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In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border	MPUC Docket No. PL-9/CN-14-916 OAH Docket No. 65-2500-32764

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

September 25, 2018

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INTRODUCTION

The Minnesota Department of Commerce, Division of Energy Resources (DOC DER) respectfully files this Petition for Reconsideration and Clarification (Petition) of the Minnesota Public Utilities Commission's (Commission) Order dated September 5, 2018, pursuant to Minn. Stat. § 216B.27 (2016) and Minn. R. 7829.3000 (2017), granting a certificate of need (CN), contingent on modifications, to Enbridge Energy, Limited Partnership (Enbridge or Applicant) for the proposed crude oil pipeline it called the Line 3 Replacement Project (Project).[1]

Reconsideration of the Commission Order is appropriate to address the following legal deficiencies. First, the Minnesota Statutes require that the Applicant provide an accurate long-range energy demand forecast for the type of energy that would be supplied by the proposed Project. However, the Order does not evaluate, nor does the record include, the required demand forecast. Therefore, the Order is affected by legal error and is unsupported by the evidence. Second, the Commission's Order impermissibly granted the CN based on pipeline integrity concerns related to the operation of the existing Line 3. These integrity concerns, however, are exclusively within the jurisdiction of the federal government, not the Commission. Therefore, the Commission's Order is affected by legal error and may be considered arbitrary and capricious. Finally, DOC DER also recommends that the Commission reconsider and clarify its Order regarding several modifications to the proposed Project.

[1] *In re Application of Enbridge Energy, Ltd. P'ship, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minn. from the N. D. Border to the Wis. Border*, MPUC Docket PL-9/CN-14-916, Order Granting Certificate of Need as Modified and Requiring Filings (Sept. 5, 2018) [hereinafter CN Order].

ARGUMENT

I. BASIS FOR RECONSIDERATION REQUEST AND STANDARD OF REVIEW ON APPEAL

"A petition for rehearing, amendment, vacation, reconsideration, or reargument must set forth specifically the grounds relied upon or errors claimed."[2] The Commission has generally reconsidered a decision when, upon a motion for reconsideration or on its own motion, it finds there are new issues, new and relevant evidence, errors or ambiguities in the prior order, or when the Commission is otherwise persuaded that it should rethink the decisions set forth in its order.[3]

DOC DER requests that the Commission reconsider its Order because it contains legal errors and ambiguities. Although reviewing courts will generally give deference to an agency's expertise, there are limits.[4] Upon judicial review of an agency order, the reviewing court may reverse if the decision is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by substantial evidence in view of the entire record as submitted; or (f) arbitrary and capricious.[5] DOC DER requests that the Commission reconsider its Order to avoid finalizing an order that could be affected by legal errors, unsupported by substantial evidence, and arbitrary and capricious.

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[2] Minn. R. 7829.3000, subp. 2 (2017); *see also* Minn. Stat. § 216B.27, subd. 2 (2016).
[3] *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).
[4] *See, e.g.*, *In re N. Dakota Pipeline Co.*, 869 N.W.2d 693, 696 (Minn. Ct. App. 2015) ("But this court does not defer to an agency's statutory interpretation when the language 'is clear and capable of understanding.'").
[5] Minn. Stat. § 14.69 (2016).

II. THE ORDER DOES NOT EVALUATE AND THE RECORD DOES NOT INCLUDE THE STATUTORILY REQUIRED DEMAND FORECAST FOR THE TYPE OF ENERGY THAT WOULD BE SUPPLIED BY THE PROPOSED FACILITY.

The Commission's Order grants a CN for a crude oil pipeline without any 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). The Commission's Order is therefore affected by a legal error and is unsupported by the evidence.

A. State Law Requires The Commission To Evaluate A Demand Forecast For The Energy Supplied By The New Line 3, Which The Commission Has Not Done In Its Order.

The Commission should reconsider its Order granting a CN to Enbridge for the proposed Project because the Order is based on a record that does not include a demand forecast for energy to be supplied by the proposed Project.

Minnesota law states that the Commission "shall evaluate . . . the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based . . . ."[6] The Commission's rules similarly require a demand forecast to be evaluated: "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:
>
> (1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility . . . ."[7]

Moreover, 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

[6] Minn. Stat. § 216B.243, subd. 3(1) (2016).
[7] Minn. R. 7853.0130 A(1) (2017).

proposed facility.[8] It also is fundamental that evaluation of demand is forward looking—based on the future and not based on the present—because the Minnesota Legislature has required evaluation of a *forecast* of energy demand.[9] The Commission's Rules define "forecast" as "a prediction of future demand for some specified time period."[10] While applicants for a CN for a crude oil pipeline must comply with the Commission's Rules, the Commission may vary its Rules, or similarly, provide applicants for CNs with exemptions from providing certain data that is otherwise required.[11] It would be unlawful, however, for the Commission to excuse a party from complying with its Rules when doing so would violate a statutory requirement set out by the legislature.[12]

The Commission should reconsider its conclusion that Enbridge has met its burden of showing that without the proposed Project, "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 . . . ."[13] No forecast of demand for crude was provided by the Applicant, and therefore, the Commission could not meet its statutory obligation to evaluate it.

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[8] *See* Minn. Stat. § 216B.243, subd. 3(1)–(2), 3(4), 3(6); *see also* Minn. R. 7853.0130 A(1), A(3)–(4) (2017).
[9] Minn. Stat. § 216B.243, subd. 3(1)–(2).
[10] Minn. R. 7853.0010, subp. 9 (2017).
[11] Minn. R. 7829.3200 (2017); Minn. R. 7853.0200, subp. 8 (2017).
[12] *See* Minn. Stat. § 216B.243, subd. 3(1); Minn. R. 7829.3200; Minn. R. 7853.0200, subp. 8.
[13] Minn. R. 7853.0130 A.

B. Because Minnesota Law Requires Evaluation Of A Long-Range Demand Forecast, And The Record Does Not Contain A Demand Forecast For Crude Oil, The Commission Should Reconsider Its Order And Conclude That Enbridge Has Not Satisfied The CN Rules Or Minnesota Law.

1. Enbridge did not provide a demand forecast in the record, and therefore, the Order does not evaluate the accuracy of a demand forecast as is required by law.

The record does not contain a demand forecast for energy (crude oil) that would be supplied by the proposed Project. The Commission's Order incorrectly refers several times to Enbridge's provision of a "forecast," or "demand forecast."[14] For example, the Order states:

> In this case, *the 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.[15]

"[T]he forecasts in the record," however, do not include a long-range forecast of demand for the crude oil that would be supplied by a new Line 3.[16]

Enbridge's failure to provide a long-range energy demand forecast for the Commission's evaluation cannot be legally cured on this record. In particular, the Order's conclusion that "Enbridge forecasted crude oil demand over the next 15 years in the Muse Stancil Report"[17] is not supported by the record. This statement is also unverifiable because it lacks any citation.[18]

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[14] *See* CN Order at 13–15. The Order, possibly referring to the ALJ Report without citation, also stated incorrectly that Enbridge provided a demand forecast as part of its Must Stancil Report, as follows, "Enbridge's *demand* forecast is contained in the Muse Stancil Report, which modeled the historic and *projected demand* for crude oil in Minnesota and the region using the 2016 Canadian Association of Petroleum Producers (CAPP) crude oil supply forecast. *Id.* at 10 (emphasis added).

[15] *Id.* at 15 (emphasis added).

[16] Minn. Stat. § 216B.243, subd. 3(1). Moreover, there is no forecast of demand for refined products, global or otherwise.

[17] CN Order at 13.

[18] *See id.*

Notably, any reference to a "forecast" in the Order in its analysis of "Demand Forecast" either expressly refers to a supply forecast or lacks any record support to identify that it refers to a forecast of demand for crude oil.[19]

The forecast created and submitted by Enbridge was its pipeline utilization forecast, or Muse Report, which was based on forecasts of supply of heavy crude oil from Western Canada.[20] The Order states that "[a] key input into [Enbridge's utilization forecast] model is the CAPP 2016 crude oil supply forecast."[21] Enbridge's utilization forecast model, however, includes as inputs only supply forecasts, not the required demand forecast.[22] Intending to "quantify the expected throughput on the Enbridge Mainline System, using a reasonable scenario of Canadian crude oil supply and of Canadian export pipeline developments," Enbridge's utilization forecast failed to consider demand for refined crude oil products as a model input.[23]

> 582. Mr. Earnest does not deny that his analysis completely ignores refined product demand. He confirms:
>
> > Dr. Fagan is correct that the demand for refined product does not play a role in the analytical modeling for assessing utilization of the Enbridge Mainline. This is fundamentally because the Enbridge Mainline transports crude oil, not refined product, and it is the demand for crude oil that will drive the utilization of the Enbridge Mainline, not refined product.

[19] *See id.* at 13–15.
[20] *Id.* at 14.
[21] *Id.* at 13.
[22] *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). In his Rebuttal Testimony, Mr. Earnest acknowledged that he did not include in his modeling a forecast of demand for refined products. Ex. EN-37, Sched. 1 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).
[23] Ex. EN-15, Sched. 2 at 59–60 (Earnest Direct).

Even assuming that the Commission could substitute the Muse Stancil Report for the required long-range demand forecast, the Administrative Law Judge (ALJ) found Enbridge's utilization analysis, including its Muse Stancil Report, to be "materially flawed" and contrary to common sense because it ignored global demand for refined products (i.e., because it ignored global demand for crude oil).[24] The ALJ Report found that it was unrealistic for Enbridge to omit from consideration in his utilization forecast modeling demand for refined products, (i.e., global demand for crude oil) since it is refineries' demand for crude oil that will drive future utilization of Enbridge's Mainline System, as follows:

> 584. Dr. Fagan disagrees. According to Dr. Fagan, under the economies of oil markets, demand for refined products drives refineries' demand for crude oil. Dr. Fagan explained that, with very few exceptions, 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. It follows that demand for refined products drives demand for crude oil, and is, therefore, is a driver of the price of crude oil. This means that weak demand for refined products can lead to lower prices for refined products; lower prices of refined products can lead to lower refinery margins (lower profitability), which impacts the viability of some refineries, which, in turn, can lead to lower refinery demand for crude oil. Thus, by focusing only on crude oil supply (as reported by Canadian oil producers) and totally ignoring refined product demand (local and ***global*** demand), ***Dr. Fagan concludes that Mr. Earnest's analysis is materially flawed***.
>
> 585. ***The ALJ agrees***. It is ***commonsense*** that reduced demand for refined products would impact the price, supply, and profitability of crude oil. By ignoring the demand for refined products -- and focusing only on the supply of Canadian crude -- Mr. Earnest's analysis ignores an important factor in forecasting the need for additional transportation of crude.[25]

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[24] *See In re Application of Enbridge Energy, Ltd. P'ship, for a Certificate of Need for the Line 3 Project in Minn. from the N. D. Border to the Wis. Border*, MPUC Docket No. PL-9/CN-14-916, Findings of Fact, Conclusions of Law, and Recommendation at 174 (Finding 582) (Apr. 23, 2018) [hereinafter Report].

[25] *Id.* at 174 (Findings 584–585). (emphasis added).

Therefore, the Order's reliance on Enbridge's analysis including the Muse Stancil Report to demonstrate future demand[26] is not supported by the record.

Enbridge's evidence and analysis was also inconsistent with the forward-looking nature of the regulatory scheme as shown by the legislature's requirement that the Commission evaluate the accuracy of "*long-range* energy demand *forecasts* . . . ."[27] Indeed, Enbridge's faulty analysis in its initial brief is underscored by the following statement, with the word "current" emphasized by Enbridge itself: "Enbridge's customers strongly support the Project because the *current* Enbridge Mainline System cannot meet *current* demand."[28] It does not appear that Enbridge considered future demand crude oil for refined products anywhere in the record.

Finally, the Commission concludes in error in its Order 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 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."[29] The conclusion that a supply forecast satisfies the CN criteria for a demand forecast is not legally tenable. The statute and rule require that Enbridge must provide a long-range energy demand forecast and that the demand forecast must be

[26] CN Order at 14.
[27] Minn. Stat. § 216B.243, subd. 3(1).
[28] Enbridge Initial Br. at 53 (emphasis in original). *See also id.* at 22 ("Regarding the demand for these crude oil supplies, demand *currently* exceeds the capacity of the Enbridge Mainline System, demonstrating need to restore the capacity of Line 3.").
[29] CN Order at 14. There is no citation in the Order to identify such previous proceedings. DOC DER notes that federal law changed in late 2015 to allow 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).

evaluated by the Commission for its accuracy. DOC DER urges the Commission to reconsider its decision and determine that Enbridge has not provided the requisite long-range energy demand forecast and therefore, has not met its burden of proof.

2. The Commission's conclusion that the Enbridge Mainline System will fail to meet future demand for crude oil due to current apportionment should be reconsidered.

In addition to the "forecasts in the record," which do not comply with Minn. Stat. § 216B.243, subd. 3(1) or Minn. R. 7853.0130 A(1) because they are not long-range demand forecasts, the Commission determined the "evidence of significant, persistent apportionment" demonstrates that Enbridge has satisfied Minn. R. 7853.0130 A.[30] Again, DOC DER disagrees. The Commission's Order lacks record support to assume that any current apportionment on the Enbridge Mainline System will continue into the future at current levels or at any particular level.[31] Therefore, there is no factual basis to assume that the Enbridge Mainline System will fail to meet future demand for crude oil due to future apportionment. Given the ALJ Report's findings that Mr. Earnest's forecast of pipeline utilization on the Enbridge Mainline was "materially flawed" because it failed to account for global demand of refined products,[32] so, too, was Enbridge witness Mr. John Glanzer's forecast of apportionment on the Enbridge Mainline System, which Mr. Glanzer based solely on Mr. Earnest's Utilization Forecast, as seen in the ALJ Report:

> All issues related to the reliability of Mr. Earnest's projections and analysis follow through to Mr. Glanzer in so far as Mr. Glanzer's testimony about future demand relies upon Mr. Earnest's supply and utilization projections.[33]

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[30] CN Order at 15.
[31] *See id.*
[32] Report at 174 (Findings 584–585).
[33] *Id.* at 199 (Finding 690).

Mr. Glanzer confirmed that his view of likely future apportionment relied entirely on Mr. Earnest's projections of future Mainline System utilization, i.e., the Muse Report.[34]

Therefore, the Commission should reconsider its conclusion that Enbridge demonstrated "continuing and possibly exacerbating" levels of apportionment on the Enbridge Mainline System in the future, which would negatively affect shippers and that the showing is sufficient to satisfy the need requirements in Minn. R. 7853.0130 A(1).[35] In light of Enbridge's lack of long-range energy demand forecast and use of "materially flawed" pipeline utilization forecasts, and similarly flawed apportionment forecasts, there does not appear to be record evidence supporting the Commission's Order in this regard.

3. The Commission's Order shifts the burden to other parties to provide a demand forecast that would demonstrate that in the future there would not be ready and willing buyers to purchase all crude oil supplied by Western Canada.

Finally, the Commission has inappropriately shifted the burden to other parties to provide a long-range energy demand forecast that would show that the proposed Project is not needed.[36] Enbridge's failure to provide a long-range energy demand forecast as required by Minn. Stat. § 216B.243, subd. 3(1) is Enbridge's failing to meet its burden of production, not intervenors' failure to sufficiently persuade the Commission on the ultimate merits.[37] By placing the burden of production on intervenors to introduce evidence on a statutory requirement, the Order is affected by an error of law.

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[34] Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 56 (Glanzer).
[35] CN Order at 15.
[36] *See id.* at 14–15; *see also* Minn. Stat. § 216B.243, subd. 3.
[37] Black's Law defines "burden of production" as "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 (8th Ed. 2004).

As noted above, the record includes only crude oil supply forecasts and not a crude oil demand forecast, or forecast of demand for refined products, as required by statute. The Order states that in previous pipeline proceedings the Commission reasonably relied "on supply forecasts to establish that demand for refined product, and therefore demand for crude oil, would continue to increase, at least not decrease, for the foreseeable future."[38] The Order finds that intervenors failed to introduce into the record "sufficient evidence of the extent to which these forces could reduce demand during the forecast period."[39] The Order carefully notes, however, that "[t]his finding does not shift the burden of proof from the Applicant to the intervenors, but rather recognizes that the intervenors' evidence failed to rebut Applicant's evidence."[40]

The CN statute places the burden of proving need for the facility on the Applicant, providing, "No proposed large energy facility shall be certified for construction . . . unless the applicant has otherwise justified need."[41] "[T]he burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party."[42] An applicant therefore has the burden of producing a long-term forecast of demand for crude oil because it is a necessary fact to support a justification of need, due to the CN statute's requirement that the Commission evaluate "the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based."[43] The language of the CN Rule also

[38] CN Order at 14.
[39] *Id.*
[40] *Id.* at 14 n.53.
[41] Minn. Stat. § 216B.243, subd. 3 (2016). The Applicant also has the burden of proof under the structure that the rules of administrative procedure provide for contested cases: "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." Minn. R. 1400.7300, subp. 5 (2017).
[42] McCormick on Evidence § 337, Vol. 2 at 648 (7th Ed. 2013).
[43] Minn. Stat. § 216B.243, subd. 3 (1) (2016).

clearly recognizes an applicant's burden to produce a demand forecast, 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."[44]

According to the Order, intervenors, including DOC DER, "failed to rebut Applicant's evidence" with other evidence that demand would decrease during the forecast period for oil supplied by Western Canada in Enbridge's Muse Report, which is based on crude oil supply forecasts.[45] Indeed, the Order found that Enbridge satisfied its burden of proving that "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" by including, in the record, a model based on supply of crude oil, not demand, as required by Minnesota law.[46]

Because Enbridge has failed to introduce a demand forecast, which the CN statute requires the Commission to evaluate, Enbridge has failed to meet its burden of production. The Order, however, inappropriately shifts the burden to intervenors and faults them for failing to include in the record sufficient evidence that future demand for crude oil would be reduced. In doing so, the Order created 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] and is not supported by the record in this matter. By creating a rebuttable presumption of infinite crude oil demand, the Order shifts the burden from the

[44] Minn. R. 7853.0130 (2017) (emphasis added).
[45] CN Order at 14 n.53.
[46] *See* Minn. R. 7853.0130 A.
[47] CN Order at 14.
[48] Minn. R. 7853.0130 A(1) (requiring the Commission to consider "the accuracy of the *applicant's* forecast of demand for the type of energy that would be supplied by the proposed facility" (emphasis added)).

Applicant to intervenors. Because the regulatory framework in no way indicates that intervenors are required to produce evidence showing that the applicant's project is not needed, this burden shifting is legal error and the Commission should reconsider its Order to correct it.

III. THE COMMISSION'S DECISION IS LARGELY BASED ON PIPELINE INTEGRITY CONCERNS RELATED TO OPERATION OF THE EXISTING LINE 3 PIPELINE, WHICH ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION (PHMSA), AND NOT THE COMMISSION.[49]

The Commission's Order fundamentally relies upon the integrity and safety concerns regarding the existing Line 3.[50] As discussed in more detail below, because the authority to take corrective action, such as replacing or otherwise restricting the use of an interstate crude oil pipeline deemed hazardous lies with the federal government, the decision to grant a CN for the proposed Project must be based on its own merits under the CN criteria, without consideration as to whether the existing Line 3 should be replaced. The Commission's considerations of these factors could be deemed arbitrary and capricious because the considerations were not intended by the legislature.

The structure and content of the Order shows the centrality of integrity concerns with existing Line 3 and "replacement" of the line to the Commission's decision to grant a CN. Prior to any discussion of Enbridge's proposed Project, the Order discusses the condition of existing Line 3, emphasizing that it "is an aging, deteriorating pipeline," and is "corroding and cracking at an accelerating rate due to outdated materials and techniques used to construct the line nearly

[49] To be clear, DOC DER does not contend that the CN statute or rule is unconstitutional, but that the Commission's Order could be considered arbitrary and capricious.

[50] *See* CN Order at 5–6, 27–28. The scope of the Commission's CN criteria, however, focus on whether a "new large petroleum pipeline facility" should be built, not on whether an "existing large petroleum pipeline" should be replaced. *See* Minn. R. 7853.0030 B, D (2017). Regarding an existing large petroleum pipeline, the Commission's Rules state that an applicant needs a CN only if the capacity would be expanded above a certain threshold. Minn. R. 7853.0030 D.

60 years ago."[51] The integrity of existing Line 3 permeates the Order's analysis, which refers to the "badly corroded Existing Line 3 pipeline,"[52] "the deteriorating state of the pipe,"[53] and more specifically finds that "the long-seam cracking risks inherent to the flash-welded seams on the pipe will continue to exist unless the pipe is fully replaced."[54] The Order concludes: "[I]n light of the risks posed by the accelerating deterioration of the Existing Line 3, the Commission finds that the consequences of granting the certificate of need are more favorable than the consequences of denying the certificate. Existing Line 3 is deteriorating at an accelerating rate."[55]

An agency's decision that is arbitrary and capricious will be overturned.[56] For instance, "[a]n agency's decision is arbitrary and capricious if it relied on factors not intended by the legislature."[57] A reviewing court will generally look to the plain language of the statute to determine legislative intent and will not afford an agency deference when the agency's interpretation is inconsistent with the plain language of the statute.[58] If the statute is

[51] CN Order at 5.
[52] *Id.* at 26
[53] *Id.* at 28. The Order also emphasized, "Existing Line 3 is deteriorating at an accelerating rate," citing to the ALJ's findings discussing a report with specific details regarding corrosion of pipe joints. *Id.* at 27, n.138 (citing Report at Findings 315–21). The Order endorsed the ALJ's finding that "the integrity risk that Existing Line 3 will continue [to] pose to the state" is a significant issue. *Id.* at 27 n.138 (citing Report at finding 835).
[54] *Id.* at 28 (quoting Report at finding 930).
[55] CN Order at 27.
[56] Minn. Stat. § 14.69 (2016).
[57] *In re Claim for Benefits by Sloan*, 729 N.W.2d 626, 629 (Minn. Ct. App. 2007) (citing *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997)); *see also Pallas v. Comm'r of Pub. Safety*, 781 N.W.2d 163, 168–69 (Minn. Ct. App. 2010).
[58] *See In re Claim for Benefits by Sloan*, 729 N.W.2d at 629.

unambiguous, the clear language controls.[59] When interpreting a statute, it must be presumed that the legislature did not intend to violate the U.S. Constitution.[60]

Under the Supremacy Clause of the U.S. Constitution, "state laws that interfere with or are contrary to federal law" are unconstitutional.[61] Courts have determined that state law can be preempted by federal law in three ways: by express terms, when federal regulation leaves no room for state regulation, or when state law actually conflicts with federal law.[62]

Related to this matter, Congress has exclusively authorized the Department of Transportation (DOT) with setting safety standards for interstate hazardous liquid pipelines pursuant to the Pipeline Safety Act (PSA).[63] The purpose of the current law "is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation."[64] To that end, Congress has authorized the Secretary to prescribe minimum safety standards for pipeline transportation "to any and all of the owners or operators of pipeline facilities," which "may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline

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[59] *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).
[60] Minn. Stat. § 645.17(3) (2016).
[61] U.S. Const. art. VI, cl. 2; *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (internal quotations omitted).
[62] *See, e.g.*, *Automated Med. Laboratories, Inc.*, 471 U.S. at 713.
[63] *See* 49 U.S.C. § 60101 *et seq.* The PSA of 1994 combined and recodified two preexisting pipeline safety statutes, the Hazardous Liquid Pipeline Safety Act of 1979 and the Natural Gas Pipeline Safety Act of 1968, without substantive changes. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 209 (5th Cir. 2010). The most recent comprehensive amendment occurred through the Pipeline Safety Improvement Act of 2002. *See* Pipeline Safety Improvement Act of 2002, Pub. L. 107-355, 116 Stat. 2985.
[64] 49 U.S.C. § 60102 (2012).

facilities . . . ."[65] The Secretary of the DOT delegated its authority under the PSA to the Pipeline and Hazardous Materials Safety Administration (PHMSA).[66] The PSA is clear that states may not regulate interstate hazardous pipeline safety: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."[67] That is, "a state authority may not impose safety requirements on an interstate hazardous liquid pipeline unless the DOT has delegated authority to the state entity under § 60106(a) or § 60117(c)."[68] In addition, Congress has provided only DOT with the authority to determine whether an interstate pipeline should be replaced or its operation otherwise restricted.[69]

Under Minnesota law, the plain language of Minn. Stat. § 216B.243 does not permit consideration of whether the current Line 3 is presently meeting safety standards, which are enforceable only by PHMSA pursuant to the PSA. Similarly, Minn. R. 7853.0130 does not state that consideration of current facility safety standards is a factor to consider when determining whether to issue a CN. In construing the intent of the Minnesota Legislature—when deciding whether to grant a CN for the proposed Project—the legislature could not have intended for the Commission to consider whether the current Line 3 is meeting safety standards, because to the

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[65] § 60102(a)(2).
[66] 49 C.F.R. § 1.97(a)(9).
[67] 49 U.S.C. § 60104(c) (2012). *See Wash. Gas Light Co. v. Prince George's Cty. Council*, 711 F.3d 412, 420 (4th Cir. 2013) ("Accordingly, we have held that the PSA expressly preempts state and local law in the field of safety.") (citing *Tenneco Inc. v. Pub. Serv. Comm'n of W. Va.*, 489 F.2d 334, 336 (4th Cir. 1973)).
[68] *Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 878 (9th Cir. 2006). The Minnesota Office of Pipeline Safety has been authorized by the federal government as an agent to inspect all pipelines crossing into Minnesota.
[69] 49 U.S.C. § 60112(d) (2012) ("If the Secretary decides under subsection (a) of this section that a pipeline facility is or would be hazardous, the Secretary shall order the operator of the facility to take corrective action, including suspended or restricted use of the facility, physical inspection, testing, repair, or other appropriate action.").

extent the legislature did so, Minn. Stat. § 216B.243 would be unconstitutional.[70] That is, because safety concerns of an interstate crude oil pipeline are exclusively within the purview of the federal government, the legislature could not have intended for the Commission to consider safety concerns of the existing Line 3 under the CN criteria.[71]

Although the rule's interpretation of the statute's considerations appear broad, directing the Commission to determine that "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate," the Commission has only the powers given to it by the legislature and the legislature cannot bestow power it does not have.[72] In its Order, the Commission made clear that safety concerns stemming from operation of the existing Line 3 is a central reason for granting a CN for the proposed Project: "In sum, on the central issue of oil spill risk, the Commission finds that the evidence in the record favors granting the certificate of need."[73] In the preceding paragraphs of the Order, the Commission found integrity concerns with the existing Line 3 and determined that the "[e]xisting Line 3 is deteriorating at an accelerating rate."[74] In addition, the Commission included the ALJ's finding that "'continuing the operation of Existing Line 3 has significant risks to Minnesota' due to the deteriorating state of the pipe."[75] As indicated above, safety concerns regarding the existing

[70] 49 U.S.C. § 60104(c); Minn. Stat. § 645.17(3).
[71] *See* 49 U.S.C. § 60112 (2012).
[72] *See Peoples Nat. Gas v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985) ("[I]t is elementary that the Commission, being a creature of statute, has only those powers given to it by the legislature." (citing *Great N. Ry. Co. v. Pub. Serv. Comm.*, 169 N.W.2d 732, 735 (Minn. 1969)). The breadth of a decision-maker's considerations are also limited by the outward forces of constitutionality. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (holding that the Colorado Civil Rights Commission was obliged by the First Amendment to proceed in a manner neutral toward parties' religious beliefs).
[73] CN Order at 28.
[74] *Id.* at 27.
[75] *Id.* at 28.

Line 3 are within the jurisdiction of PHMSA under the PSA.[76] Therefore, the legislature could not have intended the Commission to rely on these factors because otherwise, Minn. Stat. § 216B.243 would be preempted.[77] Because the Commission "relied on factors not intended by the legislature" on this "central issue of oil spill risk," its decision could be deemed arbitrary and capricious if not reconsidered.[78]

The Commission may hear a counter argument that its considerations were permissible, notwithstanding being within the federal government's purview, because PHMSA commented that it prefers that the CN be granted and that "Enbridge's proposal to replace this pipeline is consistent with the safety principals within the Lakehead Plan."[79] But such a counter argument misapplies the law of express preemption. Whether a state action is preempted due to express preemption is not dependent on conflict between the state and federal law.[80] Where Congress has unmistakably "ordained that the federal law preempts state law . . . there is no room for any state regulation be it consistent with, or more or less stringent than the federal legislation."[81] Moreover, a state cannot take action that it asserts merely enforces federal law—absent delegated authority through the statutory scheme—because "[a] comprehensive federal regulatory scheme

[76] That is, even assuming that facts related to safety concerns are true, they are still within the authority of the federal government, not the Commission.
[77] *See* Minn. Stat. § 645.17(3) (providing that courts presume that the legislature "does not intend to violate the Constitution of the United States").
[78] *In re Claim for Benefits by Sloan*, 729 N.W.2d at 629.
[79] PHMSA Public Comment (June 18, 2018) (eDocket No. 20186-143957-02).
[80] *See Nat. Gas Pipeline Co. of Am. v. R.R. Comm. of Tex.*, 679 F.2d 51 (5th Cir. 1982) ("As for the Railroad Commission's argument that Rule 36 does not obstruct the purposes and objectives of the NGPSA, it is unnecessary to reach that question as Congress has here explicitly preempted the regulations in question.").
[81] *See N. Border Pipeline Co. v. Jackson Cty., Minn.*, 512 F. Supp. 1261, 1265 (D. Minn. 1981) *quoted in ANR Pipeline Co. v. Iowa State Commerce Comm'r*, 828 F.2d 465, 469 (8th Cir. 1987).

such as the one at work here does not merely preempt state substantive legislation, it also preempts state decision making in that area."[82]

Despite the concerns about continued operation of the current Line 3, the authority to take corrective action, such as replacing or otherwise restricting the use of an interstate crude oil pipeline deemed hazardous, rests solely with PHMSA. Therefore, the decision to grant a CN for the proposed Project must be based on the new pipeline's own merits under the CN criteria, without consideration as to whether the existing Line 3 should be replaced.[83] Because the Commission in the Order made replacement of the existing Line 3 a "central issue of oil spill risk," the Commission should reconsider its Order because it could be deemed arbitrary and capricious.[84]

IV. THE COMMISSION SHOULD RECONSIDER ITS ORDER TO CLARIFY THE LEGAL STATUS OF THE MODIFICATIONS AND TO ENSURE THAT THE MODIFICATIONS IN FACT MITIGATE THE PROJECT'S NEGATIVE CONSEQUENCES.

The Order asserts that the CN is approved "contingent upon" modifications to the proposed Project:

> The Commission will grant the certificate of need contingent on modifications consistent with Enbridge's proposals in its June 22 filing as explained and further refined below. The modifications required by the Commission are essential to its determination that the project meets the criteria for a certificate of need. Accordingly, the Commission will require Enbridge to submit a compliance filing that provides further details about these modifications as required in the ordering paragraphs below, and to which intervenors will have the opportunity to respond.[85]

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[82] *ANR Pipeline Co. v. Iowa State Commerce Comm'r*, 828 F.2d 465, 472 (8th Cir. 1987). Although the court in *ANR Pipeline* interpreted the Natural Gas Pipeline Safety Act, that Act was subsumed into the PSA without substantive changes in 1994.
[83] *See* 49 U.S.C. § 60112.
[84] *See* CN Order at 28.
[85] *Id.* at 34.

The limited detail regarding the often complex modifications and the process laid out in the Order, however, create potential questions regarding at least three issues: (1) to what extent can the modifications change throughout what the Order deems a compliance process; (2) if Enbridge fails to comply with the modifications at a future date what is the legal status of the CN; and (3) to the extent that the Order's iteration of a modification would fail to achieve its stated goal, and therefore fail to tip the scales toward granting a CN, does this make the Commission's decision to grant a CN legally vulnerable?

Regarding the third question above, DOC DER requests that the Commission reconsider its Order regarding Enbridge's proposed Neutral Footprint Program because it may fail to "mitigate potential climate change impacts from the proposed Project"[86] and therefore does little to nothing to tip the scales in favor of granting a CN under Minn. R. 7853.0130 C.

The Order's general discussion of the modifications, deemed essential to the Commission's determination, also appears inadequate without further details on the modifications. Although the Commission has deemed further decisions on the modifications to be compliance related, the centrality of these modifications to the Commission's decision would appear to require more detail in the Order granting the CN. Leaving the bulk of crafting the modifications to compliance creates confusion regarding how integral the conditions are to the CN. Due to the uncertainty surrounding the modifications in this CN proceeding, DOC DER is obliged to reassert and incorporate by reference its July 20 Recommendations,[87] July 30

[86] CN Order at 29.
[87] DOC DER Letter to Mr. Daniel P. Wolf (July 20, 2018) (eDocket No. 20187-145103-01) [hereinafter July 20 Recommendations].

Recommendations,[88] August 10 Recommendations,[89] and August 31 Recommendations[90] in order to preserve consideration of its positions on the modifications.

A. The Order Did Not Require Enbridge To Implement A Neutral Footprint Program That Would Mitigate "Climate Change Impacts from the Project," Throwing Off the Order's Balancing Of Factors Under Minn. R. 7853.0130 C.

As it currently stands, the Order's adoption of Enbridge's method for calculating increased energy used by the new Line 3 could result in Enbridge purchasing zero renewable energy credits (RECs) even though the Project, as defined in the Order, would produce more emissions than existing Line 3. Because Enbridge's proposal would not "offset the incremental increase in nonrenewable energy consumed by the Project,"[91] a neutral footprint CN modification based on Enbridge's proposed calculation method does little to nothing to tip the scales in favor of granting a CN under Minn. R. 7853.0130 C. Due to the Commission's statement that the modifications are essential to the Commission's determination on the CN criteria, the Order's failure to implement a modification that actually balances the harms caused by the Project leaves the status of the CN approval in question. Therefore, DOC DER recommends that the Commission reconsider its Order to require that Enbridge implement a Neutral Footprint Program that actually mitigates climate impacts.

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[88] Recommendations of the Minn. Dep't of Commerce, Division of Energy Res. as to Enbridge's July 16, 2018 Certificate of Need Filing (July 30, 2018) (eDocket Nos. 20187-145374-01, 20187-143574-02) [hereinafter July 30 Recommendations].

[89] Supplemental Recommendations of the Minn. Dep't of Commerce, Division of Energy Res. Regarding Enbridge's July 16, 2018 Certificate of Need Filing (Aug. 10, 2018) (eDocket No. 20188-145722-01) [hereinafter August 10 Recommendations].

[90] Supplemental Filing of the Minn. Dep't of Commerce Regarding Specific Deficiencies of Enbridge Inc.'s Currently Effective General Liability Insurance Policies (Aug. 31, 2018) (eDocket No. 20188-146155-02) [hereinafter August 31 Recommendations].

[91] CN Order at 29.

The Order states the Commission's intent to "mitigate potential climate change impacts from the proposed Project by modifying the proposed Project to require Enbridge to purchase renewable energy credits to offset the incremental increase in nonrenewable energy consumed by the Project."[92] The Order accurately defines the "the Project" as "a 338 mile pipeline, along with associated facilities, extending from the North Dakota–Minnesota border to the Minnesota–Wisconsin border (Line 3 Project, or the Project) to replace its existing Line 3 pipeline (Existing Line 3) in Minnesota."[93] Appropriately, the Order does not include the Mainline in defining the Project. Thus, to ensure that the Order is consistent with both itself and the record, the Neutral Footprint Program must offset the incremental increase in nonrenewable energy consumption by a new, larger, and longer Line 3, capable of transporting both heavy and light crude oil, offset by the decrease in nonrenewable energy consumption by existing Line 3.

The Order states that this and other modifications "are essential to [the Commission's] determination that the project meets the criteria for a certificate of need."[94] The CN Order required Enbridge "to acquire renewable energy credits consistent with the terms set forth on pages 4–5 of its June 22, 2018 Commitment Letter."[95] In its letter, Enbridge stated that it "commits to purchase renewable energy credits in the amount equal to the incremental increase in total non-renewable electric energy usage on the Enbridge Mainline after Line 3 Replacement

[92] *Id.*
[93] *Id.* at 1.
[94] *Id.* at 34.
[95] *Id.* at 38.

is in service, as stated in DOC DER's surrebuttal testimony."[96] However, Enbridge's statement materially misrepresents DOC DER's testimony.[97]

DOC DER at no time suggested that the amount of RECs would be calculated based on the incremental increase on the Enbridge Mainline System. Instead, DOC DER recommended that the Commission require Enbridge to apply a neutral footprint policy as determined in the *Order Clarifying Neutral Footprint Objectives and Requiring Compliance Filing* in the Line 67 matter.[98] In that order, the Commission required Enbridge "to offset all the incremental increase in nonrenewable energy consumed by the Phase 2 project since the project became operational."[99] In its subsequent compliance filing, Enbridge compared the increase in energy use solely on Line 67, not the mainline, before and after the Phase 2 upgrade.[100] The Commission's adoption of Enbridge's method to calculate increased energy usage from the Project, therefore, makes this program materially dissimilar to the second upgrade to Line 67 program.

Importantly, Enbridge's proposed calculation method could also greatly reduce or eliminate any requirement that it purchase RECs and would fail to "offset the incremental

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[96] Enbridge June 22, 2018 Letter at 4.

[97] Enbridge's testimony regarding the neutral footprint prior to the ALJ's report focused on explaining why Enbridge would not participate in a neutral footprint program. *See* Ex. EN-30 at 24–26 (Eberth Rebuttal). The ALJ found Enbridge's objections unpersuasive. Report at 197–98 (Finding 682).

[98] Ex. DER-6 at 13 (O'Connell Surrebuttal).

[99] *In re Application of Enbridge Energy, Ltd. P'Ship for a Certificate of Need for the Line 67 Station Upgrade Project – Phase 2*, MPUC Docket No. PL9/CN-13-153, Order Clarifying Neutral Footprint Objectives and Requiring Compliance Filing (Aug. 18, 2017).

[100] *See In re Application of Enbridge Energy, Ltd. P'Ship for a Certificate of Need for the Line 67 Station Upgrade Project – Phase 2*, MPUC Docket No. PL9/CN-13-153, Neutral Footprint Program Compliance Filing (Oct. 1, 2017) (eDocket No. 201710-136538-01) (calculating the baseline energy usage using solely Line 67 prior to the Phase 2 upgrade).

increase in nonrenewable energy consumed by the Project."[101] Enbridge claimed in direct testimony: "There will be an overall reduction in electric power requirements on the Enbridge Mainline System because the Project will increase Enbridge's ability to optimize crude allocations between the various pipelines on the Enbridge Mainline System."[102]

Minn. R. 7853.0130 C requires that the Commission determine whether "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate." In making this determination the Commission must consider, "the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility."[103] The Order appears to conclude that granting a CN for a new Line 3 results in more favorable consequences to society if and only if the modifications to the Project are implemented.[104] Balancing the environmental effects of the Project, the Order found that to offset the Project's climate change impact resulting from "the incremental increase in nonrenewable energy consumed by the Project," the Project should be modified "to require Enbridge to purchase renewable energy credits."[105]

Because Enbridge's method of calculation may not result in Enbridge purchasing renewable energy credits and would not offset emissions from the proposed Project as defined in the Order, a neutral footprint CN modification based on Enbridge's proposed calculation method does little to nothing to tip the scales in favor of granting a CN under Minn. R. 7853.0130 C. To the extent that the Order adopts Enbridge's proposed method of calculation, therefore, it is in

[101] CN Order at 29.
[102] Ex. EN-19 at 16 (Glanzer Direct).
[103] Minn. R. 7853.0130 C(2).
[104] *See* CN Order at 25, 29.
[105] *Id.* at 29.

conflict with the Order's own statement that the Project is modified "to require Enbridge to purchase renewable energy credits to offset the incremental increase in nonrenewable energy consumed by the Project."[106]

Therefore, the Commission should reconsider its Order to the extent it adopts Enbridge's proposed method of calculating increased energy usage. The Commission should instead specify that the annual calculation of incremental energy, resulting in RECs to be purchased by Enbridge, be based on the difference between: (a) a reasonably representative baseline level of nonrenewable electricity used for the existing Line 3; and (b) the annual nonrenewable electricity use for the new Line 3.

B. Due To Uncertainty Regarding The Modifications, DOC DER Requests That The Commission Reconsider Its Order To Clarify The Implementation And Execution Of The Modifications Going Forward.

Minn. Stat. § 216B.27 requires that parties apply to the Commission for reconsideration within 20 days of service of "any decision constituting an order or determination."[107] A party requesting reconsideration must "set forth specifically the grounds relied upon or errors claimed."[108] Prior to the reconsideration deadline, DOC DER had expected a Commission decision with more specificity regarding the Order's broadly stated modifications. The Order as it currently stands includes only broad direction regarding some modifications, making it difficult at this time for parties to raise issues with specificity.

Due to these procedural uncertainties, DOC DER wishes to preserve its positions regarding the modifications. DOC DER, therefore, reasserts and incorporates by reference its July 20 Recommendations, July 30 Recommendations, August 10 Recommendations, and

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[106] *Id.*
[107] *See also* Minn. R. 7829.3000 (2017).
[108] Minn. R. 7829.3000, subp. 2. *See also* Minn. Stat. § 216B.27, subd. 2.

August 31 Recommendations in order to preserve consideration of its positions as to the modifications.[109] Regarding the parental guaranty, Landowner Choice Program, decommissioning trust fund, and insurance requirements, DOC DER requests that the Commission reconsider its Order to the extent it is inconsistent with DOC DER's recommendations as determined following the Commission's future decisions regarding the final form of the modifications.

1. Parental Guaranty

DOC DER in its July 30 Recommendations addressed several shortcomings of Enbridge's proposed parental guaranty. In order to preserve its positions due to the uncertainty created by the lack of specificity regarding the modifications in the Order, DOC DER reasserts and incorporates by reference its July 30 Recommendations.[110] More specifically, DOC DER requests that the Commission reconsider its Order to require that the parental guaranty itself include a more specific framework within which the State could require the Guarantor to provide collateral security.

The Order required that Enbridge Inc. provide a parental guaranty to pay for "environmental damages arising from the construction and operation of the Project."[111] Among other requirements, the Order required that the parental guaranty include the following provision:

> A provision that, if at any time it is determined by the State that the Applicant and Guarantor's at-the-ready financial resources and insurance coverage fall short of the resources necessary to take care of such a full-bore spill modeled under this agreement, the State shall have the ability to require a financial assurance account

[109] *See* July 20 Recommendations, July 30 Recommendations, August 10 Recommendations, August 31 Recommendations.
[110] DOC DER July 30 Recommendations at 2–11, Attach. A.
[111] CN Order at 36.

> or mechanism in addition to the guaranty to cover any identified deficit.[112]

While DOC DER believes inclusion of such a provision is important, DOC DER requests that the Commission also require that the parental guaranty include a more specific framework within which the State could require the Guarantor to provide collateral security. Streamlining a process at the outset would be beneficial in the event that the Guarantor's financial health deteriorates rapidly and could prevent financial exposure from a spill or other environmental damage occurring while a future Commission is devising a process within which to require collateral security. Below is the specific language recommended by DOC DER in its July 30 Recommendations.

> **10. Covenants**.
>
> (i) Reporting. As soon as available and in any event (a) within [90] days after the end of each fiscal year of the Guarantor, the Guarantor will deliver to the Commission a copy of its consolidated and consolidating financial statements for such fiscal year, audited by independent certified public accountants (including a balance sheet, income statement, statement of cash flow, statement of shareholder's equity, and, if prepared, such accountants' letter to management), and (b) if and when filed by the Guarantor, the Guarantor will deliver to the Commission a copy of all Form 10-Q quarterly reports, Form 10-K annual reports, Form 8-K current reports, any other filings made by the Guarantor with the Securities and Exchange Commission, and any other information that is provided by the Guarantor to its shareholders generally.
>
> [(ii) Collateral Security. If, at any time, the Guarantor's [_[tangible net income after taxes][tangible net worth][other financial status test or measure] fails to be at least $_____ [at any time][as of any quarter end][as of any fiscal year end]_], no later than [30] days thereafter the Guarantor shall obtain and deliver to the Commission collateral security for its obligations under this Guaranty in the form of either (a) a performance bond or (b) an

[112] *Id.* at 37.

> irrevocable standby letter of credit, in each case for the benefit of and direct payment to the State (for further payment to the Beneficiaries, as applicable) without further consent or approval by the Guarantor, issued by a surety authorized to conduct surety business in the state of Minnesota that is listed in the current Department of Treasury Circular No. 570, with an underwriting limitation equal to or greater than $1,000,000,000, or a bank organized under the laws of the United States or any state thereof or any United States branch of a foreign bank having at the date of issuance combined capital and surplus of not less than $1,000,000,000, for a duration of no less than [____] and in an amount equal to an amount necessary to cover all Occurrence-related costs and Obligations (which is estimated to be $1,200,000,000 to $1,500,000,000 U.S. as of the date of this Guaranty), adjusted to reflect inflation as measured by the Consumer Price Index for All Urban Consumers ("CPI-U").

2. Landowner Choice Program

The Commission granted a CN "contingent upon implementation of Enbridge's Landowner Choice Program based on Enbridge's proposal in its June 22, 2018 Commitment Letter," but that it must also include: (1) "an independent liaison;" (2) "longer and more flexible time for landowners to decide the course of action after decommissioning pursuant to the consent decree;" and (3) "a process for landowners to obtain independent consultation, at Enbridge's expense, from engineering firms competent in the area of oil pollution remediation or pipeline removal prior to the landowner's decision to remove."[113]

DOC DER raised several concerns with Enbridge's proposal in its July 30 Recommendations.[114] Due to the breadth of the language in the Order regarding this modification and the ongoing uncertainty regarding the implementation of the Landowner Choice Program, DOC DER incorporates by references its July 30 Recommendations in order to preserve its positions on this modification. The Order does not specify or is otherwise unclear

[113] *Id.* at 37–38.
[114] *See* July 30 Recommendations at 11–18.

regarding several important aspects of the program, including the role of the independent liaison or how this position or the independent engineer will be selected,[115] a more specific time frame for a landowner's choice regarding their property and how the program affects, or is affected, by land transfers or specific property interests,[116] recognition that the program cannot, without notice, deprive present landowners or subsequent owners of rights they may have under existing easements or other laws,[117] a method for dispute resolution,[118] or a method to enforce compliance.[119] DOC DER requests that the Commission reconsider its Order to provide further direction or clarification regarding the above issues consistent with DOC DER's positions.

3. Decommissioning Trust Fund

The Order granted the CN "contingent upon the creation and funding of a trust fund for decommissioning of the Project including the costs of removal of the Project . . . based on the decommissioning trust that the Canadian National Energy Board directed Enbridge, Inc. to fund for the decommissioning of its pipelines in Canada."[120] Beyond this broad statement, little is currently known about what form this decommissioning trust fund will take or whether the Commission will be in a position to enforce its terms several decades in the future. The Order does not specify or is unclear regarding several important aspects of the decommissioning trust fund, including that it be consistent with and require no changes to existing Minnesota and federal law; include collections over the expected 50-year life of the Line 3 project in Minnesota at least to equal approximately $1.5 billion (USD), as adjusted for inflation; not be controlled by Enbridge Inc. or any present or future affiliated entity, and be established only for the purpose of

[115] *See id.* at 12–13.
[116] *See id.* at 14–18.
[117] *See id.* at 18.
[118] *See id.* at 15–17.
[119] *See id.* at 17.
[120] CN Order at 38.

deactivating, monitoring, and removing the pipeline together with remediation of the soil at the time Line 3 is taken out of service in Minnesota.[121] Due to the breadth of the language in the Order regarding this modification and ongoing uncertainty regarding the decommissioning trust fund, DOC DER incorporates by references its July 20 Recommendations and July 30 Recommendations in order to preserve its position on this modification. DOC DER requests that the Commission reconsider its Order to provide further direction or clarification regarding the above issues consistent with DOC DER's positions.

4. Insurance Requirements

The Order states that the CN is approved "contingent upon Enbridge acquiring and maintaining General Liability and Environmental Impairment Liability insurance policies as proposed by DER" and "based on DER's recommendations in their initial and post-hearing brief."[122] DOC DER appreciates the Commission's recognition of the important protections that DOC DER's recommended insurance requirements would provide to the state of Minnesota. Due to Enbridge's post-decision filings, DOC DER wishes to reassert its position that the insurance requirements are integral to the Commission's approval of the CN and that Enbridge must obtain ongoing insurance coverage for the project through both General Liability and Environmental Impairment Liability Policies, including the specific recommendations of DOC DER.[123]

[121] *See* July 20 Recommendation, July 30 Recommendation at 18–19.
[122] CN Order at 38.
[123] *See* July 30 Recommendations at 27–34, August 10 Recommendations, August 31 Recommendations.

CONCLUSION

For the reasons stated above, DOC DER respectfully requests that the Commission reconsider its September 5, 2018 Order.

Dated: September 25, 2018

Respectfully submitted,

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