

Nos. A20-1071, A20-1072, A20-1074, A20-1075, A20-1077

**STATE OF MINNESOTA
IN SUPREME COURT**

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

**YOUTH CLIMATE INTERVENORS' PETITION FOR REVIEW OF THE
DECISION OF THE COURT OF APPEALS**

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INTRODUCTION

Petitioner Youth Climate Intervenors seeks review of a Minnesota Court of Appeals decision affirming the Minnesota Public Utilities Commission's ("PUC") grant of a Certificate of Need to Enbridge Energy ("Enbridge") for the proposed Line 3 crude oil pipeline ("Line 3"). Although it identified an error of law, the court of appeals failed to remand to the PUC for fact-finding under the appropriate legal standard and instead affirmed a decision the PUC did not make. Further, the court erred by misapplying the arbitrary-and-capricious standard of review. Because this case presents important questions about the role of a reviewing court, separation-of-powers principles, and the standards of review under the Minnesota Administrative Procedures Act ("MAPA"), this Court should grant review.

STATEMENT OF LEGAL ISSUES

1. When a reviewing court finds legal error in an agency's interpretation of a statute, must the court remand for the agency itself to reconsider the evidence under the appropriate legal standard?

The court of appeals agreed with Relators' interpretation of "long-range energy demand forecast[]" in Minn. Stat. § 216B.243, subd. 3(1), thereby rejecting the interpretation applied by Respondent PUC. Notwithstanding the PUC's error of law, the court went on to assess whether there was substantial evidence to support the PUC's decision had it used the court's legal definition, effectively usurping the agency's fact-finding role and affirming a decision the agency did not make.

2. Did the court of appeals misapply the arbitrary-and-capricious standard of review when it found the PUC did not err by disregarding lifecycle greenhouse-gas emissions as an effect of the pipeline under Minn. R. 7853.0130(C)(2)?

The court of appeals affirmed despite the fact that the PUC failed to consider an important aspect of the problem under Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs ("CARD"), 713 N.W.2d 817, 832 (Minn. 2006).

STATEMENT OF CRITERIA

Review is appropriate under Minn. R. Civ. App. P. 117, subs. 2(a), (c), and (d). The court of appeals' failure to remand after finding an error of law misconstrues the scope of review under Minn. Stat. §14.69 and presents an important question of law. *See* Minn. R. Civ. App. P. 117, subd. 2(a). Similarly, the court's affirmance of a decision the agency did not make represents a departure from the accepted course of judicial review of agency decisionmaking. *See id.* subd. 2(c). Granting this petition will "help develop, clarify, or harmonize the law" because this Court's precedents lack clarity regarding when an agency's error of law requires remand. *See id.* subd. 2(d). Additionally, granting this petition will allow the Court to clarify proper application of the arbitrary-and-capricious standard, thereby ensuring it is not eroded. *See id.*

STATEMENT OF THE CASE

Enbridge seeks to build Line 3 to transport crude oil across Minnesota. (CNRI 39 at 1494.)¹ The PUC must issue a Certificate of a Need before Enbridge may construct and operate Line 3. *See* Minn. Stat. § 216B.243, subd. 2. The Certificate of Need statute requires Enbridge to submit a “long-range energy demand forecast” (“demand forecast”) showing demand for the pipeline. *See id.* subd. 3(1). To meet this requirement, Enbridge submitted an estimate of the crude oil that petroleum producers seek to *supply*, not an estimate of *demand*. (*See* CNRI 1292 at 48222-23; CNRI 1306 at 48902-03.)

The Certificate of Need decision also requires the PUC to consider whether the consequences to society of granting the Certificate are more favorable than denying it, considering the project’s effects on the natural and socioeconomic environments. Minn. R. 7853.0130(C)(2). The Administrative Law Judge (“ALJ”) found the pipeline’s lifecycle greenhouse-gas emissions of 193 million tons per year, leading to \$287 billion in social costs over 30 years, a pertinent effect under this factor. (CNRI 2834 at 102351.)

On May 1, 2020, the PUC (with one Commissioner dissenting) granted the Certificate of Need for Line 3. The PUC found Enbridge had met the “demand forecast” requirement (CNRI 3724 at 144197-98) and rejected the ALJ’s findings on lifecycle greenhouse-gas emissions. (CNRI 3003 at 105870-71.) Petitioner and seven other Relators appealed the PUC’s decision, and on June 14, 2021, a divided court of appeals affirmed the PUC.

¹ Citations are to the Certificate of Need Record Index number (“CNRI”) which identifies the document and the bates stamp number which identifies the page.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REMAND FOR THE AGENCY TO CONSIDER THE FACTS UNDER THE APPROPRIATE LEGAL STANDARD

The core dispute throughout these proceedings has been the meaning of “demand forecast.” The PUC interpreted the term as a forecast of the amount of crude oil that petroleum *producers* desired to *ship* via the pipeline. (PUC Br. 17-18.) The Department of Commerce interpreted the term as a forecast of the amount of crude oil *demand*ed by *refineries*. (DOC Br. 23-25.)

The court of appeals agreed with the Department of Commerce and unanimously rejected the PUC’s interpretation, holding that the statute required the PUC to “evaluate a forecast . . . of the amount of crude oil from the proposed pipeline that *refineries* will be willing and able to purchase over the forecast period.” (Op. 3 (emphasis added); D-1. *See also* Op. 32 (“demand forecast” does not mean demand from oil producers because that would be “contrary to logic, as well as the plain language of the commission’s rules.”).) But instead of remanding for the PUC to assess the facts under this interpretation, the court assessed the evidence on its own *as if the PUC had applied the court’s interpretation*. (*See* Op. 34.) Based on its own evaluation, the court affirmed a decision the PUC did not make. (*Id.* at 41.) As noted by the dissent, the majority undertook an inappropriate analysis by applying its legal definitions to the facts, “absent the agency’s prior application of them.” (Op. D-7.)

A. An Exercise Of This Court’s Supervisory Powers Is Needed.

An exercise of this Court’s supervisory powers is needed because the court of appeals departed from the accepted and usual course of justice by usurping the agency’s fact-finding role and affirming a decision the agency did not make.

MAPA gives a court authority to review an agency’s “administrative finding[s], inferences, conclusion[s], or decisions.” Minn. Stat. § 14.69. Here, the PUC’s error of law left the court without “finding[s], inferences, conclusion[s] or decisions” as to whether there was a forecast of *refinery* demand in the record. Whether Enbridge supplied this type of forecast is fact-finding reserved for the agency, not the court. *See Mitchell Transp., Inc. v. R.R. & Warehouse Comm’n*, 137 N.W.2d 561, 567 (Minn. 1965) (“[Q]uestions of fact and of policy are for administrative and not judicial determination.”); *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492*, 136 N.W.2d 105, 108 (Minn. 1965) (“[M]aking findings of fact is the obligation of the administrative body and is not a function to be performed by the court in the first instance.”). The PUC—a five-member board—was deprived of the opportunity to consider the facts under the court’s articulated legal standard. The court should have remanded to the PUC for exactly such an inquiry.

The court of appeals’ approach also violates the separation of powers. The Legislature instructed the PUC—not the reviewing court—to “evaluate . . . the accuracy of the long-range energy demand forecasts” in the record. Minn. Stat. § 216B.243, subd. 3(1). Thus, it is necessary for this Court to intervene and grant review under Minn. R. Civ. App. P. 117, subd. 2(c) to ensure the court’s error in usurping the agency’s role does not become lasting precedent.

B. The Case Presents An Important Question On Which The Supreme Court Should Rule; Such A Decision Would Clarify The Law On An Issue With Statewide Impact.

A decision by this Court will also address the important question of when a reviewing court must remand upon identifying the agency committed an error of law under MAPA. Minn. R. Civ. App. P. 117, subd. 2(a). This Court typically remands under such circumstances. *See In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 583 (Minn. 2021) (requiring remand to the agency for analysis using the correct legal interpretation enumerated by the United States Supreme Court). *But see In re Restorff*, 932 N.W.2d 12, 22 (Minn. 2019) (“Although the Commissioner erred when she misinterpreted the statute, we may not reverse the final agency decision if substantial evidence in the record supports her ultimate determination.”). Thus, this Court’s clarification is needed to facilitate consistency among MAPA cases. *See* Minn. R. Civ. App. P. 117, subd. 2(d)(2).

II. A DECISION FROM THIS COURT ON THE PROPER APPLICATION OF THE ARBITRARY-AND-CAPRICIOUS STANDARD WILL CLARIFY THE LAW ON AN ISSUE OF STATEWIDE IMPACT

The majority also erred by concluding it was not arbitrary and capricious for the PUC to omit lifecycle greenhouse-gas emissions from its analysis of “the effect of the proposed facility . . . upon the natural and socioeconomic environments,” under Minn. R. 7853.0130(C)(2). (*See* Op. 39 & n.46.)

Lifecycle emissions account for total emissions from the project from oil extraction to end-use consumption. (CNRI 2834 at 102350.) Despite a record that the lifecycle greenhouse-gas emissions of the pipeline would be extraordinary, and the cost to society

in the billions, the PUC entirely disregarded the lifecycle emissions as an effect of the pipeline by reasoning that the different climate models produced different estimates, and therefore could not be relied upon. (CNRI 3003 at 105870-71 n.47.) Thus, the PUC reduced the 193 million tons of *annual* greenhouse-gas emissions to nearly zero—an implausible result for any project, much less a crude oil pipeline. Further, the PUC assumed that the same amount of oil would inevitably move—whether by proposed Line 3, truck, or rail—making the emissions from Line 3 a *fait accompli*. (*Id.* at 105871.) But basic economic principles and evidence in the record dictate that the same quantity of oil would not move absent the pipeline. (*See* CNRI 2834 at 102395; CNRI 437 at 13493.)

The court of appeals’ majority was satisfied that the PUC had not acted arbitrarily and capriciously, reasoning only that the PUC had explained its decision. By contrast, the dissent found five separate ways the PUC’s exclusion of lifecycle emissions *was* arbitrary and capricious and evidenced “a lack of reasoned decisionmaking.” (Op. D-17 to D-19.)

A decision by this Court will ensure the arbitrary and capricious standard is not eroded into an affirmance upon *any* explanation. An assessment of whether an agency’s action is arbitrary and capricious requires examining whether the agency “entirely failed to consider an important aspect of the problem; . . . offered an explanation that runs counter to the evidence; or . . . the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise,” among other factors. *CARD*, 713 N.W.2d at 832. Thus, the required assessment from the court is not just whether the agency offered *any* explanation, but whether that explanation was reasoned.

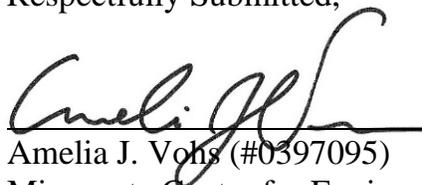
Moreover, if the PUC's decisionmaking in this case is upheld, any assessment that relies on predicting future conditions through models may be removed from agency decisionmaking. Similarly, if reasoned decisionmaking includes mere assertions that are unsupported by data and basic principles of economics, then the arbitrary-and-capricious standard will be eroded. Thus, this Court's clarification of the application of the arbitrary-and-capricious standard will have a statewide impact on review of agency decisionmaking under MAPA. Minn. R. Civ. App. P. 117, subd. 2(d)(2).

CONCLUSION

Because this case presents important questions about the role of a reviewing court, separation-of-powers principles, and the standards of review under MAPA, this Court should grant review.²

Dated: July 14, 2021

Respectfully Submitted,



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² Although Enbridge continues construction, this appeal will not be mooted upon completion of the pipeline because the Court has jurisdiction over pipeline operation. (*See* Order Den. Stay 4, 7-9 (Feb. 2, 2021).)

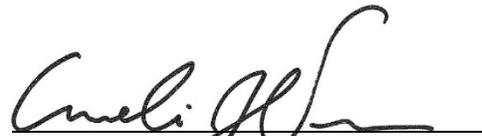
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Petitioners, Youth Climate Intervenors, hereby certify that this Petition for Review conforms to the requirements of Minn. R. Civ. App. P. 117 for a petition produced with a proportional font. The length of this Petition is 1967 words. The print is a 13-point, proportionately spaced typeface utilizing Microsoft Word 2016.

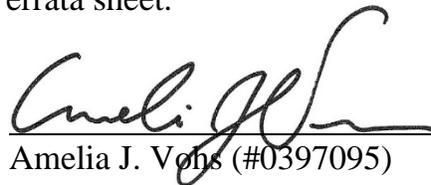
Dated: July 14, 2021


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CERTIFICATION

In compliance with this Court's March 20, 2020 Order, no paper copies of this petition will be filed with the Court. I hereby certify that, should the Court request a paper copy of this petition, the content of the accompanying paper petition will be identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and any corrections or alterations to this electronically filed petition will be separately served and filed in the form of an errata sheet.

Dated: July 14, 2021



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