

**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

**POST-HEARING REPLY BRIEF OF MN350 AND THE SIERRA CLUB**

**May 13, 2014**

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**STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION**

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Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

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**I. INTRODUCTION**

Minn350 and the Sierra Club (“Environmental Interveners”) hereby submit their Post-Hearing Reply Brief in the above referenced proceedings. Environmental Interveners reply to claims by Enbridge Energy Limited Partnership (“Enbridge”) and the Minnesota Department of Commerce, Division of Energy Resources (“Department” or “DOC”) that Enbridge has met its burden of proof under Minn. Stat. § 216B.243 (2014) and its implementing regulations in Minn. R. Ch. 7853 with regard to Enbridge’s Application for a Certificate of Need for the Line 67 Phase 2 Upgrade Project (“Project”).

Both Enbridge and the DOC rely on regional and national crude oil supply and/or demand forecasts that are not specific to the Project. As a result, their analyses do not comply with the plain language of Minn. R. Ch 7853. Also, careful review of their analyses demonstrates that reliance on national and regional forecasts in combination with anecdotal and circumstantial evidence results in inaccurate and unverifiable forecasts of need. At the same

time, the record indicates that Enbridge and the Canadian Association of Petroleum Producers (“CAPP”) have prepared project-specific forecasts, but Enbridge has chosen not to provide the data required to verify the accuracy of its forecast and CAPP chose not to provide its forecast at all. Given the plain language of the law, the demonstrated inaccuracy resulting from reliance on forecasts that are not project-specific, and the existence of superior forecasting methodologies and data, the Commission may not and should not base its decision in this proceeding on the findings proffered by Enbridge and the DOC.

## **II. PROCEDURAL DEFICIENCIES**

Both Enbridge and the DOC include procedural history sections in their Post-Hearing Briefs. Neither of these sections conveys information showing controversy related to the conduct of this hearing or violations of procedural laws by Enbridge and the Commission. The following focuses on procedural issues that prejudiced Environmental Intervenors’ and the public’s participation in this proceeding.

### **A. Procedural History**

On June 28, 2013, Enbridge initially 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 data in Application Section 7853.0520 to be trade information pursuant to Minn. R. 7829.0500 and refused to disclose it. As a consequence, Environmental Intervenors and the public had no meaningful opportunity to comment on the completeness of Enbridge’s forecast information.

On August 16, 2013, in response to DOC comments on completeness, Enbridge filed a revised Application. This version also claimed that all of Application Section 7853.0520 was trade secret information pursuant to Minn. R. 7829.0500.

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 on its face almost all of the information in this section was public information.

On November 26, 2013, in order to gain access to Enbridge's trade secret forecast information, Environmental Interveners requested a draft protective order and nondisclosure agreement from Enbridge. On the same day, counsel for Enbridge responded that a protective order might not be necessary in light of the public version of a forthcoming revised Application Section 7853.0520.

On December 4, 2013, Enbridge filed a revised Application Section 7853.0520.<sup>1</sup> This revised section considered only two lines of data comprised of 16 numbers in Table 7853.0520-B.1 to be trade secret. A comparison of this revised Section 7853.0520 to the trade secret version filed with the Applications in June and August shows that these documents are all very similar and are comprised primarily 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;

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

- 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”); and
- general descriptions of other announced Enbridge pipeline projects that are publicly available.

Therefore, Enbridge improperly and without good cause designated large amounts of information as trade secret information. This withholding of information meant that Environmental Interveners and the public were wrongfully prevented from meaningfully commenting on the completeness of Enbridge’s forecast information provided by it to comply with Minn. R. 7853.0520.

On December 6, 2013, Environmental Interveners informed counsel for Enbridge that the revised public version of section 7853.0520 did not satisfy their need for information, and therefore, repeated their request for a nondisclosure agreement that would allow access to trade secret information. One week later, on December 13, 2013, counsel for Enbridge responded by saying that a draft protective order was under review and would be circulated early the following week. On Wednesday, December 18, 2013, counsel for Enbridge provided a proposed protective order and nondisclosure agreement.

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 contained no project-specific forecast information. Instead, Mr. Earnest generally discussed regional oil

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

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 Friday, December 20, 2013, Environmental Interveners objected to the proposed protective order because it contained novel and unprecedented terms, relative to prior protective orders issued in other Commission proceedings, that were prejudicial to them and other parties. Enbridge responded by sending an email to all parties stating that it planned to circulate a revised version of the proposed protective order the following week. Enbridge suggested that parties defer detailed comments until this revision was available. Since Environmental Interveners expected a revised proposed protective order within approximately the same timeframe as would be required to provide comments on the December 18 Proposed Order, Environmental Interveners deferred preparation of detailed comments pending receipt of a revised proposed order.

On Thursday, January 9, 2014, almost three weeks later, counsel for Enbridge provided a revised proposed protective order. This revised version made modest changes but did not address Environmental Interveners' objections.

On January 10, 2014, Enbridge filed the Direct Testimony of Mark Curwin, Jeff Jurgens, and Paul Turner.<sup>4</sup> This testimony was very limited in its scope and depth. It provided no detailed information about Enbridge's forecast information, but primarily served to introduce the witnesses, describe their general areas of responsibility, and make very broad claims related to the Application.

On January 17, 2014, due to a pressing need to gain access to trade secret information with sufficient time for analysis before the deadline for initial Intervener testimony on February

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

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



18, 2014, Environmental Interveners filed their Request to Reconvene Pre-Hearing Conference in order to resolve the dispute related to the proposed protective order. On January 24, 2014, the Administrative Law Judge (“ALJ”) held a second Pre-Hearing Conference to resolve Environmental Interveners’ objections to Enbridge’s proposed protective order.

On January 28, 2014, just three weeks before the deadline for Intervener initial testimony, the ALJ issued his Forth Prehearing Order (Protective Order) in which he rejected the language proposed by Enbridge to which Environmental Interveners objected.

On February 18, 2014, the DOC filed the Direct Testimony of Laura B. Otis, as well as her Direct Testimony Attachments.<sup>5</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>6</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>7</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>8</sup> This testimony contained far more information than Enbridge’s initial testimony, totaling 126 pages of testimony and 481 pages of attachments.

On March 20, 2014, the DOC submitted a motion for leave to file surrebuttal testimony, which was not allowed by the ALJ’s Second Prehearing Order. The DOC filed this motion because Enbridge provided substantial additional facts in its rebuttal testimony and the DOC sought to respond.

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<sup>5</sup> Ex. Nos. 35, 36, Otis Direct Testimony and Direct Attachments.

<sup>6</sup> Ex. No. 35, Otis Direct Testimony at 52.

<sup>7</sup> *Id.*

<sup>8</sup> Ex. Nos. 11–20, Rebuttal Testimony of Curwin, Earnest, Turner, Cicchetti, and Rennie.

On March 21, 2014, Environmental Interveners likewise moved for leave to file Surrebuttal Testimony, but also sought to reschedule the evidentiary hearing, which was originally scheduled to begin on April 1, 2014, in order to allow time to prepare surrebuttal testimony. Environmental Interveners's motion showed "Enbridge has structured its testimony of March 13, 2014, as "rebuttal" testimony. In fact, Enbridge has provided almost all of the substantive data and arguments related to the economic impacts and need for the Project in the last scheduled opportunity for submission of evidence prior to the evidentiary hearing."

On March 25, 2014, Enbridge responded to the Environmental Interveners' motion in which it opposed rescheduling the evidentiary hearing, but did not oppose providing all parties with the opportunity to file Surrebuttal Testimony.

On March 26, 2014, the ALJ convened a prehearing conference and then issued an amended scheduling order that granted the motions for surrebuttal testimony and also ordered that the evidentiary hearing be delayed by a week.

On April 3, 2014, the PUC 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 PUC 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 PUC would deal with overflow crowds on the day of the hearing. Ultimately, the PUC 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 PUC staff were overwhelmed by and poorly prepared to accommodate the number of citizens at the public hearing. Those who arrived an hour ahead of time gained entrance to the hearing room, but those who arrived later encountered only a large group of individuals on the third floor of the PUC building. No PUC 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, PUC 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 waiting to testify. 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. Therefore, when the hearing commenced, most of the citizens in the room supported the pipeline while a much larger group of citizens was relegated to the first floor without access to an audio or video broadcast of the hearing.

Those who left the room 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 PUC's hearing room and overflow room by approximately 800 seats.

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

As a result, 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 PUC 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.

Eventually, PUC 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. This resulted in a "scalpers" line on the first floor where citizens waiting to attend asked those leaving if they had a ticket. Eventually, PUC 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.

In a voluntary effort to assist citizens, during the first recess MN350 staff established a remote listening room 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 PUC 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 75 were allowed to provide oral comment. However, due to the PUC'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 hearing without the PUC having any record of their attendance, much less hearing their comments.

#### **B. Procedural Deficiencies**

Throughout this proceeding, Enbridge has obstructed Environmental Interveners' access to information required by Minn. R. Ch.7853, and thereby violated Environmental Intervener's due process rights under state law.

Initially, pursuant to Minn. R. 7829.0500, Enbridge improperly classified all of Application Section 7853.0520 as trade secret information, even though almost all of the information in this section is undeniably public information, which status was ultimately confirmed by Enbridge's disclosure on December 4, 2013, of all of this section except for 16 numbers in a single table. However, this disclosure came months after the Commission's August 16, 2013, deadline for comments on completeness. Thus, Enbridge without good cause improperly designated non-trade secret information as being subject to the state's laws protecting trade secret information.

Rather than challenge this blatant violation of law, the Commission accepted Enbridge's illegal designation, thereby breaching its duty under Minn. Stat. Ch. 13 and Minn. R. Ch. 7829.

Under state law, "trade secret information" is defined as:

government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.<sup>9</sup>

Given this definition, no rational argument can be made that the publicly available information in the initial and revised Application Section 7853.0520 is trade secret information. Regardless, the Commission failed to comply with Minn. Stat. § 13.03, Subd. 1, which states:

All government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.

(Emphasis added.) The Commission's failure prevented Environmental Interveners and the public from commenting on the completeness of Application Section 7853.0520, because during the comment period not a single word in Section 7853.0520 was released to the public. This failure to disclose public information violated Environmental Intervener's rights under law. Environmental Interveners were not able to argue to the Commission that this section failed to include information required by Minn. R. Ch. 7853 related to forecast information. In addition, as detailed in the DOC and MN350 comments, Enbridge's Application also failed to provide other information required by Minn. R. Ch. 7853.

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<sup>9</sup> Minn. Stat. § 13.37, Subd. 1(b) (2014).

Enbridge's next limited Environmental Intervener's timely access to Enbridge's trade secret information through delay in its preparation of a draft protective order and then when it did release a draft it included terms and conditions that had never previously been approved by the Commission. These provisions were blatantly prejudicial to Environmental Interveners' interests, particularly because Enbridge sought to use its draft protective order to limit access to information and impose significant liability for disclosure of confidential information, which liability threatened Environmental Interveners' volunteers and chilled public participation. Ultimately, on January 28<sup>th</sup>, 2014, the ALJ rejected Enbridge's proposed language and adopted a protective order similar to those previously approved for Commission proceedings.<sup>10</sup> However, resolution of the dispute related to the protective order unnecessarily consumed Environmental Interveners' limited resources and meant that trade secret information was not disclosed until days before Interveners' initial testimony was due.

The Commission's improper decision to find Enbridge's Application complete also allowed Enbridge to delay its disclosure of most of its detailed evidence on the need for the Project until its rebuttal testimony. As described in detail in Environmental Interveners' March 21, 2014, Motion to Reschedule Evidentiary Hearing, Enbridge's initial testimony contained very limited information and no detailed project-specific information about need for the Project. In fact, the information was so limited that DOC witness Otis took the unusual and perhaps unprecedented position that Enbridge's Application be denied due to a lack of evidence. In response to the DOC initial testimony, Enbridge opened the floodgates and poured forth a large amount of information less than three weeks before the scheduled start of the evidentiary hearing. In response to this deluge, Environmental Interveners and the DOC both requested and were granted the right to submit surrebuttal testimony, because otherwise they would have no

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<sup>10</sup> Fourth Prehearing Order (Protective Order), January 28<sup>th</sup>, 2014.

opportunity to respond to most of Enbridge's case for need. Moreover, due to the limited time that remained, Environmental Intervenors also requested that the evidentiary hearing be rescheduled, which the ALJ granted by delaying it for one week. The practical result of this situation is that Environmental Intervenors had a narrow window in which to attempt to identify counter experts, analyze Enbridge's information and draft surrebuttal testimony, and also to prepare for a technically complex evidentiary hearing. Due to limited time, Environmental Intervenors were unable to identify an expert to counter much of the expert economic evidence of Dr. Cicchetti.

To Environmental Intervenors, it appears clear that Enbridge has intentionally sought to unreasonably limit Environmental Intervenors' timely access to information that Minn. R. Ch. 7853 requires be included in the Application. If the Commission had followed the letter and the spirit of Minn. R. Ch. 7853 and required that Enbridge disclose required evidence of need in its Application, Environmental Intervenors' would not have been forced to respond to the vast majority of Enbridge's detailed information on need in the four weeks preceding the evidentiary hearing. The Commission violated its own regulations by failing to require Enbridge to provide all information required by Minn. R. Ch. 7853, and this failure unfairly and unnecessarily prejudiced Environmental Intervenors' participation in this proceeding.

With regard to the St. Paul public hearing, Environmental Intervenors believe that administration of this hearing denied hundreds of individuals access to the hearing, prevented many citizens from providing the oral testimony that they had carefully prepared, and served to discourage and frustrate many concerned citizens who were denied the opportunity to listen, watch, or sign up to provide comment. As such, even though they had notice that a large number



of citizens would attend this hearing, PUC staff failed to appropriately plan for expected levels of citizen participation. As a result, the PUC failed to fairly administer the St. Paul public hearing.

### **III. ENVIRONMENTAL INTERVENERS' BURDEN OF PROOF RELATED TO ALTERNATIVES UNDER MINN. R. 7853.0130(B)**

Generally, interveners have the burden to prove alternatives under Minn. Rule. 7853.0130(B). However, the Commission should recognize an exception to this burden with regard to the "no action" alternative, because this alternative essentially requires proof that a project is not needed. Since proving that a project is needed falls squarely within the burden borne applicants, Minn. R. 7853.0130(B) cannot be read to shift the burden of proof related to need to Interveners. Instead, Applicants must affirmatively prove with the evidence required by Minn. Stat. § 216B.243 and Minn. R. Ch. 7853 that a project is needed. Should an applicant fail to provide such evidence, the burden does not shift to Interveners to first discover this evidence and then disprove the need for a project.

This interpretation means that the Commission must require that applicants fully comply with the information requirements of Minn. R. Ch. 7853, otherwise, an applicant could simply withhold its evidence of need and require Interveners to acquire such information through discovery or from public sources. Since key information, such as forecast information and trade secret or confidential information related to need, is typically available only from an applicant, it is not reasonable to require that Interveners attempt to force required information from applicants in order to meet the interveners' burden of proof under Minn. R. 7853.0130(B). Interveners are not required to first build an applicant's case so that it complies with Minn. R. Ch. 7853 and then rebut this case.

Here, Environmental Interveners assert that Enbridge failed to include forecast information required by Minn. R. Ch. 7853, particularly with regard to information required by

Minn. R. 7853.0520 related to Enbridge’s project-specific forecast and the data and key factors and assumptions underlying this forecast. Without access to this information, it is not possible for Environmental Interveners’ to rebut Enbridge’s project-specific forecast of need through analysis and evidence counter to Enbridge’s need forecast . It is not possible to rebut data, factors, and assumptions that are buried in a black box.

**IV. THE RECORD ESTABLISHES THAT ENBRIDGE HAS FAILED TO PROVIDE THE FORECAST INFORMATION REQUIRED BY MINN. R. CHAPTER 7853, SUCH THAT THE COMMISSION MAY NOT APPROVE THE APPLICATION AS A MATTER OF LAW**

Enbridge’s Post-Hearing Brief relies primarily on national and regional crude oil supply and demand forecasts, excess supply and apportionment forecasts unsupported by any data, historical apportionment data unsupported by evidence of increased nominations, and a variety of circumstantial and anecdotal evidence. Such information does not comply with Minn. R. Ch. 7853 requirements for project-specific forecasts supported by appropriate data and analysis. Moreover, the evidence demonstrates that such data has not and does not here provide a clear and reliable forecast of need. At the same time, the record shows that both Enbridge and CAPP have prepared project-specific forecasts, but Enbridge has not chosen to provide the data on which its forecast is based and CAPP has not chosen to release its forecast at all. Therefore, the Commission should reject the Application because it fails to comply with the regulatory standards found in Minn. R. Ch. 7853.

**A. Enbridge’s Post-Hearing Brief Does Not Rely on a Project-Specific Forecast of Need**

In its Post-Hearing Brief Enbridge bases its case for need for “heavy crude oil transportation services”<sup>11</sup> on:

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<sup>11</sup> Enbridge Post-Hearing Brief at 49.

- “numerous forecasts of heavy crude oil supply as well as significant information showing demand for the crude oil transportation capacity to be provided by Project, including “CAPP’s supply forecast, the NEB’s supply outlook, the ERCB’s oil production outlook, and the EIA’s study which forecasts the demand outlook;”<sup>12</sup>
- demand in “other parts of the world” and not domestic U.S., Midwestern, or Minnesota demand;<sup>13</sup>
- refinery upgrades by the BP Whiting Refinery, the Detroit Marathon Refinery, and the Flint Hills Resources Refinery;<sup>14</sup>
- changes and enhancements to the pipeline network downstream of Line 67;<sup>15</sup>
- the potential for apportionment of capacity;<sup>16</sup> and
- general statements of customer support for the Project.<sup>17</sup>

As discussed below, none of the above information is adequate to meet the express forecast requirements of Minn. R. Chapter 7853, and it also does not prove a need for the Project as required by Minnesota law.

In its Post-Hearing Brief, Enbridge relies on the following western Canadian supply forecasts: “CAPP’s supply forecast, the NEB’s supply outlook, [and] the ERCB’s oil production outlook.”<sup>18</sup> None of these forecasts predict the quantities of heavy crude oil expected to be transported by the Project itself.<sup>19</sup> The record clearly shows that the supply forecasts produced

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<sup>12</sup> *Id.* at 48-49.

<sup>13</sup> *Id.* at 49.

<sup>14</sup> *Id.* at 49-50.

<sup>15</sup> *Id.* at 50.

<sup>16</sup> *Id.* at 50-51.

<sup>17</sup> *Id.* at 51.

<sup>18</sup> Enbridge Post-Hearing Brief at 48.

<sup>19</sup> The CAPP, NEB and ERCB forecasts contain no project-specific forecasting, but rather provide only national and regional forecasts. Mr. Earnest characterized these forecasts as follows: “I would say these forecasts [CAPP, NEB, ERCB] are forecasts of western Canadian crude oil supply. They don't speak to how that crude oil supply will be transported to market, whether it's by pipeline, rail, or truck.” Hearing Transcript, April 8, 2014, Testimony of Mr.

by CAPP, the National Energy Board (“NEB”) of Canada, or the Energy Resources Conservation Board of the Province of Alberta (“ERCB”), are not forecasts of particular quantities of oil to be transported by the Project.<sup>20</sup> At best, they are source data for the total supply available for transportation from Canada. By themselves or together they are not “forecasts” as defined by Minn. R. Chapter 7853.

The only crude oil demand forecast cited by Enbridge is the U.S. Department of Energy, Energy Information Agency (“EIA”) Annual Energy Outlook 2014 Early Release (“AEO 2014 Early Release”).<sup>21</sup> This report forecasts total U.S. demand for crude oil, heavy and light, and does not forecast the particular quantities or types of crude oil that are expected to be transported by the Project. As such, it is not a “forecast” within the definition of Minn. R. Chapter 7853.

None of the forecasts relied on by Enbridge in its Post-Hearing Brief provide project-specific information. Therefore, combining two or more of these forecasts together cannot create a project-specific forecast within the meaning of Minn. R. Chapter 7853. While these regional and national forecasts may be relevant and could provide some of the foundational data required to produce a “forecast” within the meaning of Minn. R. Chapter 7853, the Commission may not rely on such general forecasts to the exclusion of the specific “forecast” required by Minn. R. Ch. 7853.

Oddly, Enbridge’s Post-Hearing Brief does not even mention the forecast contained in Application Table 7853.0520-B.1 (“Line 67 Supply Forecast”), which it includes in the Application to comply with Minn. R. 7853.0520(B).<sup>22</sup> This omission implies that Enbridge interprets Minn. R. Ch. 7853 to allow the Commission to base its need decision on generic

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Earnest, at 134 lines 12-15. If these forecasts do not relate to how crude oil is shipped to market in general, they cannot contain a project-specific forecast for a particular pipeline.

<sup>20</sup> *Id.*

<sup>21</sup> Ex. No. 13, Curwin Rebuttal Testimony Ex. F (Public).

<sup>22</sup> Ex. Nos. 4 (Public), 5 (Nonpublic) Revised Application Section 7853.0520 at 3.

regional and national forecasts of supply and demand for crude oil, to the exclusion of the quantified project-specific forecast required by Minn. R. Ch. 7853 supported by data as required in Minn. R. 7853.0520. While Enbridge might wish the project-specific forecasting and data requirements contained in Minn. R. Chapter 7853 into non-existence, the Commission may not ignore these requirements.

Enbridge's Post-Hearing Brief entirely ignores all of Minn. R. Chapter 7853's specific requirements for forecasts and instead cites only the language in Minn. R. 7853.0130(A) that the Commission consider "the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility." By focusing on this language in isolation, Enbridge appears to interpret it to mean that the Commission need consider only a general forecast of demand for heavy crude oil in the U.S. supported by evidence that the supply of heavy crude oil available for export from Canada is increasing. But, such narrow focus ignores the plain language contained in the definitions of "demand," "forecast," and "forecast years" in Minn. R. 7853.0010, Subp. 8, 9, and 10, respectively, as well as the data requirements in Minn. R. 7853.0520. As discussed below, these provisions require that the Commission consider a project-specific forecast and not rely just on general national and regional supply and demand data. Because it ignores these provisions, Enbridge's interpretation of Minn. R. Ch. 7853 is irrational and not in accordance with law.

**B. Minnesota Law Requires a Project-Specific Quantified Forecast of Demand for the Transportation Services to Be Provided by the Project**

Minn. R. 7853.0130 requires that the Commission consider "the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility." (Emphasis added.) The words "demand" and "forecast" in the foregoing are expressly defined in Minn. R. 7853.0010, Subp. 8 and 9.

“Demand” is defined as the “quantity of a petroleum product from the applicant's facilities for which there are willing and able purchasers . . . .”<sup>23</sup> (Emphasis added.) Thus, demand for a crude oil pipeline is not defined as consumer demand within a general geographic region, but rather a quantified demand for, as Enbridge describes it, “heavy crude oil transportation services.”<sup>24</sup>

“Forecast” is defined as “a prediction of future demand for some specified time period.”<sup>25</sup> Thus, a forecast must show a future “quantity of petroleum product from the applicant’s facilities”<sup>26</sup> during a specified time period. (Emphasis added.)

The “specified time period” is defined by Minn. R. 7853.0010, Subp. 10, which states that the forecast years include “a 16-year period consisting of the year in which an application is filed plus the next 15 years.”

Accordingly, the Commission must consider a forecast that shows the specific annual quantities of petroleum products for which there are willing and able purchasers that are forecast to be delivered by a proposed facility over a 16-year period. Put another way, the Commission must consider a forecast of demand for the crude oil transportation services that would be provided by an applicant.

In contrast, national and regional supply and demand forecasts do not show the quantity of petroleum products that would be delivered specifically by a proposed facility to willing and able purchasers. Therefore, such regional and national forecasts fall outside of Minn. R. Chapter 7853’s definition of “forecast.”

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<sup>23</sup> Minn. R. 7853.0010, subp. 8.

<sup>24</sup> Enbridge Post-Hearing Brief at 49.

<sup>25</sup> Minn. R. 7853.0010, subp. 9.

<sup>26</sup> Minn. R. 7853.0010, subp. 8.

Minn. R. 7853.0520 confirms the foregoing meaning of “forecast” in that it clarifies the type and scope of forecast data that must be included in an application. It requires:

- a list of the categories of petroleum products that the “applicant expects to transport;”
- during each of the first six “forecast years” as well as the 11<sup>th</sup> and 16<sup>th</sup> “forecast years;” and
- including for “each” forecast year and for each product the “quantities” that the applicant “expects” to transport using the “appropriate units of measure.”<sup>27</sup>

The foregoing provisions are consistent with the definition of “forecast” contained in Minn. R. 7853.0010, subp. 9, because they require data showing how much oil is forecast (“expected”) to be transported by the particular proposed project, which is the equivalent of a forecast of the heavy crude oil transportation services to be provided by a project.

In addition to providing this project-specific forecast, an applicant must also explain how it calculated the “estimation” of expected quantities of petroleum products that it forecasts will be transported in each year, including identification of “methods, assumptions, and factors” used to estimate the expected quantities.<sup>28</sup> Next, an applicant must discuss the “effect on the “forecast” of possible changes in the key assumptions and key factors.”<sup>29</sup> Thus, the Commission must have access to information that shows how an applicant’s “forecast” of demand for a project’s transportation services might change given reasonable assumptions other than those chosen by the applicant. Finally, the Commission must consider how other facilities planned by the applicant could affect the “forecast” “demand.”<sup>30</sup>

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<sup>27</sup> Minn. R. 7853.0520(A) and (B).

<sup>28</sup> Minn. R. 7853.0520(C)

<sup>29</sup> Minn. R. 7853.0520(D).

<sup>30</sup> Minn. R. 7853.0520(E)

State law does not allow the Commission to base a determination of need on only generic supply and demand data and information backed by circumstantial evidence. Instead, the law requires a far more rigorous analysis. Before the Commission may impose the burdens of a proposed crude oil pipeline on the citizens of Minnesota, and particularly on the landowners who are forced to host such pipelines, it must fully consider a project-specific quantified forecast of demand for the transportation services that would be provided by the pipeline together with such forecast's supporting data and consideration of an applicant's assumptions. Should the Commission fail to consider such forecast and perform this required analysis, the Commission would violate its own regulations.

**C. Project-Specific Forecasts Supported by Data Are Required for Certificates of Need by Other Regulations Implementing Minn. Stat. § 216B.243**

Minn. R. Ch.7853 is one of four chapters of regulation that implement Minn. Stat. § 216B.243. These other chapters include: Minn. R. Chapter 7849 (certificate of need for electrical power plants and lines); Minn. R. Chapter 7851 (certificate of need for natural gas pipelines and storage facilities); Minn. R. Chapter 7855 (certificate of need for fuel conversion, coal slurry, and nuclear facilities). These regulations contain a variety of levels of regulatory specificity with regard to the forecast required by Minn. Stat. § 216B.243, subd. 3(1), but all of them require that Commission decisions be based on project-specific forecast information and supporting data.<sup>31</sup>

The data underlying Enbridge's Line 67 Supply Forecast are comprised of only three primary elements: (1) a supply forecast for western Canada; (2) a domestic demand forecast for western Canada; and (3) a forecast of demand for other crude oil transportation services that would reduce Enbridge's market share, and specifically the amount of crude oil expected to be

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<sup>31</sup> Minn. R. 7849.270; Minn. R. 7851.0270; Minn. R. 7855.320, 420, 520, and 620.



transported during the forecast period by other existing and proposed pipelines and by railroads. Relatively speaking, the data supporting these elements are much simpler than the data supporting either electrical or natural gas facilities.

Also, the methodology used to calculate the quantity of heavy crude oil that would be transported by the Project (and its sister Line 4) is relatively simple. It requires only that a forecast of western Canadian supply be reduced by a forecast of western Canadian domestic demand and also reduced by a forecast of heavy crude oil that would be transported by competing existing pipelines, competing proposed pipelines, and railroads. This analysis is not particularly complex.

The foregoing methodology does not require exotic or particularly complex data. In fact, the record already contains:

- historical data for western Canadian supply and domestic demand;
- western Canadian supply forecasts provided by CAPP, the NEB, and ERCB;
- the capacities and recent utilization of existing import pipelines to the U.S.;
- the capacities of proposed pipelines that would compete with the Project for market share; and
- historical rail transportation of crude oil from western Canada.

It should be noted that even though the record contains a substantial amount of data, Enbridge has not disclosed the actual numbers used to calculate the Line 67 Supply Forecast. Thus, even though some of the foregoing information might appear to fill in data gaps related to the Line 67 Supply Forecast, such use of this data would be speculative. Without access to Enbridge's forecast calculations, the Commission cannot know whether and how Enbridge might have used such information in the preparation of its Line 67 Supply Forecast. As discussed in

Environmental Intervener's Post-Hearing Brief, Enbridge's decision to withhold the data underlying its Line 67 Supply Forecast means that it is impossible for the Commission to assess the accuracy of this forecast.

What is not included in the record is:

- the forecast of western Canadian heavy oil supply used by Enbridge in its calculation of the Line 67 supply forecast;
- the forecast of western Canadian domestic heavy crude oil demand used by Enbridge in its calculation of the Line 67 Supply Forecast;
- a forecast of the heavy crude oil that would be transported from western Canada by existing competing pipelines during the forecast period;
- a forecast of the heavy crude oil that would be transported from western Canada by proposed competing pipelines during the forecast period; and
- a forecast of the heavy crude oil that would be transported from western Canada by rail during the forecast period.

Yet, it appears that Enbridge and/or CAPP have developed the foregoing forecasts and have data and information related to all of them. Moreover, the record does not include any assessment of the effect of possible changes in the foregoing forecasts, which are key factors within the meaning of Minn. R. 7853.0520(D). Thus, the Commission cannot analyze the overall accuracy of the Line 67 Supply Forecast, understand Enbridge's key factors and assumptions in relation to the need for the Project, or understand how changes in these forecasts impact the need for the Project.

It would be arbitrary for the Commission to require that other large energy facilities provide project-specific quantified forecasts and disclosure of the key data and assumptions used

to calculate such forecasts, but base crude oil pipeline certificate of need decisions on general regional and national forecasts, given:

- the common statutory authority for certificates of need for all large energy facilities;
- the common regulatory requirements for project-specific forecasts supported by disclosed data and analytical methodologies; and
- the relative simplicity of the analytical methodology required for crude oil pipelines and the availability of supporting data and forecasts.

Enbridge's reliance on regional and national forecasts and its failure to include the project-specific forecast information and analysis required by Minn. R. Chapter 7853 means that Enbridge has failed to meet its burden under law.

**D. The Substantial Underutilization of Enbridge Mainline System Capacity for Years after Commission Approval of Line 67 Underscores the Need to Consider the Impact of Competing Transportation Services on Project-Specific Forecasts, as Required by Minn. R. Chapter 7853**

Because Enbridge's Post-Hearing Brief focuses on regional and national forecasts of crude oil supply and demand, it does not discuss the impacts of existing and proposed pipelines on the Line 67 Supply Forecast. Specifically, it does not discuss the impacts of the Puget Sound Pipeline, the Express Pipeline, the base Keystone Pipeline, or any other existing pipelines on the Line 67 Supply Forecast. It also does not discuss the potential impacts of the proposed Northern Gateway Pipeline, the Trans Mountain Expansion Pipeline, or the Eastern Access Pipeline on the Line 67 Supply Forecast, even though the planned dates<sup>32</sup> of operation of all of these proposed pipelines are during the first six forecast years for which Enbridge provides annual forecasts of transportation service demand pursuant to Minn. R. 7853.0520(B).<sup>33</sup>

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<sup>32</sup> Ex. No. 52, Denomy Direct Testimony at 11-12.

<sup>33</sup> Ex. No. 5, Revised Section 7853.0520 at 3 (Nonpublic).

Enbridge's Post-Hearing Brief considers the impact of the Keystone XL Pipeline primarily as an "alternative" to the Project, specifically with regard only to its ability to serve the same customers.<sup>34</sup> Enbridge focuses excessively on whether or not the Keystone XL Pipeline would serve the same end users and therefore be a direct "alternative" to the Project.<sup>35</sup> Enbridge fails to adequately consider the impact of other existing and proposed pipelines on the crude oil "supply available to Enbridge" due to supply constraints in western Canada, because shipments of crude oil to markets not served by the Project nonetheless limit the amount of crude oil available to ship on the Project.

In its Post-Hearing Brief, Enbridge's entire argument about why the Keystone XL Pipeline does not reduce the need for the Project is:

MN350/Sierra Club testified about the impact of the proposed Keystone XL Pipeline on need for the Project, claiming that construction of the Keystone XL Pipeline would result in construction of pipeline capacity from Western Canada that would far exceed demand for such capacity. MN350/Sierra Club also asserted that construction of the Keystone XL Pipeline would eliminate the need for the Project until 2022 or later. Evidence in the record, however, does not support use of the Keystone XL Pipeline over the Project because the in-service date is uncertain, it is not being built to serve the Minnesota, Midwest and PADD II markets, and as Ms. Otis testified, the construction of both the Keystone XL pipeline and the Project will not be capable of transporting the forecasted increases in supply.

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<sup>34</sup> Enbridge Post-Hearing Brief at 27 (para. 76), 32 (paras. 108, 113), 55, 58.

<sup>35</sup> Enbridge mischaracterizes Environmental Interveners' arguments related to consideration of the Keystone XL Pipeline. Specifically, Enbridge's Post-Hearing Brief states: "Although MN350/Sierra Club argued in favor of the no action, Keystone XL, and rail transportation alternatives, the arguments and evidence presented are unconvincing." It also states: "Even MN350/Sierra Club's witness Mary Ellen Denomy, the proponent of the Keystone XL discussion in MN350/Sierra Club's written testimony, stated at the evidentiary hearing that she did not analyze the Keystone XL Pipeline as an alternative to the Project." (Footnote omitted.) In fact, Environmental Interveners have not argued in favor of the Keystone XL Pipeline or rail transportation as preferred alternatives to the Project, but instead have consistently argued that supply growth in Canada is limited, therefore, the Commission should consider the impact of competing transportation service providers on the "supply available to Enbridge" and the need for the Project.

Thus, Enbridge argues that “[e]vidence in the record, however, does not support use of the Keystone XL Pipeline over the Project” due to (1) uncertainty, (2) its lack of service to Midwestern markets, and (3) the potential for future growth in western Canadian crude oil supply.

The uncertainty of the operational date of Keystone XL does not mean that the Commission should ignore its potential impact on the need for the Project, because Minn. R. 7853.0520(D) requires that the Commission consider such contingencies.

The fact that Keystone XL does not serve the Midwest does not mean that its Gulf Coast customers would not compete with Enbridge’s Midwestern customers for the limited supply of western Canadian heavy crude oil.<sup>36</sup>

With regard to the potential growth in western Canadian heavy crude oil supply, the question before the Commission is when the Project might be needed. Ms. Otis assumes that future crude oil supply will grow to a level that would exceed the combined capacities of the Project and the Keystone XL Pipeline without estimating when this would happen given forecasted western Canadian supply growth rates or the potential future impacts of competing pipeline and railroad transportation services.

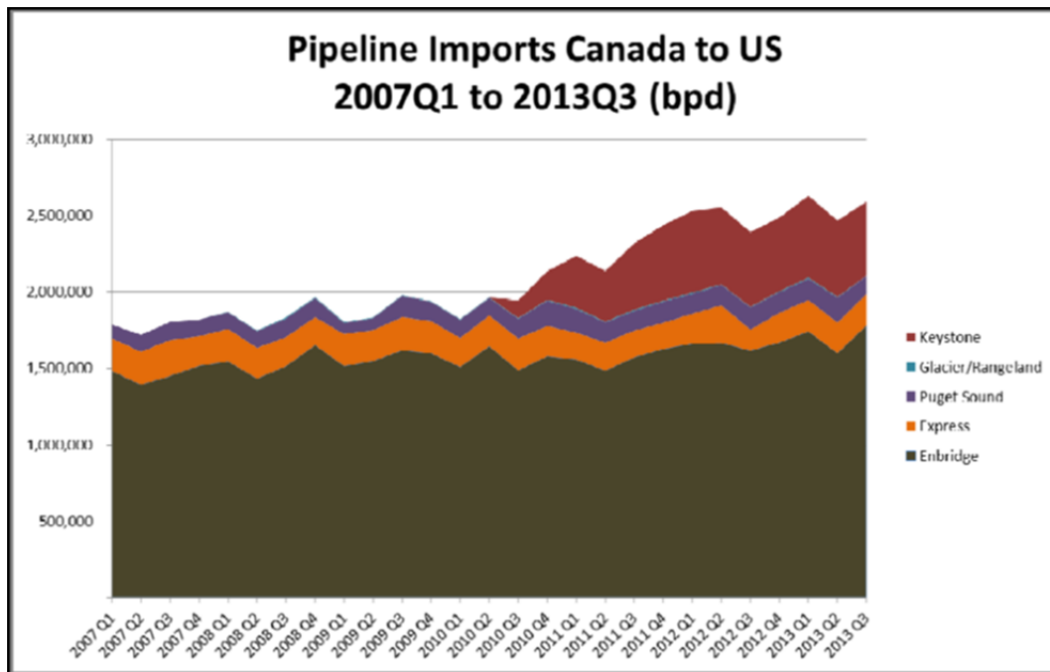
Minn. R. Ch. 7853 requires that the Commission consider a forecast over time so that it may determine whether the timing of the Project is in accordance with demand for its

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<sup>36</sup> Mr. Earnest argued in his Surrebuttal Testimony (Ex. No. 21 at 13 lines 228-232) that since Keystone XL and Enbridge’s downstream Flanagan South Pipeline are both supported by take-or-pay contracts that therefore operation of the Keystone XL would not impact utilization of the Enbridge Mainline System. This argument is incorrect for two reasons. First, even if the effective financial penalties imposed by each pipeline’s firm contracts are the same, some amount of the limited Canadian supply of heavy crude oil would likely still flow on the Keystone XL Pipeline, thereby reducing the amount of Canadian “supply available to Enbridge.” Second, the penalty imposed by firm contracts is greater for contracts with a higher value. A contract’s value depends on the committed volume and the distance shipped, since all tariff payments are based on a barrel-mile calculation. The Flanagan South contracts cover only the distance from northern Illinois to Cushing, Oklahoma. In contrast, the Keystone XL contracts are commitments to ship crude oil from Hardisty to either the Gulf Coast or Cushing, Oklahoma, both of which distances are substantially greater than the length of the Flanagan South Pipeline. Therefore, it is likely that Keystone XL shippers will have a greater incentive to utilize their firm contracts than Flanagan South shippers.

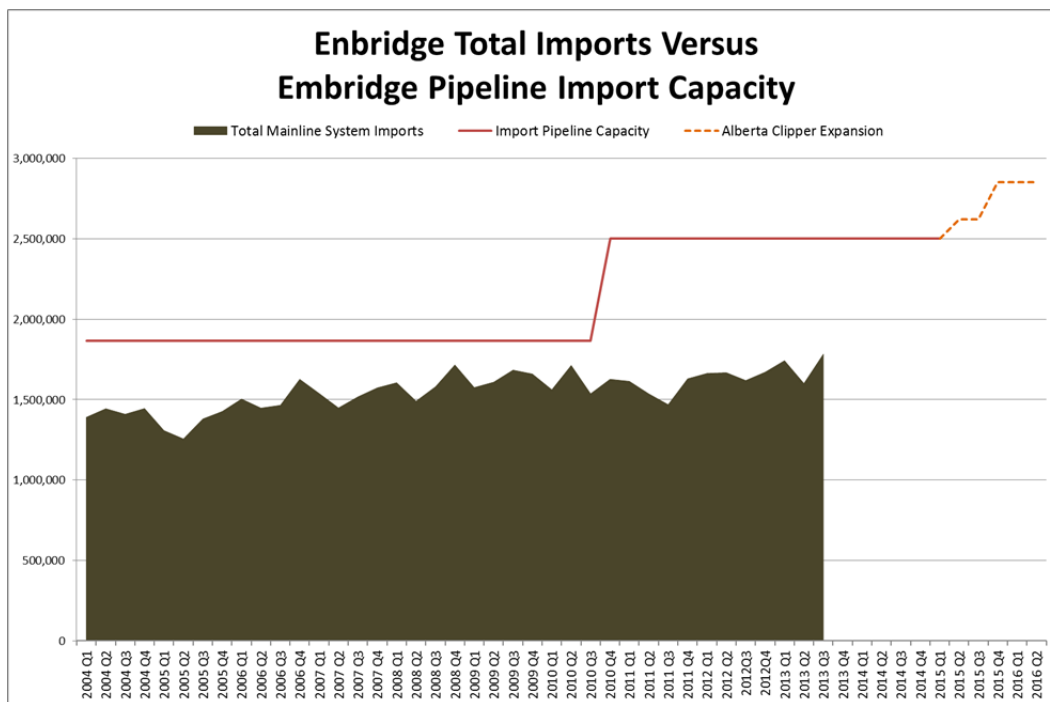
transportation services. If timing is ignored, then it could be argued that any proposed large energy facility will ultimately be needed such that every proposed facility should be built now, which is an absurd conclusion. Enbridge’s failure to provide the forecast information required by Minn. R. Ch. 7853 means that it is impossible for the Commission to determine the accuracy of the Project’s forecast with regard to the timing of the need for the Project.

Historical data proves that the potential impact of other competing pipelines, existing and proposed, is a key factor in the forecast of need for the transportation services to be provided by the Project. The following chart of FERC data<sup>37</sup> shows that the impact of other pipelines is not merely theoretical. It is clear that the first Keystone Pipeline, which is a heavy oil pipeline, attracted most of the net additions of western Canadian crude oil to it after it came online, thereby severely limiting increased use of the Enbridge Mainline System through 2013.



<sup>37</sup> Ex. No. 52, Denomy Direct Testimony at 7.

In fact, as of the third quarter of 2013, Enbridge still had not imported more oil into the U.S. on its Mainline System than the system capacity that existed before Line 67 and the LSr Pipeline commenced operations.<sup>38</sup>



The following four new major crude oil pipelines are currently proposed to come online within four years:

- Keystone XL Pipeline – 830,000 bpd (2017)
- Enbridge’s Northern Gateway Pipeline – 525,000 bpd (2018);
- Kinder Morgan’s Trans Mountain Expansion – 890,000 bpd (2017); and
- TransCanada’s Energy East Pipeline – 1,100,000 bpd (2018).<sup>39</sup>

Enbridge’s Post-Hearing Brief focuses only on the potential impacts of the Keystone XL Pipeline, but even if just one of these other pipelines is approved and constructed on schedule, it seems very likely that such pipeline would substantially impact the “supply available to

<sup>38</sup> Ex. No. 53, Denomy Rebuttal Testimony at 22.

<sup>39</sup> Ex. No. 52, Denomy Direct Testimony at 11-12.

Enbridge” and therefore reduce the need for the Project. Given that construction of additional major export pipelines from western Canada is reasonably possible and an express goal of the industry,<sup>40</sup> the Commission must evaluate the potential impacts of such proposed pipelines on the need for the Project.

Likewise, existing pipelines owned by competing companies currently transport a substantial amount of crude oil and may be able to transport additional capacity. Thus, the volume of crude oil that would be transported by other pipelines during the forecast period is a key factor in the Line 67 Supply Forecast that has not been disclosed by Enbridge. While the exact amount unused capacity on existing pipelines is subject to debate, the evidence shows that existing pipeline capacity does exist.

Mr. Earnest via general unsupported statements attempts to dismiss the possibility that any additional crude oil could be transported by existing pipelines.<sup>41</sup> For example, he states that the Express Pipeline “is fundamentally constrained by the limited need by refineries in the Rockies for Canadian crude oil and the available outbound capacity of the pipelines that connect the Rockies with PADD II.” Yet, as recently as the second quarter of 2012, the Express Pipeline imported 245,877 bpd of oil, over 40,000 bpd more than in the third quarter of 2013.<sup>42</sup> Similarly, he states that the Trans Mountain Pipeline has been under “severe apportionment for several years. Consequently, the throughput of the Puget Sound Pipeline is typically limited back at Edmonton by the volume of crude oil that is nominated for U.S. destinations post-apportionment, not by its physical capacity.”<sup>43</sup> He also states that Trans Mountain Pipeline’s deliveries to

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<sup>40</sup> Ex. No. 54, Denomy Surrebuttal at 22 lines 490-491 (Brian Ferguson, the CEO of Cenovus said at the CIBC 2013 Investor’s Conference, the industry wants to build “all pipelines, going anywhere.”)

<sup>41</sup> Ex. No. 15, Earnest Rebuttal Testimony at 34-35.

<sup>42</sup> Ex. No. 52, Denomy Direct Testimony, Att. MED-6.

<sup>43</sup> Ex. No. 15, Earnest Rebuttal Testimony at 34-35.



Vancouver, British Columbia are constrained due to product shipments.<sup>44</sup> In contrast, as recently as the second quarter of 2013 the Puget Sound Pipeline imported 163, 354 bpd, approximately 45,000 bpd more than in the third quarter of 2013.<sup>45</sup> Thus, FERC data indicates that these other existing pipelines have excess capacity. Also, Mr. Earnest does not document how much product is shipped to Vancouver. And, he does not deny that the first Keystone Pipeline has excess capacity.<sup>46</sup>

Ultimately, Mr. Earnest's testimony related to the potential for increased utilization of existing pipelines is not persuasive because he does not affirmatively provide a forecast of the potential future shipments on any of these other pipelines, does not allege that Enbridge's Line 67 Supply Forecast assumes no future growth in shipments on other pipelines, and admits that he did not "attempt to independently calculate or verify" the Line 67 Supply Forecast.<sup>47</sup> Rather than provide actual numbers about the future utilization of these other exiting pipelines, much less the actual numbers used to calculate the Line 67 Supply Forecast, Mr. Earnest merely makes unsubstantiated claims that they cannot move a single drop more.

Thus, the evidence in the record proves that other pipelines, existing and proposed, are likely to have a substantial impact on the need for the Project, such that their potential impact on the need for the Project must be considered by the Commission through review of data submitted pursuant to Minn. R. 7853.0520(C) and (D).

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<sup>44</sup> *Id.* 35.

<sup>45</sup> Ex. No. 52, Denomy Direct Testimony, Att. MED-6.

<sup>46</sup> Ex. No. 15, Earnest Rebuttal Testimony at 34-35.

<sup>47</sup> Hearing Transcript, April 8, 2014, at 110 lines 23-25, and 111 lines 1-10.

**E. Shipper Reliance on a Project-Specific Need Forecast Indicates that the Commission Should Not Rely on an Inferior Forecasting Methodology**

As discussed in Environmental Interveners' Post-Hearing Brief,<sup>48</sup> Enbridge's shippers, through the Competitive Tolling Services Agreement ("CTS Agreement") between Enbridge and CAPP, have effective control over decisions related to expansions of Mainline System capacity. With regard to the type of forecast relied on by Enbridge shippers under the CTS Agreement, the Application states that "CAPP prepares a forecast of supply available to Enbridge in its evaluation of necessary pipeline capacity."<sup>49</sup> (Emphasis added.) Thus, Enbridge's shippers forecast the quantity of crude oil that will be available for shipment on the Mainline System, which of logical necessity would equal total western Canadian crude oil supply minus western Canadian demand minus quantities forecast to be shipped by other crude oil transportation service providers. This means that Enbridge's customers rely on a quantified forecast to determine need for new capacity on the Enbridge Mainline that includes the same key elements as the Line 67 Supply Forecast.

Industry reliance on such quantified forecast of "supply available to Enbridge" indicates that the Commission should rely on a similar analysis. Conversely, the Commission should not instead rely on more general and thus inferior national and regional supply and demand forecasts.

Enbridge argues that evidence of shipper support for the Project justifies its need.<sup>50</sup> Rather than provide the Commission with CAPP's quantified analysis of need, Enbridge provided the Commission with only a simple one-page letter from CAPP with an unsupported

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<sup>48</sup> Environmental Intervener's Post-Hearing Brief at 10-11.

<sup>49</sup> Ex. No. 4 and 5, Application Section 7853.0520 at 1.

<sup>50</sup> Enbridge Post-Hearing Brief at 20, 51.

statement of support for the Project. Such generalized statements are unpersuasive.<sup>51</sup> While general letters of industry support are relevant to this proceeding, Minnesota law does not state that the Commission can base its decision on general representations by shippers, much less an unsubstantiated claim by a foreign trade association. Rather, the law requires that Enbridge provide and the Commission consider a project-specific forecast of demand for the transportation services to be provided by the Project. In other words, the Commission must conduct an independent review and cannot rely on general statements from shippers in lieu of such independent review. As discussed in Environmental Interveners' Post-Hearing Brief, Enbridge's failure to notify the Commission of the withdrawal of shipper support for the Alberta Clipper Pipeline in mid-2008 before the Commission's final 2009 need decision underscores the importance of such independent review.

CAPP and/or its shippers were free to provide the Commission with a quantified forecast and data supporting CAPP's determination of need for the Project, either directly or through Enbridge. Neither Enbridge nor CAPP nor Enbridge's shippers chose to provide the data used to calculate the Line 67 Supply Forecast or CAPP's determination of "supply available to Enbridge." Instead, it appears that these entities believe that the Commission and the citizens of Minnesota should not rely on the type of analysis used to determine need by the industry itself. Environmental Interveners assert that adoption of a less rigorous methodology than is used by the industry not only violates Minn. R. Chapter 7853 but it is also indefensible from a public policy perspective.

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<sup>51</sup> The DOC agrees that undetailed letters of support from shippers are not sufficient evidence of need for the Project. DOC Post-Hearing Brief at 17 (the general nature of [the shipper letters of] support does not constitute an adequate demonstration of need for expansion of Enbridge's pipeline." (footnote omitted)); *see also*, Ex. No. 37, Otis Surrebuttal Testimony at 9-12.

**V. ENBRIDGE’S APPORTIONMENT FORECASTS ARE NOT SUPPORTED BY DATA IN THE RECORD AND INSTEAD EVIDENCE IN THE RECORD SHOWS THAT RECENT HISTORICAL APPORTIONMENT WAS CAUSED BY A DECREASE IN THE CAPACITY OF LINE 4, NOT SUBSTANTIALLY INCREASED NOMINATIONS**

Enbridge’s Post-Hearing Brief provides descriptions of “apportionment” and then draws the following conclusions:

Evidence submitted by Enbridge, and unchallenged by any party, demonstrated that the Enbridge Mainline System will enter into ever-increasing levels of apportionment in the very near future without construction of the Project. Increasing apportionment of heavy crude oil capacity on the Enbridge Mainline System is still predicted in the future even if the Project is constructed, but the onset of apportionment will occur at a later date.”<sup>52</sup>

The capacity added by the Project reduces the probability that, due to apportionment, Minnesota refineries will experience crude oil supply shortfalls, with the corresponding reduction in local refined product supply, and lessens the impact of apportionment should it occur. Thus, the Project will ensure that demand is better met.<sup>53</sup>

(Emphasis added; footnote omitted.) Although it does not say so expressly, Enbridge implies that its apportionment data proves that the Mainline System’s heavy oil transportation capacity is operating near its limits. In support of the foregoing statements, Enbridge’s Post-Hearing Brief cites only Exhibit No. 14, Enbridge’s Revised Response to DOC Information Request 21A (trade secret version) (and presumably the public version of document in Exhibit No. 13). This exhibit provides:

- a general description of apportionment;
- Table 21.A1, which contains an annualized forecast of Mainline System heavy crude oil excess supply as a percentage;

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<sup>52</sup> Enbridge Post-Hearing Brief at 51.

<sup>53</sup> *Id.* at 19.

- Table 21A2, which contains an annualized forecast of Mainline System heavy crude oil apportionment as a percentage; and
- Attachment 21B, which provides tables showing historical apportionment of deliveries to Clearbrook and injections upstream of Clearbrook.

Since Enbridge aggregates the capacities of Lines 4 and 67 for the purposes of apportionment,<sup>54</sup> its forecasts of excess supply and apportionment must be based on the combined capacities of these pipelines.

Initially, Environmental Interveners note that when apportionment occurs is entirely dependent on the amount of “supply available to Enbridge” over time, which would be estimated by a project-specific forecast of demand for Enbridge’s heavy crude oil transportation services. Should the market ration Canadian heavy crude oil supply away from the Mainline System and into other transportation service providers, the rate at which Enbridge’s exist heavy crude oil import capacity is utilized would slow.

With regard to Enbridge’s forecasts of excess supply and apportionment, the data in Table 21.A1 shows the year in which heavy crude oil nominations will exceed heavy crude oil pipeline capacity. The data in Table 21.A2 shows the date on which heavy crude oil nominations will exceed total heavy crude oil nominations. Enbridge did not provide the data sets on which these forecasts are based.

Enbridge’s arguments related to apportionment do not hold up to close scrutiny. Initially, Environmental Interveners note that apportionment is not a cause of insufficient capacity, but rather is a regulatory mechanism created to allocate capacity when demand for pipeline transportation services exceeds currently available capacity. Apportionment is not a cause of insufficient capacity but a reaction to it. Apportionment may result either (1) when demand for

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<sup>54</sup> Hearing Transcript, April 8, 2014, Testimony of Mr. Curwin at 186 lines 11-15, and 201 line 22 to 202 line 3.

transportation services exceeds annual average pipeline capacity<sup>55</sup> or (2) when pipeline capacity is either permanently or temporarily reduced, for example due to pipeline maintenance or outage or chronic pipeline integrity limitations, such that nominations exceed the remaining pipeline capacity.<sup>56</sup>

Enbridge's excess supply forecast is based on the formula "Excess Supply beyond Capacity = (Nominations – Capacity)/Capacity."<sup>57</sup> Enbridge's apportionment forecast is based on the formula "Apportionment = (Nominations – Capacity)/Nominations."<sup>58</sup> Thus, both formulas contain only two factors: (1) a forecast of nominations; and (2) a forecast of pipeline capacity. Since nominations are defined as the monthly quantified demand of Enbridge's customers for transportation services provided by Enbridge, a forecast of nominations must be similar too or identical with a forecast of "supply available to Enbridge." Without knowing Enbridge's forecast of nominations and future pipeline capacity and its assumptions related to these factors,<sup>59</sup> it is impossible to assess the accuracy Enbridge's excess supply and nominations forecasts.

The DOC agrees that Enbridge's demand and apportionment forecasts cannot be independently verified because Enbridge chose not to reveal its proprietary information.<sup>60</sup> Therefore, it finds that these forecasts do not "provide sufficient evidence of need."<sup>61</sup>

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<sup>55</sup> Ex. No. 13, Curwin Rebuttal Att. F at 69 (Enbridge response to DOC IR 21A - Public) (future apportionment assumed to be caused by increasing demand for limited pipeline capacity).

<sup>56</sup> *Id.* ("It is possible that a major apportionment event, particularly one that is attributable to a significant loss of pipeline capacity due to a maintenance outage, could create some short-term impacts on Midwestern consumer prices until the refined product distribution system has time to react and adjust." (Emphasis added.)

<sup>57</sup> Ex. No. 14, Curwin Rebuttal Att. F (Nonpublic) at 2.

<sup>58</sup> *Id.*

<sup>59</sup> It is possible to assume that future heavy oil pipeline capacity equals existing capacity plus permitted capacity (the Phase 1 expansion) during the entire forecast period, but it is also possible that Enbridge could predict a down-rating of Line 4 at some point during the next 16 years.

<sup>60</sup> DOC Post-Hearing Brief at 17.

<sup>61</sup> *Id.* at 17-18.

Enbridge has not provided the data on which Tables 21.A1 and 21.A2 are based. It could be that Enbridge used the Line 67 Supply Forecast as the basis for its forecast of nominations, or it might have used a different forecast. It could be that Enbridge assumes that currently permitted pipeline capacity will not change over the forecast period, but it is also possible that Enbridge could predict that either Line 4 or Line 67 could be de-rated during the next 16 years.<sup>62</sup> Without knowing this underlying data, it is not possible to determine the accuracy of the forecast numbers in Tables 21.A1 and 21.A2, or the consistency of these numbers with the Line 67 Supply Forecast, the accuracy of which also cannot be verified. It is also impossible to know and assess the reasonableness of Enbridge's assumptions regarding future nominations and pipeline capacity. In any case, Enbridge should not be allowed to rely on an unsubstantiated nominations forecast to prove a need for the Project, because this would allow it to circumvent the express forecast standards included in Minn. R. Ch. 7853.

With regard to the data provided in Attachment 21B<sup>63</sup> (showing historical apportionment), Enbridge has not disclosed the cause of any of these apportionment events. Given that Enbridge has admitted that Line 4 suffered pressure restrictions during late 2013 and early 2014, it appears that the apportionment events in December 2013 and January and February 2014 were caused by pressure restrictions.<sup>64</sup> When asked about the cause of the apportionment events on Lines 4 and 67 and whether heavy oil shipments increased in December 2013 and January of 2014, and that this caused apportionment, Mr. Curwin's testimony indicates that the cause for the Line 4 apportionment was pressure restriction.<sup>65</sup> He also did not state that these events were caused by increased overall nominations on the Mainline System (Lines 4 and 67

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<sup>62</sup> A de-rating of overall heavy oil capacity is possible given that Line 4 currently has pressure restrictions imposed on it. Hearing Transcript, April 8, 2014, Testimony of Mr. Curwin at 203 lines 14-22.

<sup>63</sup> Ex. No. 13, Curwin Rebuttal Testimony, Ex. F (Public).

<sup>64</sup> Hearing Transcript, April 8, 2014, Testimony of Mr. Curwin at 202 line 1 to 203 line 22.

<sup>65</sup> *Id.* at 201 line 11 to 202 line 3.

together), only that utilization of Line 67 has been increasing.<sup>66</sup> Since Lines 4 and 67 are aggregated by Enbridge for the purposes of determining heavy oil apportionment, this answer does not mean that the cause of any Mainline System heavy oil apportionment was the result of increased nominations, because pressure restrictions on Line 4 could have caused the apportionment events. Since Enbridge did not affirmatively present evidence about the cause of the historical apportionment events, the Commission should not presume that they were the result of substantially increased nominations.

With regard to these same events, Mr. Earnest testified that they were “unequivocal evidence that capacity on the heavy crude oil pipelines in Enbridge Mainline is currently tight.”<sup>67</sup> Yet, Mr. Earnest testified that he had not discussed the causes for the apportionment on Line 67 with Enbridge employees,<sup>68</sup> which admission indicates that he is not aware of the underlying cause of recent apportionment events and merely assumed that they were evidence that Mainline System capacity is tight. Since apportionment may be caused by a temporary reduction in pipeline capacity, the apportionment events shown on Attachment 21B are not “unequivocal evidence” that Mainline System heavy crude oil capacity is nearing its limits.

According to Enbridge’s Post-Hearing Brief, “[c]urrently, the total permitted capacity of Line 4 and 67 is 1,596,000 bpd.” This is not correct. Exhibit No. 13 lines 102-104, states that the current combined permitted capacities (including the Phase 1 Expansion) of these pipelines is 1,366,000 bpd. Thus, current heavy crude oil transportation capacity on the Mainline System is 1,246,000 bpd. According to Ex. No. 53, in 2013 average shipments on Line 4 were 579,418

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<sup>66</sup> *Id.* at 204 line 6 to 205 line 14.

<sup>67</sup> *Id.* at 86 lines 20-25.

<sup>68</sup> *Id.* at 118 lines 4-8.



bpd, and on Line 67 they were 404,029 bpd, for a total combined utilization of 983,447.<sup>69</sup> This means that in 2013 excess heavy crude oil transportation capacity on the Mainline System averaged 262,553 bpd. This unused capacity is the equivalent of 58% of Line 67's current capacity. This excess capacity is equivalent to 85% of Line 67's current capacity. Given this large average excess capacity, Mr. Earnest's claim that heavy oil capacity on Line 67 is "tight" is not credible. If the Phase 1 Expansion is included in this capacity, then the unused existing and permitted capacity is 382,553.

But it is very likely that unused heavy oil transportation capacity was actually greater than 262,553 bpd in 2013. That is, Enbridge likely transported less oil in 2013 than it claims. As described in Ms. Denomy's Surrebuttal Testimony, the pipeline-specific utilization numbers used to produce the figure 262,553 bpd were provided by Enbridge in response to MN350 IR 3.e.<sup>70</sup> When compared to the quantities of oil reported by Enbridge – in its regular course of business – to the Federal Energy Regulatory Commission ("FERC"), the line-specific data provided by Enbridge in response to the information request appears to show substantially greater imports than reported to FERC.<sup>71</sup> Total (light and heavy) Mainline System shipments reported by Enbridge in response to MN350 Information Request 3.e are consistently over 100,000 bpd higher than those reported to FERC. Even though the FERC figures are for total shipments and not just for heavy crude oil, they nonetheless indicate that Enbridge likely had more than 262,553 bpd of unused capacity in 2013. Environmental Intervenors note that no party has questioned the accuracy of Ms. Denomy's reporting of FERC Form 6 data.

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<sup>69</sup> Ex. No. 53, Denomy Rebuttal Testimony, Att. MED-31 at 2 (data from Enbridge response to MN350 Information Request 3.e.)

<sup>70</sup> Ex. No. 54, Denomy Surrebuttal Testimony at 11-12

<sup>71</sup> *Id.*

Finally, Mr. Curwin’s Rebuttal Testimony asserts that Lines 4 and 67 “will be fully used, without the approval of this Project, on a daily basis starting in 2017.”<sup>72</sup> While Environmental Interveners do not agree with this date, it is evidence that the Mainline System has the capacity to absorb at least three more years of supply growth. Even given normal variations in customer demand, three years of supply growth indicates substantial current unused capacity.

In summary, Enbridge did not disclose the forecast of demand for transportation services on the Mainline System that underlie its excess supply and apportionment forecasts. As such, these forecasts have no factual support in the record and are not verifiable. Moreover, there is no evidence in the record that recent apportionment events in December 2013 and January and February 2014 on Lines 4 and 67 were caused by increased nominations. Instead, the record indicates that they were caused by Line 4 pressure restrictions. Finally, data provided by Enbridge indicates that unused heavy oil capacity on the Mainline System averaged at least 262,553 bpd in 2013, which is the equivalent of at least 58% of the current capacity of Line 67. This amount of capacity is equivalent to at least three years of supply growth. Thus, Enbridge’s argument that heavy oil nominations approximately equal heavy oil pipeline capacity and have caused recent apportionment events has no support in the record.

**VI. ENBRIDGE HAS FAILED TO PROVE THAT THE FORECAST DEMAND FOR THE PROJECT CANNOT BE MET BY EXISTING OR PROPOSED CAPACITY NOT REQUIRING A CERTIFICATE OF NEED**

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 . . . .” The plain meaning of this language is to require the Commission to consider the degree to which an applicant for a certificate of need can meet its forecast future demand through full utilization of its existing permitted infrastructure.

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<sup>72</sup> Ex. No. 11, Curwin Rebuttal Testimony at 9.

Enbridge's Post-Hearing Brief asserts that its burden of proof for this requirement is met by "the fact that there is apportionment for heavy crude oil on Enbridge's system, which means that the pipelines are full during peak demand months, and shippers are not getting all of the heavy crude that they have nominated for shipment."<sup>73</sup>

As discussed above, Enbridge's evidence of future apportionment is comprised of (1) forecasts of future excess supply and apportionment; and (2) historical apportionment events. As noted, its excess supply and apportionment forecasts are entirely unsupported by the data used to calculate them, and there is no evidence that historical apportionment events are the result of demand for Enbridge's transportation services outpacing the combined rated capacities of Line 4 and 67. Rather, the evidence indicates the recent apportionment events are the result of pressure restrictions on Line 4. Moreover, the Mainline System's average excess heavy oil transportation capacity in 2013 was at least 262,553 bpd. Even assuming variation in customer demand, this large amount of unused capacity makes unbelievable Enbridge's claim that its "pipelines are full during peak demand months," particularly because Enbridge provided no information in the record about what its peak demand months might be. Enbridge also has not provided any estimation of the monthly variation in customer nominations, and because having excess capacity equivalent to at least 58% of the current capacity of Line 67 is a very large amount of unused capacity. Therefore, Enbridge has failed to prove that its existing and permitted infrastructure cannot meet additional future demand for its transportation services.

Enbridge's Post-Hearing Brief offered no quantified evidence related to the current unused capacity of Lines 4 and 67 or the degree to which this unused capacity could meet Enbridge's forecast of future demand for its services. There is also no evidence that Enbridge has compared its current unused heavy crude oil transportation capacity to its Line 67 Supply

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<sup>73</sup> Enbridge Post-Hearing Brief at 52.

Forecast or to the future demand for heavy crude oil by particular refineries. Instead, Enbridge argues: “MN350/Sierra Club argued that Enbridge has sufficient capacity on existing pipelines to move an additional 230,000 bpd of heavy crude oil without construction of the Project. This evidence, however, was not convincing or credible.”<sup>74</sup> Since Enbridge’s current average unused heavy oil transportation capacity was at least 262,553 bpd in 2013 – according to its own data -- it appears that Enbridge can in fact transport an additional 230,000 bpd on its existing heavy oil pipelines. Moreover, if it is assumed that the Phase 1 Project is completed (which no longer requires a certificate of need, such that it must be considered under Minn. R. 7853.0130(A)(4)), then together Enbridge’s existing unused capacity and permitted but not constructed capacity would be at least 382,553 bpd of heavy crude oil import capacity.

The purpose of Minn. R. 7853.0130(A)(4) is to ensure that the Commission takes current pipeline capacity into account in its analysis of future need, because the larger the amount of existing unused capacity, the further into the future need would arise. Direct evidence for current unused pipeline capacity comes from comparing historical records of actual imports with existing and permitted pipeline capacity. Environment Intervenors provide this evidence. In contrast, Enbridge relies on its evidence of recent apportionment, even though it has not claimed that these events were caused by nominations in excess of the average annual capacities of Line 4 and 67.

With regard to whether Enbridge can meet its future demand for heavy crude oil transportation services, this depends entirely on the rate that “supply available to Enbridge” increases. Customer demand in and of itself does not make oil appear in Canada. This being said, Mr. Earnest identifies only three refineries that will or may demand larger quantities of

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<sup>74</sup> Enbridge Post-Hearing Brief at 53.

heavy crude oil: (1) the BP Whiting refinery; and (2) the Marathon Detroit Refinery;<sup>75</sup> and (3) the Husky Energy Lima, Ohio, Refinery.<sup>76</sup> He states that the BP Whiting Refinery's future increase in heavy crude oil demand will average approximately 220,000 bpd and could be as great as 270,000 bpd.<sup>77</sup> Mr. Earnest does not state a specific increase required by the Marathon Detroit Refinery, probably because the chart in his testimony shows that it is currently consuming about 75,000 bpd of heavy crude oil,<sup>78</sup> just under its 80,000 bpd limit, such that any new increased demand appears to be nominal. He states that the Husky Energy Lima Refinery project would allow it to process up to 40,000 bpd of heavy crude oil.<sup>79</sup> Thus, the total new Midwestern refinery demand identified by Enbridge is approximately 260,000 bpd to 310,000 bpd, depending on whether the BP Whiting's peak flows should be considered.

In comparison, as of 2013, the existing and permitted excess heavy oil transportation capacity on the Mainline System was at least 382,553 bpd. This figure exceeds the planned increase in demand by Midwestern refineries by over 70,000 bpd. Thus, the evidence shows that current and permitted unused heavy oil transportation capacity can meet the quantified refinery demands identified by Enbridge, even if it is assumed that none of this demand is met by other pipelines, such as the base Keystone Pipeline.

In a supply-constrained market, evidence of Midwestern customer demand does not mean that limited heavy crude oil supplies will necessarily flow to particular Midwestern refineries, because these compete with refineries in other regions served by competing heavy crude oil transportation services.

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<sup>75</sup> Ex. No. 15, Earnest Rebuttal Testimony at 10-12. The testimony also discusses the Wood River Refinery, but Mr. Earnest does not claim that it will demand heavy crude oil services from Enbridge, because the data shows that it is operating at capacity and also that it is served directly by the base Keystone Pipeline.

<sup>76</sup> *Id.* at 13 line 228-231.

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 13 line 228-231.

**VII. THE PUC MAY CONSIDER THE IMPACT OF ADDITIONAL GREENHOUSE GASES EMITTED FROM THE EXTRACTION, TRANSPORTATION AND BURNING OF ALBERTA CLIPPER TAR SAND SOIL WITHOUT VIOLATING THE COMMERCE CLAUSE.**

Contrary to the arguments presented in Enbridge's Post-Hearing Brief on page 46, a state may enact laws that may have impact outside its borders, as long as it does not overburden interstate commerce.<sup>80</sup> Rather, a state cannot discriminate against interstate transactions, *i.e.*, treat in-state economic interests more favorably than out-of-state economic interests.<sup>81</sup>

Here, the PUC would not be applying one standard to greenhouse gases generated within the state and another outside the state. Instead, it would be viewing the impact of additional greenhouse gases regardless of their source. Such a decision would not be facially discriminatory against interstate commerce and therefore would not be subject to strict scrutiny.<sup>82</sup> Instead, if the challenged statute regulates evenhandedly, then it burdens interstate commerce indirectly and is subject to the *Pike* balancing test.<sup>83</sup> Under this balancing test, a state statute violates the Commerce Clause only if the burdens it imposes on interstate commerce are "clearly excessive in relation to the putative local benefits."<sup>84</sup>

As the Eighth Circuit noted in *Cotto Waxo*, protecting the environment is clearly a legitimate public benefit.<sup>85</sup> More recently in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the Ninth Circuit upheld a California law designed to combat climate change by limiting carbon emissions. In that case, a Low Carbon Fuel Standard sought to reduce greenhouse gases by requiring fuel blenders to keep the average carbon intensity of gasoline below the annual limits set by the state. This law caused some out-of-state ethanol producers to

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<sup>80</sup> *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (state law banning the sale of petroleum-based sweeping compounds in Minnesota did not violate the Commerce Clause).

<sup>81</sup> *Id.*

<sup>82</sup> See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>83</sup> *Id.*

<sup>84</sup> *Cotto Waxo*, 46 F.3d at 793.

<sup>85</sup> *Id.* at 794.

be disadvantaged over in-state producers due to the fact that the production methods in the Midwest are more carbon intensive than in California. In considering the balance of interests in this case, the Ninth Circuit noted the important state interest in reducing carbon:

The California legislature has determined that the state faces tremendous risks from climate change. With its long coastlines vulnerable to rising waters, large population that needs food and water, sizable deserts that can expand with sustained increased heat, and vast forests that may become tinderboxes with too little rain, California is uniquely vulnerable to the perils of global warming. The California legislature determined that GHG emissions from the production and distribution of transportation fuels contribute to this risk, and that those emissions are caused by the in-state consumption of fuels. Whether or not one agrees with the science underlying those views, those determinations are permissible ones for the legislature to make, and the Supreme Court has recognized that these risks constitute local threats. (citation omitted) *Id.* at 1106.

As explained previously in Environmental Intervenors' Post Hearing Brief, MEPA requires that the environmental impact of this facility, including its impact on greenhouse gases emissions must be considered. As testified to by Dr. John Abraham, Minnesota's risks from climate change are equally as dire as California's, including droughts, flooding, additional health risks and harm to our agricultural, forest products and tourism economies.<sup>86</sup> In considering the impact of the additional greenhouse gases that will be generated by combustion of the heavy crude oil to be transported by the Project and their impact on climate change, the PUC would not be acting to burden interstate commerce. Instead it would be seeking to protect Minnesota's legitimate local interest in minimizing the negative impacts of climate change on its natural environment.

Enbridge confuses the meaning of extraterritoriality in this context. A state action is *per se* invalid if it has an extraterritorial reach, *i.e.*, the action requires people or businesses to

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<sup>86</sup> Ex. No. 50 Abraham direct testimony at 4-5, Hearing Transcript April 10, 2014, Abraham testimony at 12-14.

conduct their out-of-state commerce in a certain way.<sup>87</sup> But in this instance, the PUC is not dictating how or when sands oil extraction in Canada can occur; instead it is exercising its statutory responsibility to do a complete environmental review of the project. In requiring this analysis, Minnesota has no more impact on interstate commerce than California did on the importation of ethanol. As stated in the *Rocky Mountain Farmers* decision:

The California Fuel Standards act says nothing at all about ethanol produced, sold, and used outside California, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state.<sup>88</sup>

Similarly, in considering the impact of additional greenhouse gases, the PUC imposes no requirements on tar sands oil producers or transporters, does not require other states or countries to adopt reciprocal standards or impose civil or criminal penalties on tar sands producers or transporters. Instead it simply requires a careful weighing of all of the environmental consequences of an additional 230,000 barrels per day of tar sands oil being shipped through Minnesota.

As the Ninth Circuit noted, states should be encouraged to find ways to combat climate change:

California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise. If no such solution is found, California residents and people worldwide will suffer great harm. We will not at the outset block California from developing this innovative, nondiscriminatory regulation to impede global warming. If the Fuel Standard works, encouraging the development of alternative fuels by those who would like to reach the California market, it

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<sup>87</sup> *Cotto Waxo*, 46 F.3d at 793.

<sup>88</sup> *Rocky Mountain Farmers*, 730 F.3d. at 1102-3.



will help ease California's climate risks and inform other states as they attempt to confront similar challenges.<sup>89</sup>

The PUC must take up this challenge under MEPA and weigh the negligible benefit of the expansion against the high negative costs to Minnesota from the increased greenhouse gases and it may do so without fear of running afoul of the dormant Commerce Clause.

#### **VIII. ENBRIDGE HAS NOT PROVEN THAT THE BENEFITS TO MINNESOTA'S ENERGY NEEDS OUTWEIGH THE COSTS TO THE STATE**

Enbridge presented the testimony of Dr. Charles Cicchetti that the Project would produce substantial economic benefits to Minnesota. However, Dr. Cicchetti's calculation that expansion of the pipeline by an additional 230,000 bpd would produce \$1.2 billion in economic benefits to Minnesota and \$18 billion in benefits to the PADD 2 area is simply not credible. Dr. Cicchetti admitted that this expansion would only represent a 0.27% increase in the fuel supply in the United States.<sup>90</sup> He also agreed that it was fair to apply his analysis of the benefit on a nationwide basis and that benefit would be \$69 billion over the next 23 years.<sup>91</sup> He further agreed that the total number of barrels of oil added to the fuel supply over that 23 year period if the expansion went through would be 1,930,850,000 barrels. Applying his alleged economic benefit on a per barrel basis, Dr. Cicchetti agreed that the math would result in a \$35 dollar benefit for each barrel shipped.<sup>92</sup> With oil costing approximately \$100 per barrel, his analysis would mean that we could save a third of the price of a barrel of oil due to a less than 1% increase in the supply of oil to the United States. This projected result simply does not square with reality. His entire analysis of the benefit hinges on his assumption that the lack of spare capacity in the world oil markets will lead to sharp increases in the price of oil and therefore this

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<sup>89</sup> *Id.* at 1107.

<sup>90</sup> Hearing Transcript, April 9, 2014, Cicchetti examination at. 98.

<sup>91</sup> *Id.* at 113.

<sup>92</sup> *Id.* at 118.

miniscule increase in supply will cushion those shocks. However, Dr. Cicchetti also testified that Saudi Arabia has the largest spare capacity in the world of around 2 million barrels a day and that it has an interest in maintaining stability in the markets and maintaining the price of oil at around \$100 per barrel.<sup>93</sup> The existence of this spare capacity of an additional 2 million barrels in Saudi Arabia puts into serious doubt his conclusion about the alleged benefits of a mere 230,000 bpd increase in U.S. oil supply.

Further, Dr. Cicchetti admitted that his projected economic benefit would accrue to Minnesotans even if the pipeline was not expanded due to his assumption that tar sands development will happen regardless of this project.<sup>94</sup> Accordingly, his entire analysis with regard to the alleged economic benefit of \$1.2 billion accruing to Minnesota due to the proposed expansion should be disregarded.

#### **IX. THE DOC IMPROPERLY FINDS THAT ENBRIDGE HAS SATISFIED THE LEGAL CRITERIA FOR A CERTIFICATE OF NEED**

The DOC largely relies on arguments made by Enbridge and has conducted limited independent review of the data available in this case, and the review it has performed is filled with misunderstandings and errors. Just as the Office of Energy Security (“OES”) did in MPUC Docket No. PL9/CN-07-465, the application to construct the Alberta Clipper Pipeline (“2007 Docket”), the DOC unnecessarily relies on circumstantial evidence of need, rather than on a legally sufficient forecast of a type relied on by the industry itself. As a result, the State of Minnesota is poised, once again, to entirely fail to accurately assess need.

In its May 28, 2008, Initial Post-Hearing Brief in the 2007 Docket, the OES relied for its forecast entirely on the Annual Energy Outlook (“AEO 2007”) and Annual Energy Outlook 2008

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<sup>93</sup> *Id.* at 123-124.

<sup>94</sup> *Id.* at 228, 236.

Reference Case (“AEO 2008”) published by the United States Department of Energy, Energy Information Agency (“EIA”). This third-party forecast contained no project-specific forecast of need for that pipeline. The OES asserted that, “If a state, or a region, is growing in population, then it is likely that transportation fuel demand, and demand for other refined petroleum products, will grow along with the population. . . . Considering the EIA’s observations regarding the direct relationships between population growth and transportation fuel demand, and, in turn, transportation fuel demand and petroleum consumption, Minnesota petroleum demand will likely increase over the same time period.”<sup>95</sup> This conventional wisdom prediction turned out to be dead wrong, because demand for crude oil in Minnesota has dropped 20% since 2004, which decline started four years before the OES wrote its brief.<sup>96</sup> Although it could be argued that it was not possible to predict the “Great Recession,” less than one month after this statement was written, CAPP apparently contacted Enbridge with concerns that the Alberta Clipper Pipeline might no longer be justified.<sup>97</sup>

As does the DOC in this matter, OES made the mistake of evaluating other pipelines only with regard to whether they were an “alternative” to the proposed project, rather than to assess the potential impact of competing crude oil transportation service providers on the supply of crude oil available to the project.<sup>98</sup> As a consequence, the OES entirely failed to predict that completion of the first Keystone Pipeline would divert almost the entire net new supply of western Canadian heavy oil for export from the Enbridge Mainline System, with the result that Enbridge’s shipments on the Mainline System had not, as of the third-quarter of 2013 exceeded the Mainline System capacity that existed at the time the OES filed its Post-Hearing Brief. If

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<sup>95</sup> OES Post-Hearing Brief at 10.

<sup>96</sup> Ex. No. 52, Denomy Initial Brief at 17.

<sup>97</sup> Environmental Interveners’ Post-Hearing Brief at 6-7.

<sup>98</sup> OES Post-Hearing Brief at 11-12.

Suncor’s Petition for a Declaratory Order and Establishment of Near-Term Rate Treatment (“Suncor Petition”),<sup>99</sup> together with evidence of skyrocketing tariff rates<sup>100</sup> and stagnant shipments on the Mainline System,<sup>101</sup> are to be believed, Enbridge’s decision to construct the Alberta Clipper Pipeline likely has resulted in hundreds of millions of dollars in unnecessary costs. Yet, the OES anticipated none of this.

**A. The DOC Incorrectly Interprets Minn. R. Chapter 7853 to Not Require a Project-Specific Forecast of Need and Thereby Fails to Base its Need Analysis on a Project-Specific Forecast**

The DOC provides no detailed legal analysis whatsoever of the language of Minn. Stat. § 216B.243 or Minn. R. Chapter 7853, but merely quotes the regulations<sup>102</sup> and constructs the following very general standard: “Essentially, Minnesota law requires Enbridge to demonstrate that the proposed Project is needed and that no party other than Enbridge has shown that a more reasonable alternative to the proposed Project exists.”<sup>103</sup> This lack of analysis indicates that the DOC has failed to analyze the plain language of Minn. R. Chapter 7853 as regards its requirements for a project-specific quantified forecast of demand for crude oil transportation services. As discussed in Environmental Interveners’ Post-Hearing Brief and above, Minn. R. Chapter 7853 does not permit reliance on national or regional forecasts of demand, but rather contains a specific requirement for a project-specific forecast supported by data and analysis.

Moreover, the DOC Post-Hearing Brief at 17 and Ms. Otis’ testimony state that the DOC could not rely on the Line 67 Supply Forecast of Enbridge’s apportionment forecasts because Enbridge has not disclosed the underlying data for these forecasts:

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<sup>99</sup> Ex. No. 53, Surrebuttal Testimony of Mary Ellen Denomy, at 20-21, Petition of Suncor Energy Marketing Inc., FERC Docket No. OR10-5-000 (January 13, 2010) (“Suncor Petition”) (described and incorporated by reference).

<sup>100</sup> Ex. No. 52, Denomy Initial Testimony at 9-10.

<sup>101</sup> *Supra* at 28.

<sup>102</sup> DOC Post-Hearing Brief at 11.

<sup>103</sup> *Id.* at 10.

Q. How do you respond to Mr. Earnest's position regarding forecasts 1 of demand for pipeline capacity?

A. I do not dispute that the Project is intended to serve future needs, but 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.<sup>104</sup>

Thus, the DOC admits that Enbridge's Line 67 Supply Forecast apportionment forecasts cannot be verified and that the DOC understands that Enbridge is in possession of the underlying data for these forecasts needed to confirm its accuracy, but that Enbridge has simply chosen not to release this information. Instead of insisting that Enbridge provide the data underlying the Line 67 Supply Forecast and its apportionment forecasts, the DOC stated that it instead relied on data in an NEB report entitled, "Canada's Energy Future 2013 - Energy Supply and Demand Projections to 2035 - An Energy Market Assessment."<sup>105</sup> This report does not include a project-specific forecast of demand for heavy crude oil transportation services on the Mainline System.<sup>106</sup> Thus, the NEB report does not comply with the minimum standards for the "forecast" required by Minn. R. Chapter 7853. It follows that the DOC's support for the project is based in part on forecast data that does not comply with these minimum regulatory standards.

The DOC's use of this forecast demonstrates why the use of such forecasts to determine the need for a particular project is inappropriate. The DOC's mathematics are simple. First, it determined that Canadian heavy crude available for export would increase to 1.4 million bpd between 2020. Next, it assumed that the Mainline System is operating at its maximum capacity,

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<sup>104</sup> Ex. No. 37, Otis Surrebuttal Testimony at 5.

<sup>105</sup> DOC Post-Hearing Brief at 18.

<sup>106</sup> *Id.*

such that this entire amount of new Canadian supply could only be exported on new capacity, including Enbridge's Phase 1 Expansion and the Keystone XL Pipeline. Then it subtracted the capacity of the Keystone XL Pipeline (which it incorrectly states is 730,000 bpd) and the capacity of the Phase 1 Expansion from 1.4 million bpd, which equals 550,000 bpd, which is "over 500,000 bpd."

This analysis is incorrect for a number of reasons. First, as the DOC notes, the growth in supply is from 2012 to 2020, but the 2012 and 2013 capacity is already being transported, so the net increase between 2013 and 2020 is less than 1.4 million bpd. Second, the Keystone XL's initial capacity is 830,000 bpd.<sup>107</sup> Third, the DOC completely ignores Enbridge's existing unused heavy oil transportation capacity, which is proven by Enbridge's response to Environmental Intervenor Information Request 3.e to be at least 262,553 bpd, and this number is supported by 2013 FERC Form 6 data and Enbridge's own admission that its current capacity won't be fully used until 2017. Fourth, the DOC entirely ignores the potential impact on "supply available to Enbridge" of pipelines other than the Keystone XL Pipeline, including both existing pipelines and proposed pipelines, including the base Keystone Pipeline, the Express Pipeline, and the Puget Sound Pipeline, and the proposed Trans Mountain Express, Northern Gateway, and Eastern Access Pipelines. Fifth, the DOC ignores growing railroad exports of crude oil from Canada.<sup>108</sup> And finally, the DOC makes no attempt to determine the timing of demand for new heavy crude oil capacity on the Mainline System given all of these key factors, but simply asserts that even if the Phase 1 Project and the Keystone XL come online before 2020, that an additional 550,000 bpd of new capacity will be needed by 2020. In short, reliance on generic national forecasts such as the NEB 2013 forecast overly simplifies Enbridge's commercial situation

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<sup>107</sup> This capacity is expandable to 900,000 bpd with a PHMSA special permit.

<sup>108</sup> Environmental Intervenor Post-Hearing Brief at 36.

because the NEB forecast simply does not take into account the impact of unused capacity and all existing and proposed competitors to Enbridge over time to accurately determine the timing of commercial need for new capacity on the Enbridge Mainline System. Therefore, the DOC's method of determining need for the Project is grossly inaccurate.

### **B. The DOC Determination of Need Is Founded on Enbridge's Unsupported Apportionment Arguments**

The DOC also admits that it relied on "historical apportionment data" instead of a project-specific forecast to determine need for the project.<sup>109</sup> The DOC notes that it found persuasive Mr. Earnest's testimony that current apportionment events indicate current pipeline capacity shortages.<sup>110</sup> Yet, the DOC failed to note that apportionment may be caused by temporary or permanent decreases in pipeline capacity and/or increased nominations. It also failed to note that Mr. Earnest himself admitted that he had not discussed the causes of Enbridge's recent apportionment events with Enbridge staff so had no first-hand knowledge of their causes, or Mr. Curwin's testimony that Line 4 had been under pressure restrictions. In fact, on cross-examination, Ms. Otis acknowledged that she did not know the underlying causes for the recent apportionments on the Mainline System, yet acknowledges that apportionment may be caused by increased nominations or decreased pipeline capacity.<sup>111</sup> Thus, it appears that the DOC has no evidence that increased nominations have caused recent apportionment events and merely assumes that this is the cause.

As evidence that the Mainline System's heavy crude oil transportation capacity is currently oversubscribed, the DOC presents Ms. Otis's conversion<sup>112</sup> of Enbridge's records of

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<sup>109</sup> DOC Post-Hearing Brief at 18.

<sup>110</sup> *Id.* at 11-14.

<sup>111</sup> Hearing Transcript, April 9, 2014, at 42 line 25 to 44 line 9.

<sup>112</sup> DOC Post-Hearing Brief at 13-14.

recent apportionment events found in Attachment 21B.<sup>113</sup> However, as noted, the DOC assumes that these apportionment events were caused by nominations that exceeded the reported annual average capacities of Line 4 and 67, rather than by temporary pressure restrictions on Lines 4. Moreover, it assumed that Enbridge’s recent heavy oil apportionment events were triggered by increased shipments to the BP Whiting Refinery, but it provides no evidence that this was in fact the cause.<sup>114</sup> Finally, the DOC’s belief that Enbridge’s heavy crude oil import capacity is maxed out is contradicted by Enbridge itself, because Mr. Curwin’s Rebuttal Testimony asserts that Lines 4 and 67 “will be fully used, without the approval of this Project, on a daily basis starting in 2017.”<sup>115</sup> It is also contradicted by Enbridge’s excess supply and apportionment forecasts.<sup>116</sup> Thus, Enbridge itself does not believe that its heavy crude oil capacity will be fully utilized until after two to three more years of supply growth. Environmental Interveners do not agree that Lines 4 and 67 will be at capacity in 2017 or that Enbridge’s forecasts are accurate, due to the likely impacts of increased rail transportation of heavy crude oil, lower than forecast supply growth in Canada, and competition from other existing and proposed pipelines. However, if Enbridge itself does not assert that its heavy oil import capacity is fully utilized, the DOC’s belief in this matter must be incorrect.

**C. The DOC’s Reliance on “Announced Heavy Crude Refinery Upgrades” at Midwestern Refineries Fails to Account for Current Unused Heavy Crude Oil Import Capacity in the Mainline System**

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.” Since the DOC wrongly concluded from Enbridge’s

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<sup>113</sup> Ex. No. 13.

<sup>114</sup> DOC Post-Hearing Brief at 14.

<sup>115</sup> Ex. No. 11, Curwin Rebuttal Testimony at 9.

<sup>116</sup> Ex. No. 14, Curwin Rebuttal Testimony Ex. F, Revised Response to Department of Commerce Information Request 21A.



apportionment data that Lines 4 and 67 are at capacity, it did not consider the ability of Enbridge to serve “announced heavy crude oil refinery upgrades” using its current unused Mainline System heavy crude oil capacity.

The DOC Post-Hearing Brief analysis of the impact of the planned increases in Midwestern refinery capacity to process heavy crude oil identifies the following factors in its Table 2:<sup>117</sup>

- The addition of 120,000 bpd of capacity from the Phase 1 Expansion Project;
- The addition of 230,000 bpd of capacity from the Phase 2 Expansion Project;
- A deficit capacity of 299,000 bpd which the DOC claims is shown by recent apportionment events;
- An additional 268,000 bpd needed to serve peak demand at the BP Whiting Refinery; and
- An additional 36,000 bpd needed to serve new demand at the Flint Hills Resources Refinery.

Taken together, these figures indicate immediate need for new pipeline capacity:

-299,000 bpd of current capacity deficit (2014)

-268,000 bpd in BP Whiting increased demand (2014)

-36,000 bpd in Flint Hills increased demand (2014)

- 603,000 bpd in required new pipeline capacity on the Mainline System needed in 2014.

Next, the DOC identifies the Line 67 Phase 1 and 2 expansions available to meet this alleged capacity demand, which total just 350,000 bpd. The result of this analysis is that Enbridge will have a capacity deficit of 250,000 bpd this year.

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<sup>117</sup> DOC Post-Hearing Brief at 16.

Due to a misunderstanding of the historical apportionment data, the DOC's analysis incorrectly assumes that Enbridge's heavy crude oil pipelines are currently at capacity. Even Enbridge's excess supply and apportionment forecasts (which the DOC cannot verify) don't show that its heavy crude oil transportation capacity is subject to regular apportionment now. The DOC also ignores recent utilization data for Lines 4 and 67 from Enbridge, as corroborated by FERC Form 6 data and Enbridge's own estimate that its heavy oil transportation capacity won't be fully utilized until 2017. Finally, the DOC asserts that the Flint Hills Refinery upgrade project will increase demand there by 36,000 bpd, which figure does not appear to be in the record.

Thus, this DOC need analysis is grossly inaccurate. The DOC failed to review any actual import data for Line 4 or 67;<sup>118</sup> therefore, it also failed to consider the fact that Enbridge had an average unused heavy oil transportation capacity in 2013 of at least 262,553 bpd, which is at least 58% of the current capacity of Line 67. As a result of its limited review of available data, the DOC simply did not consider how a pipeline system with such a large amount of unused heavy oil transportation capacity could suffer apportionment due to increased nominations. Moreover, there is no evidence that heavy oil imports recently increased to the point that at least 262,553 bpd in capacity was fully utilized between December 2013 and February 2014. FERC Form 6 data shows that between 2008 and the third-quarter of 2013 the largest historical annual combined import increase of heavy plus light crude oil on the Mainline System was less than 100,000 bpd.<sup>119</sup> Moreover, the 2013 CAPP Report forecasts increases in total western Canadian heavy crude oil supply of 125,000 bpd in 2013 and 228,000 bpd in 2014.<sup>120</sup> Thus, Enbridge's current unused pipeline capacity could transport all of the additional heavy crude oil supplies

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<sup>118</sup> Hearing Transcript, April 9, 2014, at 17-20.

<sup>119</sup> Ex. No. 53, Denomy Rebuttal Testimony at 8-9.

<sup>120</sup> Ex. No. 52, Denomy Initial Testimony at Att. MED-2.

forecast by CAPP for 2013. Given the increase in rail transportation in 2013 and the potential for increased shipment by Enbridge's competitors, it is more likely than not that the Mainline System will transport on a modest portion of the additional western Canadian heavy crude oil supplies in coming years.

Any meaningful review of current import data, historical import data, and forecasts of total western Canadian heavy crude oil supply, would show that full utilization of the combined average annual capacities of Lines 4 and 67 in 2013 is impossible for all practical purposes. What is not impossible is that the apportionment events in December 2013 through February 2014 were caused by temporary pressure reductions and related maintenance of Line 4, which would temporarily reduce the capacity of Line 4 and trigger apportionment.

The DOC Post-Hearing Brief states that the DOC relied on Enbridge "testimony [of] instances of refineries in the Midwestern region that are increasing their capacity to refine heavy crude oil from western Canada," and particularly the Rebuttal Testimony of Mr. Earnest at 10-13 (Ex. No. 15). In turn, in this testimony Mr. Earnest identifies only two refineries that will or may demand larger quantities of heavy crude oil: (1) the BP Whiting refinery; and (2) the Marathon Detroit Refinery.<sup>121</sup> As regards the BP Whiting Refinery's future increased heavy crude oil demand of up to 270,000 bpd,<sup>122</sup> the current and permitted excess heavy oil transportation capacity on the Mainline System (at least 382,553 bpd) significantly exceeds the planned increase in demand by this refinery. Mr. Earnest does not state a specific increase required by the Marathon Detroit Refinery, probably because the chart in his testimony shows that it is

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<sup>121</sup> Ex. No. 15, Earnest Rebuttal Testimony at 10-12. The testimony also discusses the Wood River Refinery, but Mr. Earnest does not claim that it will demand heavy crude oil services from Enbridge, because the data shows that it is at capacity and also it is served directly by the first Keystone Pipeline.

<sup>122</sup> *Id.* at 11.

currently consuming about 75,000 bpd of heavy crude oil,<sup>123</sup> just under its 80,000 bpd limit, such that its possible incremental demand appears to be nominal.

The DOC also claims that the Flint Hills Resources refinery in Rosemount, Minnesota is planning a 36,000 bpd heavy crude oil refining expansion, but the source documents cited by the DOC (“LBO-S-5, LBO-S-6”) do not contain this figure, and Environmental Interveners could not locate any estimate in the record of the increased capacity that will result from the current maintenance work at the refinery. Thus, while the refinery may increase its heavy crude oil demand, the amount of this increase does not appear to be high enough to publish.

## **X. CONCLUSION**

Thus, neither Enbridge nor the DOC have complied with Minn. R. Ch. 7853’s forecast requirements, such that Enbridge has not met its burden to prove that the Project is needed. Moreover, neither Enbridge nor the DOC have shown that Enbridge cannot meet future demand for Enbridge’s transportation services with existing and permitted capacity, given the rate of heavy crude oil supply increases in Canada and the impact of competing heavy crude oil transportation services. Therefore, for the reasons described herein, MN350 and the Sierra Club respectfully request that the Commission deny Enbridge’s Application for a Certificate of Need for the Project.

Date: May 13, 2014

Respectfully submitted,

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<sup>123</sup> *Id.*