “general rule is that when, pending appeal, an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot.” *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn.1997). It “is a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.” *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002). Thus, the doctrine requires “a comparison between the relief demanded and the circumstances of the case at the time of decision in order to determine whether there is a live controversy that can be resolved.” *Minnegasco*, 565 N.W.2d at 710.

This court’s decision reversing the commission’s FEIS adequacy decision has rendered these appeals moot because—as both the commission and Enbridge concede—the decision in the FEIS appeals has rendered the CN invalid. *See* Minn. Stat. 116D.04, subd. 2b (2018) (providing that no project may be started and no permits may be issued before EIS determined adequate). Accordingly, because this court can no longer grant effective relief, it is appropriate to dismiss the appeals.

We have considered the department’s request for a remand, but conclude that it is neither authorized nor necessary. The department provides no authority that supports its request. And the commission and Enbridge agree that the CN underlying this appeal is no longer valid.

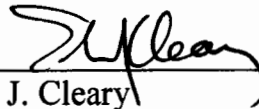
We discern no basis for waiving fees for future appeals.

IT IS HEREBY ORDERED:

1. The motion to dismiss is granted.
2. The writs of certiorari are discharged, and these appeals are dismissed.
3. Nothing in this order shall preclude subsequent appeals from a decision by the commission issuing a CN after completion of the additional environmental review required by this court's FEIS decision.

Dated: October 29, 2019

BY THE COURT



Edward J. Cleary
Chief Judge