

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION  
FOR A CERTIFICATE OF NEED FOR THE  
LINE 67 - PHASE 2 UPGRADE PROJECT**

OAH Docket No. OAH 8-2500-30952  
PUC Docket No. PL-9/CN-13-153

**EXCEPTIONS OF MN350 AND THE SIERRA CLUB  
TO FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION  
OF THE ADMINISTRATIVE LAW JUDGE**

**June 27, 2014**

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**STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION**

Beverly Jones Heydinger	Chair
Dr. David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

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**I. INTRODUCTION**

Pursuant to Minn. Stat. § 14.61 and Minn. R. part 7829.2700, MN350 and the Sierra Club (“Environmental Intervenors”) respectfully file these Exceptions to the Findings of Fact, Conclusions, and Recommendation (“Report”) of the Administrative Law Judge (“ALJ”), dated June 12, 2014, with regard to Enbridge Energy Limited Partnership’s (“Enbridge”) Application for a Certificate of Need for the Line 67 Phase 2 Upgrade Project (“Project”). In the following exceptions, Environmental Intervenors identify some of the findings and recommendations in the ALJ’s Report that were either not supported by the record or do not sufficiently or accurately reference the evidence in the record. Due to our very substantial disagreement with the ALJ Report over the outcome of this proceeding and limited time, Environmental Intervenors have not attempted to identify every statement in the ALJ Report with which they disagree. Instead, we have prioritized our exceptions on key issues. Environmental Intervenors take exception to

all statements in the ALJ Report that are in conflict with statements in our Post-Hearing and Reply Briefs.

## **II. EXCEPTIONS TO DESCRIPTION OF PROCEDURAL HISTORY**

The ALJ Report fails to include any information about the procedural deficiencies in the contested case hearing or the controversy related to these deficiencies. Since these deficiencies arise primarily from decisions made by staff for the Minnesota Public Utilities Commission (“Commission”) and the Commission itself, Environmental Intervenors believe these deficiencies should be considered and addressed by the Commission.

### **A. Description of Hearing Process Related to the Commission’s Improper Approval of the Incomplete Application**

On June 28, 2013, Enbridge filed an Application for a Certificate of Need for the Project (“Application”). In response, on July 3, 2013, the Commission issued a Notice of Comment Period regarding the completeness of Enbridge’s Application. The Application considered Enbridge’s entire discussion of forecast information in Application Section 7853.0520 to be trade secret information pursuant to Minn. R. 7829.0500, with the result that the Commission did not disclose this section to the public.

On August 16, 2013, in response to Department of Commerce (“DOC”) comments on completeness, Enbridge filed a Revised Application. This version also claimed that all of Application Section 7853.0520 was trade secret information.

On September 17, 2013, the Commission issued a Notice and Order for Hearing in which it rejected MN350’s objections related to the completeness of the Application and determined that Enbridge’s Revised Application was substantially complete. The Commission allowed Enbridge to include the additional information that it provided in the Revised Application and referred the matter to the Office of Administrative Hearings (“OAH”) for a contested case

proceeding. The Commission failed to object to Enbridge's classification of Application Section 7853.0520 as trade secret information, even though it is now obvious that almost all of the information in this section was public information.

On December 4, 2013, Enbridge filed a revised Application Section 7853.0520.<sup>1</sup> By filing this revised section as a public document, Enbridge withdrew its claim that this entire section was protected trade secret information, and instead claimed that only two lines of data comprised of 16 numbers in Table 7853.0520-B.1 are trade secret. Instead of flagging Enbridge's blatant misuse of the state's trade secret protection law, the ALJ Report euphemistically stated only that Enbridge had "narrowed the range of trade secret protections claimed by the Company."

A comparison of the December version of Section 7853.0520 to the trade secret versions filed in the June and August shows that these documents are all very similar and are comprised almost entirely of obviously publicly available information, such as:

- a basic project description, which information is available in other non-trade secret Application sections;
- a general description of CAPP and Enbridge project-specific forecasting methodology;
- a general description of Enbridge's operations in Minnesota, which are also described in other non-trade secret Application sections;
- descriptions of public forecasts and forecasting methodologies prepared by the CAPP and the National Energy Board of Canada ("NEB"), which information is available online; and

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<sup>1</sup> Ex. No. 4, Revised Application Section 7853.0520 at 3.

- general descriptions of other announced Enbridge pipeline projects that are publicly available.

Therefore, Enbridge improperly and without good cause designated large amounts of information related to its forecasting as trade secret information.

Commission staff failed to challenge this improper trade secret designation such that not one page of Application Section 7853.0520 was available to Environmental Intervenors during the comment period on the completeness of the Application. As a result, it was impossible for Environmental Intervenors to identify Enbridge’s failure to comply with the forecasting data requirements in Minn. R. 7853.0520 until over two months after the start of the contested case hearing.

On December 20, 2013, Enbridge filed the Direct Testimony of Neil K. Earnest and the Muse Stancil Benefits Analysis for the Line 67, Phase 2 Upgrade.<sup>2</sup> This Exhibit did not contain the project-specific forecast information required by Minn. R. 7853.0520. Instead, Mr. Earnest generally discussed regional oil markets, energy supply in Minnesota, the potential for crude oil exports, national security policy issues, various Canadian supply forecasts, and relative transportation costs.<sup>3</sup>

On January 10, 2014, Enbridge filed the Direct Testimony of Mark Curwin, Jeff Jurgens, and Paul Turner.<sup>4</sup> The following table summarizes the numbers of pages of initial testimony filed by Enbridge.

<b>DIRECT TESTIMONY TIMING AND NUMBER OF PAGES</b>			
<b>Date</b>	<b>Witness</b>	<b>Testimony Number of Pages</b>	<b>Substantive Attachments Number of Pages</b>
December 20, 2013	Neil Earnest	10	62

<sup>2</sup> Ex. 6 (Earnest Direct Testimony); Ex. 7 (Muse Stancil Benefits Analysis).

<sup>3</sup> *Id.*

<sup>4</sup> Ex. Nos. 8 (Curwin Direct), 9 (Jurgens Direct), and 10 (Turner Direct).

January 10, 2014	Mark Curwin	12	9
January 10, 2014	Jeff Jurgens	6	4
January 10, 2014	Paul Turner	6	3
	<b>Total</b>	<b>34</b>	<b>78</b>

This direct testimony filed on January 10 was very limited in its scope and depth. For example, Enbridge’s entire discussion of the economic impacts of the Project were contained in just four paragraphs in the testimony of Mr. Curwin,<sup>5</sup> which discussion provided no data or analysis and instead made broad unsupported allegations. Also, this additional direct testimony provided no detailed information about Enbridge’s forecast information. Instead, the January 10 testimony primarily served to introduce the witnesses, describe their general areas of responsibility, and make very broad claims similar to those already contained in the Application.

On February 18, 2014, the DOC filed the Direct Testimony of Laura B. Otis, including Attachments.<sup>6</sup> Due the limited information provided by Enbridge at that time, the DOC took the unusual step of recommending that the Commission deny Enbridge’s Revised Application.<sup>7</sup> Ms. Otis testified: “The Applicant has not provided adequate information to definitively, quantitatively show that denial of the Certificate of Need would negatively impact supply and demand in Minnesota or regional petroleum and petroleum product markets.”<sup>8</sup>

On March 13, 2014, Enbridge filed the “rebuttal” testimony of Mark Curwin, Neil K. Earnest, Paul Turner, Charles J. Cicchetti, Ph.D., and William J. Rennie.<sup>9</sup> As show by the following table, this “rebuttal” testimony contained far more information than Enbridge’s direct testimony, totaling 126 pages of testimony and 481 pages of attachments.

<b>“REBUTTAL” TESTIMONY NUMBER OF PAGES</b>
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<sup>5</sup> Ex. 8, Direct Testimony of Mark Curwin, responses to questions 8-10.

<sup>6</sup> Ex. Nos. 35, 36, Otis Direct Testimony and Direct Attachments.

<sup>7</sup> Ex. No. 35, Otis Direct Testimony at 52.

<sup>8</sup> *Id.*

<sup>9</sup> Ex. Nos. 11–20, Rebuttal Testimony of Curwin, Earnest, Turner, Cicchetti, and Rennie.

<b>Witness</b>	<b>Testimony Number of Pages</b>	<b>Substantive Attachments Number of Pages</b>
Cicchetti	67	0
Curwin	16 (single spaced)	111
Earnest	38	336
Rennicke	2	34
Turner	3	0
<b>Total</b>	<b>126</b>	<b>481</b>

It should also be noted that witnesses Cicchetti and Rennicke did not initially provide direct testimony and instead their extensive new evidence on the economic justification for the Project and railroad transportation of crude oil, respectively, was introduced only as “rebuttal” testimony.

All or almost all of the information contained in Enbridge’s “rebuttal” testimony was available at the time that Enbridge filed its direct testimony and could have been provided much earlier in the proceeding. Thus, it appears that Enbridge simply chose to submit this evidence as “rebuttal” evidence in response to the DOC direct testimony recommendation that the Application be denied.

The surrebuttal testimony filed by the DOC in response to Enbridge’s “rebuttal” testimony found that the new evidence provided by Enbridge was sufficient to sustain Enbridge’s burden to prove a need for the Project. Thus, from the DOC’s perspective, it appears that this case depends on the evidence filed by Enbridge late in this proceeding. In particular, the following evidence provided on March 13 by Enbridge appears to be essential to the ALJ and DOC conclusions:

- Evidence related to work at the Flint Hills Resources Refinery;<sup>10</sup>
- Evidence related to potential future demand by the BP Whiting Refinery;<sup>11</sup>

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<sup>10</sup> Paragraph 92 of the ALJ Report cites Enbridge Ex. 12, at Attachment C (Curwin Rebuttal); DOC Ex. 37 at 22, LBO-S-5 and LBO-S-6 (Otis Surrebuttal) for the size of the expansion.



- The impact of downstream pipeline expansions on the need for the Project;<sup>12</sup> and
- Economic evidence that the global market for refined products may be strong in the near-term.<sup>13</sup>

If this evidence were not critical to Enbridge's case for need, then presumably the DOC would not have changed its position that the Application should be denied for lack of evidence.

### **B. Violations of Law Related to the Improper Approval of the Incomplete Application**

Decisions by Commission staff related to completeness had the practical effect of permitting Enbridge to provide a very large amount of its evidence late in this process. This timing severely prejudiced Environmental Intervenors' participation in this matter because it left insufficient time for: (1) analysis of the new evidence; (2) discovery based on this new evidence; (3) adequate surrebuttal testimony to respond to this evidence; and (4) preparation for the evidentiary hearing including cross examination. The tactics used by Enbridge to accomplish this result are described below.

Initially, Enbridge improperly designated all of Application Section 7853.0520 as trade secret information, pursuant to Minn. R. 7829.0500, even though almost all of the information in this section is undeniably public information. This improper classification meant that Environmental Intervenors had no opportunity to comment on the completeness of Enbridge's forecast information before the Commission referred this case to the OAH.

Rather than challenge Enbridge's blatant violation of law, the Commission accepted Enbridge's improper trade secret designation, thereby breaching its duty under Minn. Stat. Ch. 13 and Minn. R. Ch. 7829. This violation of law prevented Environmental Intervenors and the

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<sup>11</sup> Paragraph 93 of the ALJ Report cites Enbridge Ex. 12 at Attachment D (Curwin Rebuttal); Enbridge Ex. 15 at 10-13 (Earnest Rebuttal); DOC Ex. 37 at 11-12 and 23 (Otis Surrebuttal).

<sup>12</sup> Paragraphs 97 to 101 of the ALJ Report cites Ex. 15 at 15-17 (Earnest Rebuttal).

<sup>13</sup> Paragraph 102 of the ALJ Report cited Ex. 19, at 9 (Cicchetti Rebuttal).

public from commenting on the completeness of the forecast information in Application Section 7853.0520, as was their right under law.

The Commission's failure to require compliance with Minn. R. Ch. 7853's application information requirements had the practical effect of allowing Enbridge to withhold key elements of its case for need until its "rebuttal" testimony. Since neither the ALJ nor other parties control the contents of an applicant's direct testimony, Enbridge could provide direct testimony that was very general and contained no detailed project-specific information about need for the Project. In fact, Enbridge provided such little information in its direct testimony that DOC witness Otis took the unusual and perhaps unprecedented position in her direct testimony that Enbridge's Application be denied due to a lack of evidence. In response to the DOC's direct testimony, Enbridge opened the floodgates and poured forth a large amount of information as "rebuttal" testimony less than three weeks before the scheduled start of the evidentiary hearing.

In short, the Commission's failure to require rigorous compliance with Minn. R. Ch. 7853's application requirements allowed Enbridge to withhold information until very late in the contested case hearing process.

Due to the extensive nature of Enbridge's new information, Environmental Intervenors could not analyze and prepare discovery and surrebuttal testimony, as well as prepare for the evidentiary hearing itself in three weeks. Therefore, Environmental Intervenors requested an opportunity for surrebuttal testimony and that the evidentiary hearing be delayed by a month. The ALJ granted relief by allowing surrebuttal testimony and delaying the hearing by a single week. Even with this limited additional time, Environmental Intervenors were not able to analyze and respond to substantial portions of the Cicchetti, Curwin, Earnest, and Rennie testimony.

By failing to follow the letter and the spirit of Minn. R. Ch. 7853's Application contents requirements, the Commission allowed Enbridge to delay disclosure of key elements of its case for need until late in the hearing process. This delay prejudiced Environmental Intervenors' participation in the contested case hearing. Therefore, the Commission violated its own regulations and unfairly and unnecessarily prejudiced Environmental Intervenors' participation in this proceeding.

### **C. Procedural History Related to the St. Paul Public Hearing**

The ALJ Report does not describe the failure of the ALJ and Commission staff to adequately plan for the public hearing in St. Paul. The result of this failure was a hearing process that did not comply with state law, violated many citizens' due process rights, and disrespected citizen efforts to participate in government.

The ALJ Report describes the St. Paul hearing as follows:

77. A public hearing was held in St. Paul, Minnesota, on April 3, 2014. Over the course of four hours of public testimony, the Administrative Law Judge heard from 58 witnesses, received 19 exhibits and dozens of handwritten comments. Importantly, the presentations during the public hearing were equally divided between proponents of the project and opponents of the project.

78. Not all of those persons who enrolled on the hearing register and sought recognition on April 3 were able to provide oral testimony before the close of the public hearing. Those who did testify, however, represented a good cross-section of the views on the project and representation from communities that would have otherwise faced challenges in reaching the earlier set of public hearings in Greater Minnesota.

The foregoing completely ignores the gross failings of the ALJ and Commission staff in administering this public hearing.

On April 3, 2014, the Commission held a public hearing in St. Paul, Minnesota, in its large hearing room. Prior to this hearing, Andy Pearson of MN350 notified Tracy Smetana of the

Commission that MN350 expected several hundred individuals to attend to speak against the Project. When told the capacity of the hearing room by Ms. Smetana (140 persons), Mr. Pearson expressed concern that this room would not be able to accommodate the expected public commenters and other participants. Accordingly, he inquired about the possibility of moving the public hearing to a larger venue or providing overflow capacity. Ms. Smetana said that there was no possibility of moving the public hearing into a larger venue and stated that the Commission would deal with overflow crowds on the day of the hearing. Ultimately, the Commission used only its existing large hearing room and it also established an overflow room with a capacity of 70 persons.

On the day of the hearing, it became clear that Commission staff were overwhelmed by and poorly prepared to accommodate the large number of citizens at the public hearing. Those who arrived an hour ahead of time gained entrance to the hearing room. This included a very large proportion of Project supporters. Those who arrived later, including many of the approximately 1,000 people who attended a MN350 rally just before the public meeting, encountered only a large group of individuals milling around on the third floor of the Commission building. No Commission staff were visible to explain the process; there were no signs explaining how to sign up to testify; there were no ropes or other guides to help citizens form queues. Unbeknownst to citizens, Commission staff had set up a table outside of the hearing room that allowed citizens to sign up to testify pro, con, or neutral. Apparently, queues were established for each group. However, none of this structure was communicated to those not immediately near the registration table. One citizen called out that there were separate lines for pro and con but this served only to increase confusion. Once citizens determined that sign-in sheets existed, they began jostling their way toward them.

Those who were able to enter the hearing room found that over half of the seats were taken by those who arrived before the queues were established, most of whom were supporters of the Project. Even though empty seats remained, Ms. Smetana began refusing entry to additional citizens, saying that there were no empty seats, and initially directed citizens to the overflow room. Once this room filled, she directed citizens to the downstairs lunchroom, which had no audio or video feed from the large hearing room. Therefore, when the hearing commenced, most of the citizens in the hearing room supported the pipeline while a much larger group of citizens was relegated to the first floor without access to the hearing.

Those who were initially admitted to the public hearing but then left the room for any reason were not allowed to return, including a mother who left to feed her parking meter only to find that she could not reenter the hearing room to sit with her child. Her child, who subsequently testified, sat alone for approximately one hour.

A police officer on duty told Mr. Pearson that they estimated the total number of citizens in attendance to be approximately 1,000. Therefore, the number of persons in attendance exceeded the capacity of the Commission's hearing room and overflow room by approximately 800 seats.

In an attempt to accommodate citizens, the Commission established a dial-in line so that citizen could at least listen to the proceedings via cell phones, but since the conference line was set up so that listeners were not muted and could not be muted, it generated substantial noise in the hearing room. As a result, this resource was quickly turned off.

Therefore, most of those who attended the hearing were shunted into a basement cafeteria with no access, audio or video, to the hearing. For nearly an hour, there was no way for people in the cafeteria to sign up to speak, and the escalator and elevators to the upper level rooms were

blocked by police on the first floor who were not informed by the Commission staff of how citizens might sign up to speak. Thus, many citizens who came to the hearing after work initially encountered only police officers who informed them that they could not proceed to the third floor, much less enter the hearing room. It is not known how many citizens gave up and went home.

Eventually, Commission staff established a “ticket” system, whereby those who left would relinquish their tickets to those waiting to attend. However, not everyone who left the hearing room acquired a ticket and many attendees with tickets simply left without relinquishing them to others. This mechanism resulted in a “scalpers” line on the first floor where citizens waiting to attend asked those leaving if they had a ticket. Eventually, Commission staff set up a sign-up sheet on the first floor, but by then it was so late that many citizens concluded that the chances of them seeing or hearing the public hearing, much less providing comments, were slim to none. Again, the number of citizens who simply gave up and went home is unknown.

In a voluntary effort to assist citizens, during the first recess MN350 staff established a remote listening room on the first floor with a cell phone attached to a sound system, which allowed up to 50 additional citizens to hear the proceedings.

By 7:00 PM, attrition had reduced those waiting to enter the hearing room to the point that Commission staff directed the police to allow access to upper floors. Thus, those who remained were allowed to watch the hearing, but they had no opportunity to speak.

The hearing ended at approximately 8:20 PM. Of those who attended the hearing, the sign-in sheets for the hearing indicate that approximately 140 signed up to speak but only about 58 were allowed to provide oral comment. However, due to the Commission’s lack of planning and its decision to restrict access to the third floor without providing any direction to citizens on

the first floor, an unknown number of citizens did not gain access to a sign-in sheet and left the public hearing without the Commission having any record of their attendance, much less hearing their comments.

#### **D. Violations of Law Related to the St. Paul Public Hearing**

The ALJ Report fundamentally misunderstands the full purpose for “public hearings.” It assumes that the only purpose is to allow the Commission to gather information. This is not true. If this were the public hearing’s only purpose, then it could be accomplished equally well by having only written comments and oral comments provided to a court reporter individually.

Public hearings are also intended to allow citizens to speak and listen to other citizens. As such, the state must provide citizens who wish to attend a public hearing and speak with a reasonable opportunity to do so. Should the state unduly and unnecessarily limit the number of concerned citizens who are allowed to attend a public hearing, it would violate these citizens due process rights to attend and participate in a public hearing. Here, Commission mismanagement of the St. Paul public hearing meant that a large proportion of the citizens who wish to attend this public hearing were turned away and had no opportunity to speak at the public hearing or to listen to others speak. Therefore, the Commission violated the due process right to participate in the St. Paul public hearing, as required by Minn. R. 7829.2500, subp. 9.

### **III. EXCEPTIONS TO ALJ REPORT’S DETERMINATION OF NEED**

With regard to facts related to the need for the Project, the ALJ Report contains a number of clear errors of fact and it ignores evidence that directly contradicts its findings. The ALJ Report relies principally on the following evidence in its finding of need:

- forecasts of increased, near-term demand for heavy crude oil within PADD II, and primarily increased demand from particular refineries that have recently or may in the near-term increase their demand for heavy crude oil; and

- Evidence of recent apportionment on Lines 4 and 67 which was interpreted to indicate that Lines 4 and 67 are currently being utilized at their maximum design capacity.

At the same time, the ALJ Report completely ignores evidence related to:

- substantial unused heavy oil capacity in the Enbridge Mainline System that will be used to serve existing and future planned refinery expansions;
- substantial competition to serve the western Canadian crude oil transportation market by other pipelines and railroads that will limit future demand for Enbridge's heavy crude oil transportation services; and
- evidence that recent apportionment events were caused by temporary reductions in the capacities of Lines 4 and 67 and not by nominations that exceeded each pipeline's annual rated capacity.

Moreover, the ALJ Report ignores Environmental Intervenor arguments related to the failure of the record to contain information required by state law and regulations, including:

- a project-specific forecast supported by specific types of documentation;
- information about state conservation programs; and
- the need for the Commission to consider all of the climate change impacts that would result from Project, and not just the impacts from the energy used in its operations.

#### **A. Errors of Fact in ALJ Report**

- **Paragraph 25:** This paragraph states: "Currently, the total permitted capacity of Lines 4 and 67 is 1,596,000 bpd." As authority, the ALJ Report cites to Mr. Earnest's "rebuttal" testimony. In fact, Mr. Earnest clearly states: "With the Project, the total available capacity is 1,596 kb/d." (Emphasis added.) Thus, the total permitted capacity of Lines 4 and 67 is not 1,596,000 bpd. The total currently permitted capacity of Line 4 is 796,000



bpd. The current permitted capacity of Line 67 is 570,000 bpd. The sum of these volumes is 1,366,000 bpd. This error first appears in the record in paragraph 29 of Enbridge's Post Hearing Brief. Environmental Intervenors pointed out this error in the Reply Brief on page 37. Apparently, the ALJ did not independently verify this permitted capacity. This statement also indicates that the ALJ confused permitted capacity with current physical capacity in his analysis of need.

- **Paragraph 87:** This paragraph states: "Enbridge predicts that Line 67 will reach its current permitted capacity of 570,000 bpd on an annual basis by mid-2014." In support of this statement, the ALJ Report cites to "Ex. 4, at 3 (Revised Section 7853.0520)." On page 3, this section states; "Based on the information provided in the table above, Enbridge anticipates that Line 67 will be at the 570,000 bpd annual capacity approved by the Minnesota Public Utilities Commission on August 12, 2013<sup>7</sup> by mid-2014." While the ALJ correctly repeated the Application's language, it is in fact impossible for shipments on Line 67 to reach a capacity of 570,000 bpd by the middle of 2014 for legal and physical reasons. Construction of the Phase 1 expansion of Line 67 may not proceed unless and until the U.S. Department of State ("DOS") amends Enbridge's current Presidential Permit for the Mainline System, which decision may not be made until completion of an Environmental Impact Statement ("EIS"). At present, the DOS has completed scoping for this EIS, but it has not yet issued a Draft EIS for public comment, much less a Final EIS. Although the release date for the draft EIS is not known, it is not possible for the DOS to issue a Final EIS by "mid-2014." At the earliest, the DOS could complete its NEPA process around the end of this year, and then if the DOS grants a Presidential Permit, Enbridge could start construction of the Phase 1 project. Therefore,

it is not legally or physically possible for Enbridge transport 570,000 bpd by “mid-2014.” Rather, the earliest that this might be possible is Mid-2015, which conclusion is consistent with paragraph 19, which states: “Enbridge asserts that its proposed upgrades to Line 67 could be operational as soon as July 1, 2015.” Also, Enbridge’s claimed timing on page 3 of Revised Application Section 7853.0520 states that the timing depends on the information provided in Table 7853.0520-B.1. The Environmental Intervenors and the DOC agree that the information in this table cannot be verified. Moreover, the conclusion in paragraph 87 is not in accordance with Enbridge’s own trade secret apportionment forecast, which does not indicate that Enbridge’s existing and permitted heavy crude oil transportation capacity will be fully utilized this year. The statement in paragraph 87 further indicates that the ALJ confused current physical capacity with permitted capacity, incorrectly believes that the Mainline System’s heavy crude oil transportation capacity is currently fully utilized, and also that he does not understand the impact of the federal process on Project timing.

- **Paragraph 92:** This paragraph states: “the Flint Hills Resources refinery located in Rosemount, Minnesota, is expanding its capabilities to refine heavy crude oil. This expansion will permit it to refine an additional 36,000 bpd of heavy crude oil.” In support of this statement, the ALJ Report relies on the following exhibits: “Enbridge Ex. 12, at Attachment C (Curwin Rebuttal); DOC Ex. 37 at 22, LBO-S-5 and LBO-S-6 (Otis Surrebuttal); Ex. 52, at 13 (Denomy Direct).” The only reference that contains the 36,000 bpd figure is in Ms. Otis’ Surrebuttal Testimony. However, the references cited by Ms. Otis to support this claim (Attachments LBO-S-5 and LBO-S-6) do not contain this figure. LBO-S-5 does not contain any information about the Flint Hills Refinery.

LBO-S-6 (a November 16, 2012 press report in the Star Tribune) states only that the upgrade project “aims to boost efficiency without increasing the refinery’s size, so that more barrels of crude oil can be processed each day . . .” In contrast, Exhibit C of Mr. Curwin’s “rebuttal” testimony (Letter from Flint Hills Resources to ALJ Lipman dated March 12, 2014) does not include the 36,000 bpd figure and does not claim that the refinery’s peak capacity will increase. Instead it states, “The upgrades will permit the refinery to operate at a rate closer to its design capacity.” (Emphasis added.) Similarly, the more recent April 17, 2013, article by the Star Tribune included in Ms. Denomy’s Direct Testimony as Attachment MED-9 states: “The upgrade to the 57-year-old Pine Bend refinery aims to boost its efficiency so that it operates closer to its design capacity of 320,000 barrels per day.” Thus, Flint Hills Refinery itself does not claim that its upgrade project “will permit it to refine an additional 36,000 bpd of heavy crude oil.” Instead, the refinery’s own letter and corroborating press reports state that the refinery’s capacity will be unchanged by the current upgrade project and the upgrade will only improve efficiency. Thus, the 36,000 bpd figure cited by Ms. Otis is not supported by the exhibits she sites or by any other independent evidence in the record. Environmental Intervenors flagged this lack of evidence for Ms. Otis’ testimony in its Reply Brief at 55. The ALJ apparently failed to independently verify Ms. Otis’ testimony.

- **Paragraph 94:** This paragraph states: “These known increases in heavy crude refining capacity exceed the recently-upgraded capacity of Line 67 by an additional 184,000 bpd.” By way of explanation, it appears that the ALJ added the unsupported 36,000 bpd Flint Hills Refinery figure to the BP Whiting Refinery increase in heavy oil refining capacity of 268,000 bpd to claim a total future demand for Line 67 transportation services of

304,000 bpd, and then subtracted the Phase 1 upgrade capacity of 120,000 bpd to produce the 184,000 bpd figure (36,000 bpd + 268,000 bpd – 120,000 bpd = 184,000 bpd). This calculation ignores substantial evidence of existing excess heavy crude oil capacity on the Mainline System<sup>14</sup> and instead assumes that the Mainline System’s heavy crude oil transportation capacity will be 100% utilized this year, which assumption is inconsistent with Enbridge’s own apportionment forecast. Moreover, this calculation assumes a 36,000 bpd increase in capacity at the Flint Hills Refinery, for which there is no evidence in the record. Finally, this statement is incorrect because it assumes that Enbridge has completed the Line 67 upgrade, when in fact the pipeline has not yet been physically upgraded and cannot be upgraded until amendment of the Mainline System Presidential Permit. This language in this paragraph indicates that the ALJ confused permitted capacity with current physical capacity, incorrectly assumed that the Enbridge Mainline System’s heavy crude oil transportation capacity is 100% utilized, and failed to produce a reliable and accurate forecast of the future need for the Project.

- **Paragraph 95:** This paragraph states: “In 2012, Marathon Petroleum completed a \$2.2 billion upgrade and expansion project at its Detroit refinery.” While this statement is technically correct, it fails to note that the evidence in the record presented by Enbridge witness Earnest shows that this refinery has a heavy crude oil capacity of “about 80,000 bpd” and that existing pipelines currently provide approximately 70,000 bpd to 75,000 bpd to this refinery. Ex. 11, Curwin Rebuttal Testimony at 11, lines 185-188, and Figure 4. Thus, the largest amount of additional heavy crude oil that this refinery could in theory process is between 5,000 bpd and 10,000 bpd, but since refineries rarely operate at

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<sup>14</sup> Ex. 54 at lines 212-264.

100% capacity over time, the possible additional demand for heavy crude oil by this refinery is nominal.

- **Paragraph 96:** This paragraph states: “In February 2013, a \$400 million upgrade to the BP-Husky Refining LLC Toledo refinery was complete.” The ALJ Report cites “Ex. 1, § 7853.0250, at 5” (the Revised Application). Neither the Revised Application nor Enbridge’s witnesses nor any statement in the record alleges that this upgrade will require additional heavy oil supplies. There are many types of upgrades at refineries, most of which do not permit use of greater volumes of heavy crude oil. Thus, the upgrade at the Toledo Refinery does not constitute evidence of need for the Project.
- **Paragraph 104:** This paragraph states: “the hearing record makes clear that there will be significant new stocks of Canadian crude oil available for transport.” This statement fails to define the term “available for transport.” While heavy crude oil supply available for export is increasing in Canada, not all of this supply is available for transport on the Mainline System. Enbridge admits that the amount of supply “available to Enbridge” is limited by Canadian demand and volumes transported by other companies. Ex. 1, at 1 (Revised Application Section 7853.0520). Thus, not all of the supply forecasted to exist by CAPP or the NEB will be available to Enbridge. Merely stating that “there will be significant new stocks of Canadian crude oil available for transport” begs the question about how much of this new supply will be available to Enbridge. Thus, the ALJ failed to identify how much of the forecasted growth in western Canadian heavy crude oil supply is forecasted to be transported on the Mainline System.
- **Paragraph 105:** This paragraph states: “Laura Otis, a Rates Analyst with the Minnesota Department of Commerce, testified credibly that an additional 1.4 million bpd of

Canadian crude oil will be available for transportation between 2012 and 2020. If one subtracts 120,000 bpd that can be carried as a result of the Phase I capacity upgrades to Line 67, and subtract another 730,000 bpd that could be transported by the Keystone XL pipeline, there remains over 500,000 bpd of heavy crude oil that would be available for transport.” This statement incorrectly assumes that the Mainline System is currently at capacity, which assumption is not supported by the record. Ex. 54 at lines 212-264. Ms. Otis also fails to account for the commercial need factors identified in Ex. 4, at 1 (Revised Application Section 7853.0520), in that it assumes that the entire amount of new heavy crude oil supply in western Canada will be available to transport on the Mainline System. The record shows that some of the forecast additions to western Canadian heavy crude oil supply will be consumed in Canada, some can be transported by existing unused capacity on the Mainline System, and some will be transported by other transportation service providers. Ms. Otis’ failure to account for these factors means that her mathematical analysis is overly simplistic and incorrect.

- **Paragraph 106:** This paragraph states: “The record contains significant and credible forecasts of increased, near-term demand for heavy crude oil within PADD II.” As evidence, the ALJ Report cites “Ex. 37, at 17 (Otis Surrebuttal).” In fact, Ex. 37 does not discuss PADD II demand. Instead, Ms. Otis states: “I cannot independently verify Enbridge’s demand and apportionment forecasts because this information is based on proprietary sources that Enbridge did not reveal. Given this difficulty, I cannot conclude that the Applicant’s unverified forecasts are sufficient evidence of need. I have relied, instead, on information that shows need in the near term, such as historical apportionment data and announced heavy crude refinery upgrades, because this information can be

verified with publicly available data.” Thus, Ms. Otis does not state that there are “significant and credible forecasts in the record of increased, near-term demand for heavy crude oil within PADD II.” Rather, she states exactly the opposite. She states that Enbridge’s demand forecasts cannot be verified such that the only evidence in the record of demand is (1) apportionment data and (2) announced heavy crude oil refinery upgrades.

As discussed by Environmental Intervenors, Ms. Otis’ incorrectly relies on apportionment data as the foundation for her belief that the Mainline System is currently operating at 100% of its capacity, when in fact current utilization data provided by Enbridge and FERC shows that this is not true. Ex. 54 at lines 212-264. Moreover, Enbridge’s apportionment forecast also does not support this assumption. With regard to refinery upgrades, the only evidence of announced refinery upgrades in the record shows that only the BP Whiting expansion will require increased use of existing pipelines, but Ms. Otis does not calculate how much of this demand could be met by existing unused Mainline System heavy crude oil transportation capacity because she incorrectly assumes that none exists. As discussed by Environmental Intervenors Reply Brief at 55-56, the BP Whiting Refinery’s future increased demand can be met using Enbridge’s existing and permitted heavy crude oil transportation capacity.

- **Paragraph 107:** This paragraph states: “The record contains significant and credible forecasts of increased, near-term production of heavy crude oil by Canadian oil producers and that this oil will be available for transport along Enbridge's Mainline System.” To support this claim, the ALJ Report cites: “Ex. 7, at 30 - 35 (Muse Stancil Benefits Analysis).” The Muse Stancil Benefits Analysis discusses only the overall western

Canadian crude oil supply forecasts prepared by CAPP and the NEB. It does not discuss how much of this heavy crude oil will be “available to Enbridge” as this is defined by Enbridge in Revised Application Section 7853.0520 at 1 and shown in Table 7853.0520-B.1. An assumption that all western Canadian heavy crude oil supply will be available to Enbridge is not supported by the record.

- **Paragraph 109:** This paragraph states: “When Midwestern demand for heavy crude oil increases, alongside increasing supplies of oil in Western Canada, the market pressures upon Enbridge's limited transportation services are likely to increase. Increasing the capacity of Line 67 would forestall the rate and frequency of apportioned shipments along Line 67.” As support for this statement the ALJ Report cites: “Ex. 13 at 6 and Attachment A; Ex. 14 (Response to Department of Commerce Information Request 21A - Trade Secret Version); Ex. 15 at 19-20 (Earnest Rebuttal).” Assuming for the sake of argument that this statement is true, the ALJ fails to state when demand for Enbridge’s services will increase, the rate at which demand will increase, or the impacts of competing transportation service providers. As discussed by Environmental Intervenors, state law requires that the Commission consider the accuracy of a forecast showing the timing of demand.<sup>15</sup> It cannot merely find that demand will increase will increase to the point that additional capacity will be needed at some unstated future date. The law requires greater specificity.
- **Paragraph 110:** This paragraph states: “Given the regional and global demands for heavy crude oil, it is unlikely that conservation programs in Minnesota could reduce the demand for this type of oil by 230,000 bpd.” To support this statement the ALJ Report cites: “HEARING TRANSCRIPT, Volume 2, at 239-41 (Cicchetti Testimony).” This

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<sup>15</sup> Environmental Intervenors’ Post Hearing Brief at 22-26 and Reply Brief at 18-21.



testimony generally claims that global demand for crude oil is unlikely to be reduced by “demand-side management” and generally discusses the likelihood of reduced demand for crude oil. This testimony does not discuss any Minnesota conservation programs or specifically state that it is “unlikely that conservation programs in Minnesota could reduce the demand for this type of oil by 230,000 bpd.” Moreover, as noted by Environmental Intervenors, the record fails to include any evidence related to state conservation programs as required by Minn. Stat. § 216B.243, subd. 3.<sup>16</sup> In the absence of such evidence from the record, it simply is not possible for the Commission to reach the conclusion offered in this paragraph.

- **Paragraph 111:** This paragraph states: “Similarly, given the regional and global demands for heavy crude oil, it is unlikely that conservation programs in Minnesota could reduce the demand for heavy crude oil enough to significantly reduce apportionment along Line 67.” Enbridge also cites Dr. Cicchetti’s hearing testimony at Volume 2, pages 239-241 to support this statement. As noted, the record contains no evidence of Minnesota conservation programs, as required by Minn. Stat. § 216B.243, subd. 3. Further, this testimony does not discuss the impact of Minnesota conservation programs on apportionment. Therefore, the record cited by the ALJ does not support this statement in the ALJ Report.
- **Paragraph 116:** This paragraph states: “The current 570,000 bpd limitation on Line 67 is not sufficient to meet current and expected peak demand for crude oil shipments. Under such circumstances, it is likely that the apportionment of nominated shipments of crude oil will occur with greater frequency and severity on Line 67 if additional capacity is not available.” In support of this statement, the ALJ Report cites three sources: “See

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<sup>16</sup> MN350 and Sierra Club Post-Hearing Brief at 45-48.

Ex. 7 at 3-4 (Muse Stancil Benefits Analysis); Ex. 13, Exhibit F, Enbridge Response to Department of Commerce IR21B, Attachment 21B, Schedule 1; DOC Ex. 37 at 11 and 22-23 (Otis Surrebuttal). Each of these exhibits is discussed in turn.

First, the Muse Stancil Benefits Analysis at 3 shows total current demand, not future increased demand for heavy crude oil in various regions of the U.S. It provides no project-specific data and draws no conclusions about the ability of Enbridge to meet future demand with currently permitted capacity. This analysis at page 4 also states: “in recent months, the heavy crude oil pipelines within the Enbridge Mainline system have been under apportionment, which means that the shippers are not getting all of the heavy crude oil that they have nominated for shipment.” This statement is a truism, because apportionment is defined by the amount that nominations exceed current pipeline capacity. What this analysis fails to realize is that apportionment may be caused by either increased nominations or temporary or permanent decreases in pipeline capacity or both.<sup>17</sup> Temporary decreases in pipeline capacity may be caused by a number of factors that reduce the number of hours that a pipeline may operate in a month, such as maintenance shutdowns, power losses, or de-ratings due to safety concerns. Thus, the mere fact of apportionment is not evidence that nominations have exceeded the design capacity of a pipeline. Mr. Earnest admitted that he did not discuss with Enbridge the underlying causes of recent Mainline System apportionments, such that he has no knowledge of whether these apportionments were caused by increased nominations or decreased pipeline capacity.<sup>18</sup> In the absence of such knowledge, the Muse Stancil

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<sup>17</sup> Environmental Intervenor Reply Brief at 33-39.

<sup>18</sup> Environmental Intervenor Reply Brief at 37.

Benefits Analysis cannot be cited for the proposition that recent increases in customer nominations caused the recent apportionment events.

The Enbridge apportionment data cited is “Ex. 13, Exhibit F, Enbridge Response to Department of Commerce IR21B, Attachment 21B, Schedule 1.” This exhibit contains only apportionment amounts, but the data used to calculate these amounts (monthly nominations and monthly pipeline capacities) are not in the record, such that it is impossible to determine from this data the underlying causes for these apportionment events. In any case, this data does not itself state the conclusion reached in this paragraph.

The ALJ Report also relies on “DOC Ex. 37 at 11 and 22-23,” which is the Surrebuttal Testimony of Ms. Otis related to future demand by refineries in the Midwest. As previously discussed, Ms. Otis’ analysis incorrectly assumes that the Mainline System heavy crude oil capacity is 100% utilized and it also assumes that the Flint Hills Refinery demand will increase by 36,000 bpd, even though there is no evidence for this increase in the record.

Thus, the Exhibits cited by the ALJ Report in support of the conclusion in this paragraph do not support it. The conclusions in this paragraph require a substantial analytical leap that is not justified by the record.

- **Paragraph 117:** This paragraph states: “Enbridge’s shippers are knowledgeable and sophisticated parties. It is doubtful that these firms would underwrite capacity expansions on Line 67, through increased tolls, if a pipeline company could increase the amounts of heavy crude oil transported along this line without new infrastructure.” In support of this conclusion, the ALJ Report cites: “Ex. 53, at 3 (Denomy Rebuttal);

HEARING TRANSCRIPT, Volume 1, at 26 and 137 (Otis Testimony and Cicchetti Testimony).”

Ex. 53, at 3, discusses the ability of pipeline companies to ship different types of products in the same pipelines. This testimony is supported by the Enbridge Mainline System Configuration graphic included in Ex. 52 as Attachment MED-3. This exhibit shows that Enbridge currently operates its Lines 4, 6, 7, 10, 11, 55, and 61 to transport all types of crude oil including condensates, light synthetics, sweet crudes, light and high sour crude, medium crudes, and heavy crudes in the same pipelines. The cited testimony states nothing about Enbridge’s shippers or their alleged need for new infrastructure. Instead, the ALJ Report ignores evidence that Enbridge’s shippers miscalculated the need for construction of Line 67, documentation for which is included in Ex. 53 at lines 435 to 501 (this exhibit incorporated by reference the Petition of Suncor dated January 13, 2010, in Federal Energy Regulatory Commission Docket No. OR10-5-000.)<sup>19</sup> Thus, even “knowledgeable and sophisticated” shippers make mistakes. In any case, Minn. Stat. 216B.243 and Minn. R. 7853 do not allow the Commission to rely on the commercial judgments of Enbridge’s shippers to prove need for pipeline capacity. Instead, the Commission must conduct an independent investigation based on statutory and regulatory requirements, including analysis of a project-specific forecast.

The Hearing Transcript at Volume 1, page 26 contains a dialogue between ALJ Lipman and Mr. Kingstad unrelated to ALJ Report paragraph 117. Page 137 contains testimony by Mr. Earnest about whether or not shippers might believe that Enbridge can ship heavy crude oil on the pipelines it currently designates for light oil shipments. Mr.

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<sup>19</sup> The regulatory history showing that Enbridge constructed Line 67 prematurely is discussed in Environmental Intervenors’ Post-Hearing Brief at 2-16.

Earnest does not claim that he discussed the issues in ALJ Report paragraph 117 with Enbridge's shippers, such that his testimony is speculation. Again, under Minnesota law, the Commission may not rely on the judgment of a pipeline company's shippers, much less speculation about what shippers understand, to determine need for a pipeline.

- **Paragraph 118:** This paragraph states: “The testimony of Mary Ellen Denomy does not point to a different conclusion.” The ALJ Report cites: “Ex. 54, at 3 (Denomy Surrebuttal).” Environmental Intervenors reject the ALJ’s characterization of this testimony. In fact, the entire point of her testimony related to the possibility of shipping heavy crude oil on pipelines currently assigned by Enbridge to ship only light and/or medium crude oils was to point out that shippers might be able to use Enbridge’s pipeline system more efficiently and thereby avoid the cost of the Project. Uncontroverted evidence in the record indicates that as of the third quarter of 2013, Enbridge had 796,372 bpd of unused Mainline System capacity in Minnesota upstream of Clearbrook, and 838,895 bpd of unused capacity between Clearbrook and Superior, WI. Ex. 54 at lines 212-222. The evidence shows that unused heavy oil transportation capacity was at least 262,253 bpd, but this figure may be substantially higher because the data provided by Enbridge on which this figure is based shows much higher crude oil shipments than reported to FERC in Enbridge’s quarterly Form 6 Reports. Ex. 54 at lines 232-255. It is reasonable to investigate how much of this current excess capacity is available for use in heavy oil transportation service.
- **Paragraph 119:** This paragraph states: “There are reasons to doubt that an additional 230,000 bpd of heavy crude oil capacity can be obtained by transporting additional barrels of heavy crude oil on Line 4 or shipping by alternating batches of light and heavy

crude oil along this pipeline. In general, a pipeline has less capacity to transport heavy crude oil than light crude oil. Thus, there is not a 1-for-1 correlation between the excess capacity that may exist on Line 4, which does ship light crude oil, and the additional amounts of heavy crude oil that could be transported along this line. The capacity of Line 4 to ship additional barrels of heavy crude oil is substantially less than 230,000 bpd.” In support of this paragraph, the ALJ Report cites: “Compare, Ex. 15, at 33-34 (Earnest Rebuttal); Ex. 21, at 3 (Earnest Surrebuttal); Ex. 23, at 3-4 (Jurgens Surrebuttal) with HEARING TRANSCRIPT, Volume 3, at 61- 62 (Demony Testimony). The ALJ entirely ignores the uncontroverted evidence of total Mainline System unused capacity, including data about unused capacity not just on Line 4, but on Lines 1, 2, and 3. Ex. 54 at lines 212-264. The ALJ Report also entirely ignores the fact that Enbridge currently uses its Lines 4, 6, 7, 10, 11, 55, and 61 to transport all types of crude oil. Ex. 52, Attachment MED-3. While Environmental Intervenors do not contest that mixing oil types on the same line reduces throughput to some degree, the fact that Enbridge does this successfully on seven of its lines indicates that batch shipping different types of crude oil is practical and commercially viable.

- **Paragraph 120:** This paragraph states: “Further, in order to utilize Line 4 for additional heavy crude oil shipments, it is likely that additional pumping station, and a certificate of Need proceeding like this case, would be required before any such shipments could occur.” In support of this statement, the ALJ Report cites: “Ex. 23, at 3 (Jurgens Surrebuttal); see also, Minn. R. 7853.0030 (D).” This statement is incorrect. The maximum capacity of Line 4 is based on its maximum pressure as defined by federal

law.<sup>20</sup> Currently, Line 4's maximum capacity given this pressure rating is 796,000 bpd for heavy crude oil. Thus, this rating cannot be increased. The ALJ Report fails to understand that additional capacity on Line 4 may come from transferring the limited amounts of light currently transported on Line 4 to other pipelines. It also fails to consider the possibility of operating Lines 2 or 3 to transport heavy crude oil in batches with light and medium grades, as is done on Lines 4, 6, 7, 10, 11, 55, and 61. Ex. 52, Attachment MED-3.

- **Statements Related to Inefficient Use of Resources:** Paragraphs 126 to 130 generally discuss the efficiency of Enbridge's energy consumption for pumping. As discussed in Environmental Intervenors' Post-Hearing Brief, Minn. Stat. § 216B.243, subd. 3(6) requires that the Commission consider the "potential for increased efficiency and upgrading of existing energy . . . transmission facilities." Likewise, Minn. R. 7853.0130(A)(4) requires that the Commission consider "the ability of current facilities and planned facilities not requiring certificates of need, and to which the applicant has access, to meet the future demand . . . ." These provisions focus on the potential for reducing need through more flexible and efficient use of existing pipeline capacities, not the energy efficiency of pumps. Moreover, the ALJ Report is incorrect in its assumption that conversion of an existing pipeline to ship both heavy and light crude oils requires a certificate of need. Enbridge converted Line 3 from heavy oil service to only light and medium service just before Line 67 came online and did not initiate a docket at the Commission to accomplish this switch. Ex. 53, Denomy Testimony, Petition of Suncor, Exhibit H, incorporated by reference at lines 435 to 438.

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<sup>20</sup> 49 C.F.R. §§ 195.106 and 195.406 (2014).

- **Statements Related to Use of Keystone XL and Railroads as Alternatives:** The ALJ Report notes that construction of the Keystone XL Pipeline could eliminate the need for the Project for years. ALJ Report paragraph 132. Likewise, the ALJ Report states: “One possibility suggested by the Environmental Intervenors is to increase the number and frequency of railroad tank cars carrying crude oil to Midwestern refineries.” ALJ Report paragraph 135. Both of these paragraphs grossly and unfairly characterize Environmental Intervenors’ testimony and arguments related to these modes of transportation.

Environmental Intervenors have consistently and uniformly stated that the Commission should consider the competitive impacts of these competing transportation services on the need for the Project. We have not argued that they are alternatives to the Project. An alternative as defined by law would provide transportation services to the same customers. Environmental Intervenors argue that Keystone XL and other proposed pipelines and railroads would compete for the limited crude oil supplies being developed in western Canada, regardless of the markets served.

Thus, the ALJ Report fails to distinguish the competitive impact of construction of the Keystone XL Pipeline, other existing and proposed pipelines, and railroads, on the commercial need for the Project, as opposed to consideration of the Keystone XL Pipeline or railroads as alternatives to the Project. Environmental Intervenors have not argued that the Keystone XL Pipeline, other pipelines, or railroads should be considered as an alternative to the Project. Instead, they have argued expansion of these other services would delay the need for the Project, because a greater proportion of future increases in western Canadian crude oil supply should be expected to be carried by other transportation service providers.



## **B. Errors of Law in ALJ Report Related to Need**

The ALJ Report rejected the legal argument contained in Environmental Intervenors's Post Hearing and Reply Briefs related to statutory and regulatory requirements for:

- a project-specific forecast backed up by the contents required by Minn. R. 7853.0520, particularly in light of the fact that Enbridge and CAPP apparently both rely on such forecasts rather than the circumstantial evidence relied on by the ALJ Report and DOC;
- consideration of the impact of competing transportation service providers given the substantial impact that construction of the first Keystone Pipeline had on utilization of the Enbridge Mainline for heavy oil transportation;
- consideration of the capacity to meet demand through more efficient use of unutilized pipeline capacity, given the proven existing excess capacity on the Enbridge Mainline System; and
- consideration of state petroleum conservation programs.

The Commission's failure to comply with the plain meaning of the statutes and regulations applicable here would result in an incomplete record and be reversible error.

## **IV. EXCEPTIONS TO THE ALJ'S FINDINGS RELATED TO THE IMPACTS OF THE PROJECT ON CLIMATE CHANGE**

### **A. The ALJ Report's Findings Related to Climate Change**

With regard to renewable energy and climate change, the ALJ Report contains a number of statements that are clear errors of fact and/or ignores evidence that directly contradicts its findings. Specific examples of these errors are listed below.

- **Paragraph 139:** This paragraph accepts Dr. Cicchetti's testimony that there are no renewable energy alternatives to petroleum and completely ignores Dr. Abraham's

uncontroverted testimony that improving the fuel economy of American cars by one mile per gallon would easily reduce the need for an additional 230,000 barrels per day of tar sands oil in the United States. Ex. 50, Abraham Direct Testimony at 4.

- **Paragraph 179:** This finding is incomplete because it leaves the impression that extraction and combustion of Canadian tar sands oil releases more greenhouse gases than Saudi Arabian crude oil. To accurately state the findings of Ex. 51, Attachment 7, it should be amended as follows:

~~Moreover, Mr. Dr.~~ Abraham's pre-filed testimony suggests that on average, the transportation of Canadian heavy crude oil to refineries results in the release of ~~far~~ fewer greenhouse gases than oil transportation operations in other oil producing nations—such as Angola, Ecuador or Saudi Arabia. However the greenhouse gases produced by the extraction, production, transportation and consumption of Canadian tar sands oil overall is higher than any other source of oil. Ex. 51, Attachment 7.

- **Paragraph 182:** The statement that denying the Certificate of Need will add approximately \$11 to the cost of a barrel of oil is unsupported in the evidence cited. Neither Dr. Cicchetti nor Neil Earnest testified that denying the certificate of need will add \$11 to the cost of a barrel of oil. Moreover, as a matter of common sense, it seems unlikely that a failure to construct the Project would increase the price of crude oil by \$11 per barrel nationwide.
- **Paragraph 184:** This paragraph reads “Attributing all of the greenhouse gas impacts from the oil that Enbridge transports to the project, is problematic—in terms of both

causation and calculations. . . .” However, the statutory factors to be considered are not whether Enbridge causes the emissions but rather what the effect of the Project is on the natural environment. The transportation of the crude oil leads to the ability to burn the crude oil and that impact must be considered with weighing the costs and benefits of the Project. Moreover, while it is correct that the amount of greenhouse gases released differs between types of oil, in this case, the only oil transported by Line 67 is tar sands oil so that impact can be measured and was in fact measured by Dr. Abraham. This entire paragraph should be replaced with:

**Paragraph 184:** The additional CO<sub>2</sub> that would be released into the environment if the incremental expansion of the Alberta Clipper of 230,000 bpd was fully utilized would be an additional 7,200,000,000 kg of CO<sub>2</sub> annually, assuming that the tar sands oil replaced conventional oil. This increase is the equivalent of the daily emissions of an additional 1.5 million cars or more than two coal-fired plants. Ex. 50, Abraham Direct Testimony at 3-5.

- **Paragraph 187:** This paragraph reads “For these reasons, the better reading of the requirements of Part 7853 is to assess the environmental impacts at, or adjacent to, Line 67.” This sentence is not a finding of fact, but is instead a conclusion of law and should be stricken.
- **Paragraphs 188-199:** In assessing the socioeconomic impact of the project, Paragraphs 188-199, the ALJ erred in failing to include the uncontroverted socioeconomic costs of the project as detailed by Dr. Abraham.

The following undisputed findings of fact should be added:

- **New Paragraph:** The additional carbon in the atmosphere if the project is approved will adversely impact Minnesota's socioeconomic environment by reducing the productivity of key economic sectors, including Minnesota's agricultural, forest products and tourist economies. Ex. 50, Abraham Direct Testimony at 4-5.
- **New Paragraph:** Climate change will increase the likelihood of severe weather and weather-related natural disasters, impact food supplies, adversely impact water levels on Lake Superior and reduce drinking water supplies in parts of the state. Ex. 50, Abraham Direct Testimony at 4-5.
- **New Paragraph:** Climate change will also have adverse effects on the health of Minnesotans as the increased humidity and temperatures lead to increases in instances of heat stress, respiratory problems due to increased pollen and mold in the air, higher rates of vector borne diseases such as those carried by mosquitos and increased air pollutants such as ozone. Ex. 50, Abraham Direct Testimony at 5; HEARING TRANSCRIPT , Volume 3, at 11-14 (Abraham Testimony).

**B. The ALJ Report's Failure to Consider the Full Climate Change Impacts of the Project as Required by Law**

As detailed in Environmental Intervenors' Post Hearing brief, the consequences of further extraction, refining, transporting and burning of Canadian tar sands oil will be devastating to Minnesota and the world due to the increase of greenhouse gases being released into the atmosphere. MN350/Sierra Club Post Hearing Brief at 43-45. The ALJ erroneously focused only on the potential emissions from transporting the tar sands oil rather than all of the emissions from the entire process from extraction to consumption and concluded that the impact of the project would be minimal. The ALJ's narrow focus was incorrect as a matter of law. *See* MN350/Sierra Club Post Hearing Brief at 27-29 and MN350/Sierra Club Post Hearing Reply

Brief at 43-45. The ALJ's disregard of the unrefuted testimony of Dr. Abraham and many members of the public with regard to the projects' impact on climate change is an affront to the public who cares so passionately about this issue.

## V. CONCLUSION

For the reasons described herein, MN350 and the Sierra Club respectfully request that:

- the Commission reject the ALJ's Findings of Fact, Summary of Public Testimony, Conclusions of Law and Recommendation and deny Enbridge's Application for a Certificate of Need for the Project; and that
- the Commission either reject the Application or in the alternative, remand this matter to the Office of Administrative Hearings for further proceedings for the purpose of providing a record that fully complies with the requirements of Minn. Stat. § 216B.243 and Minn. R. Ch. 7853 and the public hearing requirement in Minn. R. 7829.2500, subp. 9.

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