

STATE OF MINNESOTA
IN COURT OF APPEALS



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

ORDER

A20-1071
A20-1072
A20-1074
A20-1075
A20-1077

Considered and decided by Reilly, Presiding Judge; Jesson, Judge; and Florey,
Judge.

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

These consolidated appeals are taken from a May 1, 2020 order by respondent Minnesota Public Utilities Commission (the commission) that (1) determines adequate a second revised environmental-impact statement (EIS), (2) grants a certificate of need (CN), and (3) grants a routing permit (RP), all in relation to respondent Enbridge Energy, Limited Partnership's (Enbridge) Line 3 pipeline replacement project. Briefing is underway, and the appeals have been scheduled for oral argument on March 23, 2020.

On November 25, 2020, relators Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe (the Tribes) filed a motion with the commission for a stay of its decisions authorizing the Line 3 replacement project. The day before the Tribes filed their

motion, the commission had authorized Enbridge to begin construction. The commission issued an order denying the Tribes' motion for a stay on December 9, 2020, and denied a petition for reconsideration of that decision on December 23, 2020.

The Tribes and relator Friends of the Headwaters (FOH) subsequently filed motions in this court to stay the commission's decisions pending these appeals. Relators Honor the Earth, The Sierra Club, and Youth Climate Intervenors support the motions. Enbridge opposes the motions, along with respondents Laborers' District Council of Minnesota and North Dakota; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and Shippers for Secure, Reliable, and Economical Petroleum Transportation. Relator Minnesota Department of Commerce takes no position on the motions.

The pendency of these appeals does not impact the effectiveness of the commission's order unless the commission or this court grants a stay. *See* Minn. Stat. § 216B.53 (2018); Minn. R. Civ. App. P. 108.01, subd. 1. A party seeking to stay an agency decision pending appeal must first request the stay from the decision-maker. Minn. R. Civ. App. P. 115.03, subd. 2(b), 108.02, subd. 1. Upon motion, this court may review an agency's decision to grant or deny a stay. Minn. R. Civ. App. P. 115.03, subd. 2(b); *see also* Minn. R. Civ. App. P. 108.02, subd. 6.

When considering a motion to stay, relevant factors may include "whether the appeal raises substantial issues; injury to one or more parties absent a stay; and the public interest, which includes the effective administration of justice." *Webster v. Hennepin County*, 891 N.W.2d 290, 293 (Minn. 2017). Substantial issues may favor the grant of a

stay “where important questions of law are raised, which if decided in favor of appellant, will require a reversal.” *State v. N. Pac. Ry. Co.*, 22 N.W.2d 569, 574 (Minn. 1946). “Effective administration of justice includes protecting appellate jurisdiction, avoiding multiple lawsuits, and preventing the defeat of “the objects of the appeal or writ of error.” *Webster*, 891 N.W.2d at 293 (quoting *N. Pac. Ry.*, 22 N.W.2d at 574); *see also DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 143 (Minn. App. 2007) (“When determining whether or not to grant a stay pending appeal, the trial court or governmental unit must balance the appealing party’s interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain secure in victory while the appeal is pending.” (quotation omitted)). The decision-maker must “identify the relevant factors, weight each factor, and then balance them, applying [its] sound discretion.” *Webster*, 891 N.W.2d at 293. In reviewing a stay decision, we “will interfere only when there is a demonstrated abuse of discretion.” *DRJ*, 741 N.W.2d at 144.

I.

Enbridge and other respondents argue that FOH is precluded from seeking a stay from this court because it did not request a stay from the commission. *See* Minn. R. Civ. App. P. 115.03, subd. 2(b), 108.02, subd. 1. We agree. Accordingly, we deny FOH’s motion to stay based on its failure to first move the commission for a stay, but we have nevertheless considered FOH’s submissions in relation to the Tribes’ motion.

II.

The commission relied on *Webster* in reciting the legal standard governing its stay decision and determined “the relevant factors in this case to be the likelihood that denying the stay would render the appeal meaningless, the likelihood that denying the stay would cause irreparable harm to Movants, the likelihood that granting the stay would cause irreparable or disproportionate harm to Enbridge, and the impact of this decision on the public interest, including impact to non-moving parties.” The commission then addressed each of these factors in turn and ultimately concluded that “the relevant factors weigh against the Motion for a stay pending appeal.”

With respect to whether the appeal would be rendered meaningless, the Tribes relied on Enbridge’s estimate that construction will take six to nine months to argue that construction of the pipeline may be completed before this court issues a final decision, potentially mooted the appeal. The commission acknowledged the Tribes’ concern, but reasoned that, even if construction is complete, this court will be able to “cease operation of the pipeline,” which would “remove the risk of an accidental oil spill . . . the most serious potential impact raised by opponents of the Project.”

The commission next considered the harm to the Tribes from denying a stay, recognizing that the Tribes had identified “potential impacts that construction and operation of the Project could have on natural and Tribal resources along the Project route as potential irreparable harm.” But the commission reasoned that the “potential harms of construction . . . appear to be less than the alleged harms of operation” and that a “stay would have little impact on the potential harms of operating the Project.” And the

commission reasoned that it had “mitigated the harms of construction by placing important conditions on the certificate of need and routing permit.” The commission also recognized the risks posed by beginning construction during the COVID-19 pandemic, but reasoned that Enbridge and other respondents had represented that plans were in place to prevent the spread of COVID-19 during construction; that individuals would also be governed by federal, state, local, and tribal health and safety guidelines; and that “the governor’s executive orders related to COVID-19 have designated petroleum pipeline construction as a Critical Sector that should continue to operate through the pandemic.”

The commission also considered alleged harm to Enbridge, recognizing that Enbridge “estimates the costs of a six-month stay at \$314 million” and “maintains that it would not be able to recover losses caused by delayed construction through its federal tariffs.”

The commission finally considered the alleged harms to public interest, reasoning that “[g]ranted a stay would have a substantial negative effect on the public interest because it would necessitate the prolonged operation of Existing Line 3,” which “increases the chance of an accidental spill on that pipeline, chances that will be greatly reduced with the construction of the state-of-the-art Project.” The commission further reasoned that “granting a stay would require Enbridge to conduct many more integrity digs to keep Existing Line 3 operable,” which it found “impacts the land in a manner that is comparable to new pipeline construction.” Also with respect to the public interest, the commission considered the harm a stay would cause to workers employed on the Line 3 replacement project and area communities, a “harm that is exacerbated by the last-minute nature of the

Motion [to stay].” The commission explained that workers had invested time and money preparing for work on the project and passed up other work in anticipation of it, and that “[a] stay pending appeal would delay Project construction for many months, plunging these workers into unemployment during already difficult economic times.” And the commission explained that “[c]ommunities along the route would also miss out on months of tax revenue and economic activity that could boost their economies that have been negatively impacted by the COVID-19 pandemic.”

Having considered the competing harms, the commission “conclude[d] that the potential harms of granting the Motion are greater than the potential harms of denying it.” The commission explained that it had “carefully considered the potential negative impacts that the construction and operation of the Project could have on the environment and the public throughout this proceeding and concluded that the risks of continuing to transport oil through Existing Line 3 are greater than those caused by construction and operation of the Project.” The commission emphasized that “granting a stay would cause its own environmental impacts that must be weighed against those of construction, along with significant economic impacts.”

The commission’s decision is not an abuse of discretion. The parties before the commission raised significant, competing harms—most notably, on one hand, the harm of continued construction on the environment and the rights of tribes and indigenous peoples, and, on the other hand, the risk of an oil spill due to the rapidly deteriorating condition of existing Line 3. And the nature of the competing harms that the commission considered was impacted by the fact that the Tribes did not bring their motion for a stay until more

than six months after the commission issued its decisions and more than three months after these appeals were filed. Stays are typically granted to preserve the status quo pending appeal. *See DRJ*, 741 N.W.2d at 144. In this case, by the time that the commission considered the Tribes' stay motion, construction on the Line 3 replacement project was underway.

The balance of these harms, in the context of the *Webster* analysis, might also support an order granting a stay. But that does not render the commission's decision denying a stay an abuse of discretion. *See, e.g., Chamberlain v. Chamberlain*, 615 N.W.2d 405, 412 (Minn. App. 2000) (finding no abuse of discretion by decision-maker although "a different result [was] supportable, and we might have reached a different result"). Nor does it require this court, which is required to give deference to the commission, to override the commission's decision and grant a stay. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) ("When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." (quotation omitted)). In sum, given these overarching competing harms, the commission did not abuse its discretion in applying the *Webster* analysis to deny a stay.

Still, the Tribes assert that a stay is required in this case because in the absence of a stay the objects of their appeal will be defeated and the appeal will become moot. The commission determined that the object of the appeal will not be defeated because this court,

if it reverses one or more of the commission's decisions, will be able to grant relief through cessation of operation of the pipeline. The Tribes assert that the commission disregarded that the purpose of their appeal is to prevent not just operation of the Line 3 replacement project, but also its construction, and that denying a stay will defeat that "object" of their appeal.

Although it has separately recognized the factor of whether the objects of an appeal will be defeated, the supreme court has not explained how that factor is determined. Nor has it addressed the situation where arguably one object of an appeal might be defeated but not another. In the absence of authority supporting the Tribes' assertion that the determination must be based on all of a relator's goals, we conclude that the Tribes have not demonstrated an abuse of discretion in this regard. *See DRJ*, 741 N.W.2d at 144 (stating that this court will interfere with stay decision only upon "demonstrated abuse of discretion").

For the same reasons that the commission determined the object of the appeals will not be defeated, we conclude that completion of construction will not moot the appeals. "[A]n appeal is not moot when a party could be afforded effective relief." *Wayzata Nissan, LLC v. Nissan N. Am., Inc.*, 875 N.W.2d 279, 283 (Minn. 2016). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 2287 (2012) (quotation omitted), *quoted in State v. Hentges*, 844 N.W.2d 500, 503 (Minn. 2014). Applying these principles in *Hous. & Redev. Auth. ex rel. City of Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885 (Minn. 2002), the supreme court held that a

condemnation appeal was not mooted by transfer of title to property and physical changes to the property because the court could still compel return of all or part of the property. 641 N.W.2d at 891. Here, as in *Walser*, this court will be able to grant some relief if it reverses one or more of the commission's decisions.

The Tribes finally assert that the commission failed to consider whether the appeal raises substantial issues. The Tribes are correct that the commission in its written decision denying a stay did not identify this as one of the "relevant factors in this case," and did not discuss whether the appeals raise substantial issues. But the supreme court in *Webster* expressly declined to "require written analysis of each relevant factor," although the court recognized that "the better practice is to do so in the interest of completeness and to facilitate appellate review." 891 N.W.2d at 293 n.2. Moreover, although the caselaw recognizes the existence of substantial issues as a factor that may support a discretionary decision to grant a stay, nothing in the caselaw requires a decision-maker to issue a stay when there are substantial issues. Instead, the substantial-issues factor is one factor that a decision-maker may determine relevant to its stay analysis. *See Webster*, 891 N.W.2d at 293 (holding that administrative-law judge did not abuse discretion by failing to consider every factor listed in *N. Pac. Ry.*). Finally, it is not clear that these appeals raises questions of law that override the balance of other factors to require issuance of a stay. Instead, relators appear to challenge the commission's application of the Minnesota Statutes and Minnesota Rules to the very specific facts of this matter. For these reasons, we conclude that the commission did not abuse its discretion by failing to identify the substantial-issues

factor as one of the relevant factors for determining whether to issue a stay in this case. In so concluding, we express no opinion on the merits of the issues raised in these appeals.

IT IS HEREBY ORDERED:

1. Friends of the Headwaters' motion for a stay is denied.
2. Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe's motion for a stay is denied.

Dated: February 2, 2021

BY THE COURT



Denise D. Reilly
Presiding Judge