**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**
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St. Paul, Minnesota 55164

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**
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| In the Matter of the Application of Enbridge Energy Limited Partnership for a Certificate of Need for the Line 67 Station Upgrade Project – Phase 2 – In Marshall, Clearwater, Itasca, Kittson, Red Lake, Cass and St. Louis Counties | MPUC Docket No. PL9/CN-13-153<br><br>OAH Docket No. 8-2500-30952 |
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# ENBRIDGE ENERGY LIMITED PARTNERSHIP'S REPLY TO THE MN350/SIERRA CLUB POST-HEARING BRIEF

May 13, 2014

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## INTRODUCTION

Enbridge Energy, Limited Partnership ("Enbridge") presents this Reply to the post-hearing brief filed by MN350/Sierra Club (the "MN350/Sierra Brief"). The brief filed by MN350/Sierra Club does not assist the Minnesota Public Utilities Commission's ("MPUC") review of the application filed by Enbridge because it does not properly address the Certificate of Need ("CN") statutes and rules; instead, MN350/Sierra Club present arguments regarding prior permits issued by the MPUC or on matters outside the record or the scope of the MPUC's authority. Where MN350/Sierra Club do address the record before the Administrative Law Judge ("ALJ"), they first attempt to define the law in unique and unsupported ways to avoid addressing facts supporting issuance of a CN for Enbridge's Line 67, Phase 2 project (the "Project").

In this Reply, Enbridge will first address the irrelevant and unsupported statements advanced by MN350/Sierra Club, and then apply established facts to the law as it is written, not as it is improperly interpreted in MN350/Sierra Club's brief.

## STATEMENT OF CORRECTED FACTS

The MPUC must apply the law, as written in Minn. R. 7853.0130, to the facts established during the contested case proceeding. The MN350/Sierra Club post-hearing brief contains numerous unsupported statements from outside the record, and the few allegations presented as facts are either incorrect or misapplied.

### I. MN350/Sierra Club's discussion of the regulatory history of Line 67 is irrelevant and largely inaccurate.

MN350/Sierra Club chose to spend a significant portion of their brief making claims about matters that are not before the ALJ or the MPUC, such as allegations about the evidence in prior permitting processes or matters dismissed by the Federal Energy Regulatory Commission ("FERC"). The original permitting process for Line 67 from 2007 to 2008 is given substantial treatment in the MN350/Sierra Brief. However, the original CN for Line 67, the pipeline Enbridge intends to upgrade, was issued by the MPUC in 2008.[1] The time to make arguments regarding those decisions has long passed, and arguments related to those permits are therefore irrelevant to the MPUC's consideration of whether to issue a CN for this Project.

Putting aside the irrelevance of MN350/Sierra Club's discussion of the regulatory history of Line 67, their allegations are unsubstantiated and largely incorrect. To support their allegations, MN350/Sierra Club rely exclusively on unverified allegations made by a single shipper – Suncor Energy Marketing Inc. ("Suncor") – in a proceeding challenging the rates to be charged by Enbridge that was brought before the FERC. On January 13, 2010, more than two years after the MPUC issued a CN for Line 67, Suncor filed a petition for declaratory order with

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[1] *In re Application of Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC for a Certificate of Need for the Alberta Clipper Pipeline Project*, MPUC Docket No, PL-9/CN-07-465, December 29, 2008 (E-Dockets Document No. 5674505).

the FERC (the "Suncor Petition"),[2] claiming that a settlement setting terms for recovery of the costs of the Alberta Clipper (now known as Line 67) project would not result in just and reasonable rates and should not be put into effect.

The Suncor Petition is not part of the record, and accordingly, cannot be considered as evidence.[3] Enbridge responds here, in a limited fashion, only to illustrate the liberties MN350/Sierra Club have taken with the Suncor Petition and subsequent FERC Order, attached as Exhibit A.[4] While the Suncor Petition and the FERC Order cannot be considered due to MN350/Sierra Club's failure to introduce them into the record before making arguments based on the documents,[5] the MPUC should understand that MN350/Sierra Club are not making accurate representations in their brief.

MN350/Sierra Club mischaracterize statements made by Suncor in its petition to claim that shippers withdrew support for the Alberta Clipper project months before the Commission's final decision.[6] As an initial matter, Suncor, one of hundreds of Enbridge shippers, filed a Petition addressing the rates that would be charged by Enbridge and in support of its complaint made allegations regarding the "need" for Alberta Clipper. However, Suncor's allegations were never addressed or validated by the FERC. As MN350/Sierra Club acknowledge, the FERC's order dismissed Suncor's petition,[7] and never suggested that Suncor's claims were credible. In fact, the FERC referred to Suncor's arguments as "speculative."[8]

In its petition filed with the FERC, Suncor argued that the previously-approved settlement should not go into effect because, in Suncor's view, the Alberta Clipper project was premature. Notably, Suncor argued "the Alberta Clipper Surcharge will not result in just and reasonable rates *in the near term*" but conceded "there will likely come a point when the Alberta Clipper will be needed."[9] Suncor's claims were never tested through discovery or evidentiary proceedings. The FERC simply found that Suncor's allegations that "the benefits of the Alberta Clipper Project will not be realized" were "not sufficient to abrogate the settlement or find that the proposed rates are unjust or unreasonable."[10]

As this history shows, MN350/Sierra Club's allegation that shipper support for Alberta Clipper ended months before the MPUC's final decision is inaccurate.[11] It is unclear why MN350/Sierra Club have devoted several pages of their brief to recounting and exaggerating the

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[2] *See Petition of Suncor Energy Marketing Inc*., FERC Docket No. OR10-5-000 at 1 (January 13, 2010), cited on page 13 of the MN350/Sierra Brief.
[3] Minn. R. 1400.7300, Subp. 2. ("All evidence to be considered in the case, including all records and documents in the possession of the agency or a true and accurate photocopy, shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.")
[4] *Enbridge Energy, Limited Partnership*, 130 FERC ¶ 61,270 (2010) ("FERC Order").
[5] Minn. R. 1400.7300, Subp. 2.
[6] MN350/Sierra Brief, p. 9.
[7] MN350/Sierra Brief, p. 9.
[8] FERC Order, p. 11, ¶ 33.
[9] *See* Suncor Petition at 35 (emphasis added). Suncor also filed a protest to Enbridge's February 19, 2010 tariff filing asserting the same arguments, which was later consolidated with the proceeding addressing Suncor's petition. *See* FERC Order, p. 5, ¶ 15.
[10] FERC Order, p. 11, ¶ 33.
[11] MN350/Sierra Brief, p. 10.

allegations of a single shipper that the FERC described as "speculative."[12] The record simply does not support the assertion that shippers in general stopped supporting Line 67, either in 2008 or at any time since then.

## II. MN350/Sierra Club's assertions that Line 67 was premature are misplaced.

MN350/Sierra Club also rely on Suncor's claim in its 2010 petition that there was "growing evidence of the total lack of justification for adding the Alberta Clipper's capacity" in 2008.[13] This is simply not true. As shown below, Suncor's arguments had no merit, and, in any event, have been thoroughly discredited by subsequent events.

### A. Line 67 was needed and has been utilized since it entered service.

MN350/Sierra Club reassert Suncor's primary argument that there was "a surplus of oil pipeline capacity from Western Canada" and as a result, "Lakehead shippers will not realize the Clipper Benefits when the Alberta Clipper is expected to be ready for service."[14] Simply put, MN350/Sierra Club's reliance on Suncor's unsupported allegations that the original Line 67 project was not needed at that time because western Canadian crude supplies were forecasted to decline is misplaced. In fact, Line 67 has been well-utilized and was oversubscribed in January 2014. Further, there has been apportionment due to the current shortage of capacity on the Enbridge heavy crude oil pipelines, including Line 67, for Clearbrook deliveries in 5 out of the last 24 months (including the 3 most recent months).[15] These statistics belie any argument that Line 67 was not needed or would not be utilized by shippers.

Alberta Clipper was prudently designed to address long-term demand. The design allowed the pipeline to be upsized as demand increases over the years,[16] which Enbridge now seeks to accomplish through the Project.

### B. The possible construction of Keystone XL did not, and does not, undermine the need for Line 67 and the Project.

MN350/Sierra Club's reliance on Suncor's argument that Line 67 was not needed because of Keystone XL is also misplaced.[17] Suncor argued in its FERC petition that if Keystone XL was approved by the NEB, 326,000 barrels per day ("bpd") would be diverted from the Enbridge system.[18] However, since the Keystone XL project has yet to be approved and built, Suncor's premonition has not come to pass. Even the MN350/Sierra Club witness who promoted the Keystone XL pipeline as a factor that could eliminate need for the Project, could not describe when Keystone XL will be able to begin construction. Further, even if the Keystone

[12] FERC Order, p. 11, ¶ 33.
[13] MN350/Sierra Brief, p. 6 (MN350/Sierra Club emphasis removed).
[14] MN350/Sierra Brief, p. 6.
[15] Ex. 15, p. 4, lines 65-67; *see also* Ex. 13, Exhibit F, Enbridge Response to Department IR21B, Attachment 21B, Schedule 1.
[16] Ex. 1, § 7853.0230, p. 2-3.
[17] MN350/Sierra Brief, p. 7.
[18] Suncor Petition at 4.

XL project is built, it will not jeopardize the usefulness of Line 67, which directly serves refineries that Keystone XL would not reach.[19]

## III. MN350/Sierra Club's allegations about the Competitive Toll Settlement are irrelevant and incorrect.

MN350/Sierra Club make several incorrect allegations about the Competitive Toll Settlement ("CTS") entered into between Enbridge, shippers, and CAPP to establish rates for volumes shipped in Canada and internationally on the Enbridge Mainline System. These allegations have no conceivable relevance to the issues in this proceeding. Nonetheless, a brief response to three points will set the record straight.

First, MN350/Sierra Club incorrectly claim that shipper reaction to construction of Alberta Clipper and Suncor's petition triggered negotiation of the CTS.[20] That was not the impetus for negotiating the CTS. No evidence is provided for this assertion, and nothing on the face of the CTS supports that assumption.

Second, MN350/Sierra Club suggest that in the CTS Enbridge gave all its authority to construct changes or additions to its infrastructure to shippers.[21] The CTS only provides that Enbridge will not adjust the CTS rates in order to recover capital expenditures on the Enbridge Mainline System unless Enbridge and the representative shipper group agree.[22] The CTS also provides that projects "which are not supported by Enbridge because the incremental revenues … would not cover the incremental costs, may proceed if there is sufficient financial support from [shippers]."[23] Projects that are vetted by CAPP under the CTS are, if anything, more likely to be used and useful because shippers have agreed that those projects need to be built and will be worth the cost. Nothing in the CTS prevents Enbridge from constructing projects without CAPP approval, but in that event, Enbridge could not recover the costs from shippers through an increase in the CTS rates. Thus, the CTS represents a collaborative process between Enbridge and shippers that acts as an indicator that projects will be "commercially necessary and should be built."[24]

Here, members of CAPP have indicated that they support the Project.[25] That, in turn, indicates that the Project is needed by those that will use the additional 230,000 bpd of capacity on Line 67. As Neil Earnest testified, and no other witness contradicted, Enbridge's shippers are

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[19] Even by MN350/Sierra Club' own logic, their arguments are not credible. MN350/Sierra Club claim that the FERC's failure to halt the Alberta Clipper project in 2010 "meant that … shippers faced nearly $1 billion in losses unless utilization of the Mainline System increased, which would likely happen only if Keystone XL was not online until years later than its anticipated 2012-2013 operational date." MN350/Sierra Brief, p. 7. But since that is exactly what happened, the FERC's failure to halt Alberta Clipper *never* caused shippers the "$1 billion in losses" MN350/Sierra Club refer to.

[20] MN350/Sierra Brief, p. 3.
[21] MN350/Sierra Brief, p. 11.
[22] Ex. 106, § 16.
[23] Ex. 106, § 16.
[24] MN350/Sierra Brief, p. 11.
[25] Ex. 8, Exhibit A, Schedules 1 and 2.

sophisticated commercial entities with substantial knowledge of Enbridge's system. These shippers would not agree to pay for an unnecessary infrastructure expansion.[26]

Third, MN350/Sierra Club point out that the CTS allows (1) shippers to seek renegotiation of the agreement if Keystone XL is not approved by January 1, 2013, and (2) Enbridge to require renegotiation of the agreement if throughput drops below a certain level.[27] MN350/Sierra Club then contend, without any support, that these provisions "impl[y] that CAPP and Enbridge's shippers anticipated the potential for long-term underutilization of Enbridge's Mainline System."[28] However, parties to contracts frequently draft provisions addressing contingencies to protect their interests regardless of whether they expect those contingencies to occur. That Enbridge and CAPP were careful to address certain contingencies in the CTS, which was to govern rates for the next decade, does not indicate that they were expecting the Enbridge Mainline System to be underutilized. Indeed, the major issue facing the Enbridge Mainline today is lack of sufficient capacity (leading to persistent apportionment), rather than excess capacity as MN350/Sierra Club suggest.

## IV. MN350's argument regarding Line 67's impact on tolls is incomprehensible and irrelevant.

MN350/Sierra Club continue their review of irrelevant material by presenting an argument about Line 67's alleged impact on tolls for transportation of crude oil on the Enbridge Mainline System. Leaving aside, for a moment, the fact that Enbridge's toll is outside the jurisdiction of the MPUC, the MN350/Sierra Club Brief on this point is completely illogical and internally contradictory.

MN350/Sierra Club first claim that "Since Line 67 *became operational in 2010*, tariffs on the Mainline have approximately doubled."[29] Support for that claim comes in the next sentence, where MN350/Sierra Club claim that tolls between the international border and Lockport increased from $.926 per barrel in 2001 to $2.1861 in February 2010.[30] That time period, however, predates Line 67 becoming operational in 2010, thus it was not Line 67 that caused an increase from $.926 per barrel to $2.1861. MN350/Sierra Club's claim that Line 67 caused toll rates to increase makes no sense. MN350/Sierra Club may assume that shippers were paying for Line 67 as it was constructed, but that is not accurate.[31] In fact, based on MN350/Sierra Club's own presentation of the evidence and accepting their logic for purposes of argument, installation and operation of Line 67 *reduced* the heavy oil toll on the Enbridge Mainline System, as shown in the graph on page 14 of MN350/Sierra Club's brief, which indicates that Enbridge's toll rates dropped after Line 67 became operational in 2010.

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[26] Evid. Transcript, Vol. 1, p. 137-138, lines 5-25, 1.
[27] M350/Sierra Brief, p. 12.
[28] MN350/Sierra Brief, p. 13.
[29] MN350/Sierra Brief, p. 13 (emphasis added).
[30] MN350/Sierra Brief, p. 13.
[31] Tariff rates do not go into effect until a pipeline is placed into operation. *See* Ex. 1, § 7853.0530, p. 1 "Enbridge plans to file its tariff for the Project approximately 60 days prior to placing the facilities in service." Accordingly, the construction of Line 67 did not cause an increase in toll rates from 2002 to 2012, as MN350/Sierra Club claim.

MN350/Sierra Club next claim that this is evidence that Enbridge overbuilt the Mainline System by constructing Line 67. The record clearly demonstrates that Enbridge properly designed Line 67 to match capacity to need. First, MN350/Sierra Club repeat disproven claims that lack of growth in crude oil imports produced increased tariff rates.[32] MN350/Sierra Club rely on the testimony of Mary Ellen Denomy for this proposition, but Ms. Denomy has no expertise in the pipeline industry.[33] Ms. Denomy claimed in her testimony that "When pipelines are built and are underutilized for extended periods of time, the cost per barrel to ship oil rises. These costs are passed on to the shippers, who ultimately report their sales for the purpose of establishing index prices. This cost would be folded into the value of each barrel and would ultimately be reflected in the sale of gasoline at the pump to the consumers in Minnesota and other areas served by the pipeline."[34] Ms. Denomy was attempting to make the point that proposed capacity increase is not needed, and as a consequence, constructing the Project will adversely affect consumers.[35] Ms. Denomy made two mistakes in that argument. First, that is not how Enbridge's tariff pricing operates. Second, that is not how fuel is priced in the marketplace.

Oil pipeline tariffs simply do not work the way that Ms. Denomy suggests. Ms. Denomy assumed throughout the proceeding that Enbridge bears no risk of underutilization. For example, Ms. Denomy claimed in her rebuttal testimony that Enbridge

> will receive tariff payments that cover its capital and operating costs and profit. If the Project is substantially underutilized, these costs will nonetheless be passed onto shippers, who will in turn pass on the costs of the Project to consumers. Acquisition of unneeded infrastructure normally results in lower revenue and profit, but for rate regulated utilities, including pipelines, whose revenue comes from government-approved tariffs, the costs of unneeded capacity are passed onto customers who suffer financial loss due to higher prices.[36]

That is not how oil pipelines are regulated by the FERC. Enbridge does not have the ability to raise rates in order to earn some approved rate of return.[37] In fact, the rates for transporting a barrel of oil are negotiated with shippers and are set through June 30, 2021.[38] Those rates can be renegotiated under some circumstances, but a renegotiation requires agreement between the shippers and Enbridge in order to change the rate.[39] As a result, Enbridge, not the shippers, bears the risk of loss if volumes transported on the Mainline System are less than Enbridge forecasts.[40] MN350/Sierra Club's assertion that Enbridge can simply raise tolls on the Mainline System to cover the cost of unnecessary infrastructure is false.

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[32] MN350/Sierra Brief, p. 3, citing Ex. 52.
[33] Evid. Transcript, Vol. 3, p. 39, lines 10-25
[34] Ex. 52, p. 10.
[35] Ex. 52, p. 10 to 11.
[36] Ex. 53, p. 18, lines 383-390.
[37] Ex. 22. p. 3, lines 35-41.
[38] Ex. 22. p. 3, lines 47-55.
[39] Ex. 22, p. 4, note 7.
[40] Ex. 22, p. 4, lines 58-60.

MN350/Sierra Club's second error is to assume that crude oil transportation costs are simply passed directly on to consumers. This incorrect claim is based on the unreliable testimony of Mary Ellen Denomy, who concedes her inexperience with any aspect of crude oil transportation.[41] Enbridge presented testimony by witness Neil Earnest, an expert witness with significant experience in the pipeline and refining industry, explaining that fuel prices in the Midwest are set by the price on the United States Gulf Coast, plus transportation costs to get the fuel to the Midwest.[42] The Department agreed.[43] Crude oil transportation costs are not passed on to consumers.

MN350/Sierra Club's emphasis on allegations about the past and on rates for transporting crude oil is puzzling. The original installation of Line 67 is not at issue. The criteria that the MPUC must evaluate under Minn. R. 7853.0130 are forward looking; it is unclear why MN350/Sierra Club argue that the pipeline was not needed in prior years. Likewise, the tariff is outside the scope of the criteria to be considered by the MPUC, as rate regulation for crude oil pipelines falls within the sole jurisdiction of the FERC.

## V. MN350/Sierra Club's claims about the impacts of other transportation options on the need for the Project ignore the need and the record.

MN350/Sierra Club ineffectually attempt to refute Enbridge's alternative analysis by contriving an ineffective argument that other pipeline projects, including the proposed Keystone XL pipeline and rail transportation will eliminate the need for the Project. This argument fails completely due to basic flaws in MN350/Sierra Club's logic and contrary facts.

The Project is intended to serve the need for additional heavy crude oil at refineries in Minnesota, the surrounding states, the Midwest, and the Gulf Coast.[44] MN350/Sierra Club assert, however, that there will be insufficient supply to serve Minnesota because other pipelines and transportation methods will consume all of the oil produced in Western Canada.[45] This statement is inconsistent with the record for numerous reasons.

First of all, the pipelines that MN350/Sierra Club rely upon do not meet the need established in the record. The Project is needed to satisfy demand for heavy crude oil in Minnesota, the Midwest, and the Gulf Coast. While this demand had been met for the Minnesota and Wisconsin refineries, growing demand for heavy crude from Western Canada has increased apportionment on Line 67 and Line 4, resulting in the inability for the refineries to obtain all of their required supply. The Project is designed to avoid apportionment as demand for pipeline capacity on the Enbridge Mainline System increases, and this demand is demonstrated by unchallenged evidence in the record.

[41] Evid. Transcript, Vol. 3, p. 38-40.
[42] Ex. 7, p. 20-21.
[43] Ex. 35, p. 21-23.
[44] Ex. 7, p. 3.
[45] MN350/Sierra Brief, p. 35.

The Flint Hills Resources refinery in Minnesota will need additional crude oil because it is embarking on a facility upgrade to process additional crude oil.[46] Recently completed upgrades at the BP Whiting and Marathon Detroit refineries will also require additional heavy Canadian crude oil starting in 2014.[47] The Flanagan South pipeline will also soon come online, with a capacity of 430,000 bpd that will later expand to 600,000 bpd.[48] The only way to move crude oil to Flanagan, Illinois, the origin point of the Flanagan South pipeline, is through the Enbridge Mainline System.[49] There are committed shippers on the Flanagan South pipeline with ship-or-pay contracts.[50] Accordingly, these shippers will have significant incentive to move oil on the Enbridge Mainline System to move their committed volumes on the Flanagan South pipeline.[51] That will increase the demand to move heavy crude oil on the Enbridge Mainline System.[52] This is concrete and unrefuted evidence of need for additional crude oil in Minnesota and beyond.

Additional concrete evidence of the need for the Project comes from the fact that the Enbridge System has been apportioned in recent months,[53] and that apportionment is forecast to continue to worsen in the near term without the Project.[54] The Project does not eliminate the risk of apportionment; rather, it delays the onset of significant apportionment for heavy crude oil on the Enbridge Mainline System.[55]

The pipelines that MN350/Sierra Club assert will take up the available demand from Western Canada include the Express Pipeline, the Puget Sound Pipeline, the Glacier/Rangeland Pipeline, and the Keystone Pipeline.[56] To that list, MN350 now adds the TransCanada Keystone XL pipeline, the Kinder Morgan Trans Mountain Expansion, the Enbridge Northern Gateway Pipeline, and the TransCanada Energy East pipeline.[57] MN350/Sierra Club witness Mary Ellen Denomy's testimony regarding these pipelines was rebutted by Enbridge witness Neil Earnest. MN350/Sierra Club's arguments ignore the level of demand for transportation on these pipelines as well as the ability of the pipelines to receive crude oil. The Express Pipeline will not run at its full capacity because there is limited need for transportation on that pipeline.[58] The Rocky Mountain Pipeline System cited by Ms. Denomy is limited by the same market conditions.[59] The Puget Sound Pipeline cannot receive sufficient supply at the present time in order to run at its

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[46] Ex. 52, p. 13, lines 324-328.
[47] Ex. 15, p. 10, 12.
[48] Ex. 15, p. 15.
[49] Ex. 15, p. 17.
[50] Ex. 15, p. 16, lines 309-319.
[51] Ex. 15, p. 17.
[52] Ex. 15, p. 17.
[53] Ex. 15, p. 4, lines 65-67; *see also* Ex. 13, Exhibit F, Enbridge Response to Department IR21B, Attachment 21B, Schedule 1.
[54] Ex. 14, Enbridge Revised Response to Department of Commerce Information Request 21A, TRADE SECRET VERSION.
[55] Ex. 14, Enbridge Revised Response to Department of Commerce Information Request 21A, TRADE SECRET VERSION.
[56] MN350/Sierra Brief, p. 17, citing Ex. 52, p. 8, lines 177-178.
[57] MN350/Sierra Brief, p. 17.
[58] Ex. 15, p. 34, lines 704-710.
[59] Ex. 15, p. 34, lines 711-717.

full capacity.[60] And the Trans Mountain Pipeline cannot transport additional crude oil.[61] Accordingly, these pipelines will not be competing with the Enbridge Mainline System for crude oil produced in Western Canada.

Even if these pipelines served Minnesota, the surrounding states, or the Gulf Coast, MN350/Sierra Club presented no evidence that oil will be moved on them rather than the Enbridge Mainline System. Instead, MN350/Sierra Club ask the MPUC to assume that these pipelines will compete with the Enbridge Mainline System simply because they exist or expansions of them are proposed. MN350/Sierra Club do not apply that same reasoning to the Project.

The Keystone XL Pipeline will not serve Minnesota, Wisconsin, or the greater Chicago area.[62] To the extent that the Project will transport crude oil to the Gulf Coast, the record shows that the Project and the Keystone XL pipeline can coexist. There will be sufficient supply from Western Canada for both the Project and Keystone XL.[63] The soon-to-be-operational Flanagan South pipeline will also connect shippers on the Enbridge Mainline System to the Gulf Coast via the Seaway pipeline, and there are committed shippers with incentive to use the Flanagan South pipeline. The capacity to refine Canadian heavy crude oil in the United States also exceeds the total capacity of Keystone XL and the Project.[64]

None of the pipelines referenced by MN350/Sierra Club serve Minnesota, the surrounding states, or the upper Midwest. Construction has not begun on any of the proposed pipeline projects advanced by MN350/Sierra Club, which are not projected to begin service until at least 2017 or 2018.[65] MN350/Sierra Club have presented no evidence that Minnesota could be served by any of the listed pipelines, whether existing or proposed. Accordingly, these pipelines are irrelevant to the question of whether the Project is needed to eliminate the current and predicted apportionment on the Enbridge Mainline System.

MN350/Sierra Club's argument about the alleged lack of need for the Project also demonstrates their fundamental misunderstanding of the pipeline and refining industries. MN350/Sierra Club have continually asserted that light and heavy crude oil are interchangeable in pipelines and refineries.[66] That is not true.[67] MN350/Sierra Club present import data for various pipeline systems, but failed to discuss whether they will carry light or heavy crude oil, or whether light or heavy crude oil is needed in the areas served by those pipelines. The Project will satisfy the demand for safe, efficient, and economical transportation of heavy crude oil from Canada to refineries in Minnesota, the surrounding states, and beyond. Accordingly, MN350/Sierra Club's allegations about total import capacity and the capacity of other pipelines should not be considered because MN350/Sierra Club have failed to differentiate between light, medium, and heavy crude oil.

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[60] Ex. 15, p. 34-35, lines 718-725.
[61] Ex. 15, p. 35, lines 726-730.
[62] Ex. 13, p. 9.
[63] Ex. 35, p. 39.
[64] Ex. 7, p. 13; Evid. Transcript, Vol. 1, p. 102, line 25 and p. 103, lines 1-6.
[65] MN350/Sierra Brief, p. 17.
[66] For example, Ex. 54, p.3, lines 52-55.
[67] Ex. 15, lines 685-689, Ex. 23, pp. 3-4, lines 44-55.

## LAW AND ARGUMENT

### I. MN350/Sierra Club present a unique and unsupported interpretation of the law in an attempt to avoid established facts.

MN350/Sierra Club go to great lengths to contrive what the MPUC must consider in its decision to approve or deny Enbridge's application for a CN.[68] In doing so, MN350/Sierra Club attempt to frame the law to avoid having the MPUC consider the evidence in the record, yet also consider elements outside the MPUC's authority at the same time. MN350/Sierra Club cite no authority for their view of the law. As detailed below, none exists.

#### A. The MN350/Sierra Club claim that the MPUC cannot consider any forecasts other than that provided by Enbridge ignores the law and the MPUC's prior consideration of forecast data.

MN350/Sierra Club first argue that Enbridge bears the burden of proof.[69] That is true, to a point. It is up to MN350/Sierra Club, the Dyrdals, or Honor the Earth to demonstrate that there is a more reasonable and prudent alternative to the Project, otherwise the burden lies on Enbridge.[70]

The bulk of MN350/Sierra Club's argument about the meaning of Minn. R. 7853.0130 is carefully crafted to support their argument that the MPUC cannot consider evidence in the record. This can be seen in their attempt to restrict the scope of Minn. R. 7853.0130 A(1), which requires the MPUC to evaluate "the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility."[71] MN350/Sierra Club would have the MPUC believe that forecasts prepared by outside entities and actual, quantifiable evidence of demand cannot be considered in this matter.[72] This is an untimely and absurd interpretation of the rule.[73]

MN350/Sierra Club take the inclusion of the word "applicant" in Minn. R. 7853.0130 A(1) to mean that all such forecasts must be prepared by Enbridge. However, it is equally plausible that inclusion of the word "applicant" in this sub-factor merely requires the MPUC to consider forecasts *provided* by Enbridge, not just those *prepared* by Enbridge.

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[68] MN350/Sierra Brief. p 17 to 29.
[69] MN350/Sierra Brief, p. 18.
[70] Minn. R. 7853.0130, B.; *In re Application of the City of Hutchinson for a Certificate of need to Construct a Large Natural Gas Pipeline*, Minn. App. A03-99, September 23, 2003, p. 11.
[71] MN350/Sierra Brief, p. 22-23.
[72] MN350/Sierra Brief, p. 22.
[73] Enbridge notes that MN350/Sierra Club's argument is really a challenge to the admissibility of Enbridge's exhibits and testimony. As such, it is untimely. The Seventh Prehearing Order required such objections to be made by April 4 (for prefiled direct and rebuttal testimony) or April 8, 2014 (for prefiled surrebuttal testimony). Seventh Prehearing Order, March 27, 2014 (E-Dockets Document No. 20143-97672-01).

MN350/Sierra Club position is inconsistent with the rule and past practice and would deny admission of some of MN350/Sierra Club's own evidence. A forecast is "a prediction of future demand for some specified time period."[74] Under that definition, the testimony of MN350/Sierra Club witness Mary Ellen Denomy is also a forecast, given that Ms. Denomy provided significant data supporting her prediction of future demand for crude oil transportation services.[75] In fact, the majority of Ms. Denomy's testimony was a prediction of no future demand for the Project. If the MPUC cannot consider any forecast data outside of that provided by Enbridge, the MPUC would also need to ignore Ms. Denomy's testimony.[76]

MN350/Sierra Club's argument that only forecasts prepared by Enbridge can be considered is also contrary to the history of Minn. Stat. § 216B.243. This statute, originally numbered Minn. Stat. § 116H.13, was passed in 1974 as part of Minnesota Statutes sections 116H.01-116H.15 to address concerns about energy shortages.[77] Section 116H.13, Subd. 3 has since been renumbered to Minn. Stat. § 216B.243, but remains identifiably the same statute.[78] Most significantly, section 116H.13, Subd. 3(1) required evaluation of "[t]he accuracy of the long range energy demand forecasts on which the necessity for the facility is based." This language still exists in Minn. Stat. § 216B.243, Subd. 3(1). MN3350/Sierra Club's artificial limitation on the source of the forecast data to Enbridge does not exist in the controlling statute.

Likewise, the criteria under Minn. R. 7853.0130 have remained unchanged since 1978, when they were left substantially the same as an earlier version in compliance with section 116H.13.[79]

When it was adopted, Minnesota Statutes section 116H.11 explicitly required the director of the Minnesota Energy Agency to provide a report at least every two years identifying emerging trends related to energy supply, demand, *et cetera*, and provided that certain of the "forecasts established by the director shall serve as the basis for certification of large energy facilities in section 116H.13."[80] The current version of that statute, Minn. Stat. 216B.18, no longer contains the reference to the certificate of need process. Section 116H.11 remained the same.[81] Accordingly, when the criteria for review of a CN were first passed, the decision maker was required to use a forecast prepared by the State of Minnesota, not an applicant. This makes

[74] Minn. R. 7853.0010, Subp. 9.

[75] See generally Exhibits 52, 53 and 54.

[76] Enbridge contends that Ms. Denomy's testimony should be ignored nonetheless, as Ms. Denomy has no relevant experience, no expertise, and little accurate knowledge of the crude oil pipeline or refining industry. Accordingly, Ms. Denomy's testimony is not "the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 1400.7300, Subp. 1.

[77] 1974 Minn. Laws. c 307 s 1 p 1673-1680; Minn. Stat. § 116H.01 (1974)(identifying the purpose of 116H.01-116H.15) (116H.01's tone was significantly moderated in by 1980 Minn. Laws. c 579 s 4 p 944, and is now found in section 216C.05)

[78] Some changes have been made, including minor language changes, the deletion of a criteria related to future development, the addition of an explicit requirement that the Commissioner consider the project's ability to "increase reliability of energy supply in Minnesota and the region," and the addition of subparts (8)-(12). *Compare* Minn. Stat. § 216B.243, Subd. 3 *and* Minn. Stat. § 116H.13, Subd. 3 (1974).

[79] Energy Agency Rules 10001-1091, 2 Minn. Reg. 1560-64 (Feb. 20, 1978), adopted Nov. 2, 1978 as documented in 3 Minn. Reg. 1371 (Jan. 8, 1979).

[80] Minn. Stat. § 116H.11 (1976).

[81] Minn. Stat. 116H.11 (1978).

it apparent that neither Minn. Stat. § 216B.243, Subd. 3(1), nor Minn. R. 7853.0130, A(1) were ever intended to limit the MPUC to considering only a forecast prepared by an applicant. MN350/Sierra Club's attempt to limit consideration of the record should be ignored.

MN350/Sierra Club also ignore the MPUC's ability to consider the criteria contained in Minn. R. 7853.0130 as the MPUC deems them to be applicable and pertinent to the Project.[82] Prior MPUC practice demonstrates that MN350/Sierra Club's limiting interpretation of Minn. R. 7853.0130 A(1) is incorrect, and that the MPUC can consider any forecast data that it deems applicable and pertinent. The MPUC has a long history of relying on forecasts provided by entities other than an applicant for a CN. It did so in 1998 when it approved Lakehead Pipe Line Company, L.P.'s application for a CN, evaluating need based on "shipper forecasts supplied *to* Lakehead."[83] In 2007, the MPUC granted a CN to Minnesota Pipe Line Company, relying on forecast data from the applicant, refineries, the U.S. Department of Energy, CAPP, and the NEB.[84] In 2008, the MPUC granted a CN for the installation of Line 67. In doing so, the MPUC relied on forecasts from the NEB, CAPP, Enbridge, the Energy Information Administration, and analysis from the Minnesota Department of Commerce, Division of Energy Resources (then identified as the Office of Energy Security).[85] Similarly, the MPUC relied on forecast data from the NEB, the refining industry, and the U.S. Department of Energy when it granted a CN for the Alberta Clipper Station Upgrade Project, Phase 1 just last year.[86]

The MPUC's reliance on forecasts other than that provided by an applicant is not limited to consideration of crude oil pipelines. Wind energy facilities of sufficient size also require a CN from the MPUC.[87] The criteria for approving a CN for such a wind generation facility, or any power plant for that matter, are identical to those used for crude oil pipelines.[88] In the past, the MPUC has considered forecasts by outside parties in evaluating applications for certificates of need for wind generation projects. For example, in 2004 the MPUC issued a CN to Mankato Energy Center, LLC for a wind farm, relying on forecasts from the North American Reliability Counsel and the Mid Continent Area Power Pool.[89] Similarly, in 2010, the MPUC granted a CN

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[82] Minn. R. 7853.0100.

[83] *In the Matter of the Application by Lakehead Pipe Line Company, Limited Partnership, for a Certificate of Need for a Large Petroleum Pipeline Facility,* Docket No. PL-9/CN- 98-327, Order Granting Certificate of Need, p. 3 (Aug. 5, 1998) (E-Dockets Document No. 1064599).

[84] *In the Matter of the Application of Minnesota Pipeline Company for a Certificate of Need for a Large Petroleum Pipeline*, MPUC Docket No. PL-5/CN-06-2, Findings of Fact, Conclusions and Recommendation, ¶ 61, 62, 65-69, November 17, 2006, adopted by the MPUC in the Order Granting Certificate of Need, April 13, 2007, p. 10 (E-Dockets Document No. 4030286).

[85] *In the Matter of the Application of Enbridge Energy, Limited Partnership, and Enbridge Pipelines (Southern Lights) LLC for a Certificate of Need for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, MPUC Docket No. PL-9/CN-07-465, Summary of Testimony at the Public Hearings, Findings of fact, Conclusions and Recommendations, ¶ 111-122, July 17, 2008 (E-Dockets Document No. 5361433), adopted by the MPUC in the Order Granting Certificate of Need, Dec. 29, 2008, p. 14 (E-Dockets Document No. 5674505).

[86] *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 67 Station Upgrade Project in Marshall, Clearwater, and Itasca Counties*, MPUC Docket No. PL-9/CN-12-590, Order Granting Certificate of Need, August 12, 2013, p. 4-5 (E-Dockets Document No. 20138-90205-01).

[87] Minn. Stat. § 216B.243 requires a CN for a Large Energy Facility. The definition of Large Energy Facility includes power generating plants over 50,000 kilowatts. Minn. Stat. 216B.2421, Subd. 2(1).

[88] Compare, Minn. R. 7849.0120 to Minn. R. 7853.0130.

[89] *In the Matter of the Application for a Certificate of Need and a Site Permit by Mankato Energy Center, LLC,* MPUC Docket No. IP-6345/CN-03-1884, Findings of Fact, Conclusions of Law and Recommendation, August 20,

to Lakefield Wind Project, LLC for a 205.5 MW wind generation facility, relying on forecasts produced by Indianapolis Power and Light and relied upon by the applicant.[90]

The MPUC has consistently relied on forecast information beyond that prepared directly by an applicant. Accordingly, MN350/Sierra Club's claim that the MPUC cannot rely on the data in the record from the NEB, CAPP, the Energy Information Administration ("EIA"), the Energy Resources Conservation Board ("ERCB"), and refineries is utterly wrong. All of these forecast sources provide useful and reliable information properly admitted into the record, and the MPUC must carefully evaluate the full record.

**B. MN350/Sierra Club incorrectly claims that the MPUC must evaluate specific conservation programs listed in the Quadrennial Report.**

MN350/Sierra Club conflate two parts of Minn. R. 7853.0130 A when making the claim that the MPUC must consider conservation efforts listed in the Energy Policy and Conservation Quadrennial Report issued under Minn. Stat. § 216C.18 (the "Quadrennial Report").

MN350/Sierra Club are correct that Minn. R. 7853.0130 does not require consideration of the Quadrennial Report. The Quadrennial Report is mentioned in Minn. Stat. § 216B.243, Subd. 3 (3), but not in the context that MN350/Sierra Club claim. The MPUC is required to examine "the effect of existing or possible energy conservation programs under sections 216C.05 to 216C.30 and [Minn. Stat. § 216B.243] or other federal and state legislation on long-term energy demand."[91] The Quadrennial report must be examined in the context of overall state energy needs.[92] Under the more specific rule, the MPUC must examine "the effects of the applicant's existing or expected conservation programs and state and federal conservation programs."[93] The MPUC is also free to evaluate these criteria to the extent it deems applicable.[94] Here, national conservation programs are the most appropriate for consideration by the MPUC, because the Project will serve more than just Minnesota.

**C. The MPUC is not required to prepare an EIS for the Project, and the Minnesota Environmental Policy Act cannot be applied to activities outside the State of Minnesota.**

The Project involves a minor amount of construction in Minnesota, primarily the addition of pumps at four pump facilities along the existing pipeline. Line 67 carries crude oil extracted in Canada to various destinations in the U.S. MN350/Sierra Club claim that an environmental

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2004, p. 10-11 (E-Dockets Document No. 1882956), adopted by the MPUC Order Granting Certificate of Need, September 22, 2004, p. 4, 8 (E-Dockets Document No. 1899758).

[90] *In the Matter of the Application of Lakefield Wind Project, LLC for a Certificate of Need for the 205.5 MW Lakefield Project in Jackson County*, MPUC Docket No. IP-6829/CN-09-1046, Order Granting Certificate of Need, October 15, 2010, p. 5 (E-Dockets Document No. 201010-55510-01).

[91] Minn. Stat. § 216B.243, Subd. 3(2).

[92] Minn. Stat. § 216B.243, Subd. 3 (3); *See* Ex. 13, Enbridge Response to Department IR9, p. 2-3 for a discussion of Minnesota's energy needs as described in the 2008 Quadrennial Report, which was the most recent Quadrennial Report available at the time.

[93] Minn. R. 7853.0130 A. (2).

[94] Minn. R. 7853.0100.

assessment worksheet ("EAW") is required for the Project. That is false; there is no requirement for an EAW or an environmental impact statement ("EIS"). Minn. Stat. § 116D.04, Subd. 2a(a) required the Environmental Quality Board ("EQB") to establish lists of projects that require an EAW or an EIS. The EQB did so in Minn. R. Ch. 4410. An EAW is required for *routing* of a pipeline, not for a certificate of need for a pipeline.[95] Likewise, an EIS, prepared by the MPUC, is required for *routing* a pipeline under the full route selection procedures under Minn. Stat. § 216G.02, which governs pipeline routing permits.[96] And then, the pipeline routing permit process serves as an alternative EIS process, which fulfills the requirements of the Minnesota Environmental Policy Act.[97] No new pipeline will be installed outside of existing Enbridge pump facilities as part of the Project.[98] Accordingly, no pipeline routing permit, and therefore no additional environmental review, is required. It is important to understand that Line 67 and its entire route through Minnesota was fully reviewed under Chapter 7852 of the Minnesota Rules, an alternative to the EIS process, when the MPUC issued a pipeline routing permit to Enbridge for Line 67 in 2008.[99]

With regard to extraterritorial application, the United States Supreme Court has explained that unless specified, there is a presumption that laws passed by the Congress have no effect outside the territorial jurisdiction of the United States.[100] More to the point, environmental impacts caused by actions of foreign governments occurring outside the United States cannot be analyzed under the National Environmental Policy Act ("NEPA").[101] Similarly, The Minnesota Environmental Policy Act ("MEPA") cannot be applied outside the jurisdiction of the State of Minnesota.[102] Since NEPA cannot be applied to analyze the environmental effects of the Canadian oil extraction actions, then, certainly, MEPA also does not apply.

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[95] Minn. R. 4410.4300, Subp. 7 A.

[96] Minn. R. 4410.4400, Subp. 24.

[97] *In re Application of Enbridge Energy Limited Partnership and Enbridge Pipeline (Southern Lights) L.L.C. for a Routing Permit for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, MPUC Docket No. PL-9/PPL-07-361, December 29, 2008, p. 9 (E-Dockets Document No. 5675994). ("For nearly two decades pipeline companies have been able to demonstrate compliance, with the Minnesota Environmental Policy Act by filing an Environmental Assessment Supplement (EAS) with their applications for a Pipeline Routing Permit. In 1989 the EQB approved the pipeline routing rules as a substitute form of environmental review for pipelines. The rules imposed a number of requirements on applicants including the requirement to submit a detailed EAS with any routing permit application. The Legislature subsequently transferred jurisdiction over these matters to the Commission and re-codified the rules at chapter 7852. And Minnesota Rules, part 7852.2700, provides for an applicant to submit the EAS.")

[98] Ex. 1, § 7853.0230, p.3.

[99] *Supra*, n. 93.

[100] *Morrison v. National Australia Bank*, 561 U.S. 247, 130 S. Ct. 2869, 2877 (2010) (citing, *EEOC v. Arabian American Oil Co.*, 449 U.S. 244, 248, 111 S. Ct. 1227 (1991).

[101] *Basel Action Network v. Maritime Administration*, 370 F. Supp. 2d 57 (D.D.C. 2005) (NEPA applies to actions within the United States, and there is no legal or policy reason to extend it beyond our borders); *Born Free USA v. Norton,* 278 F. Supp. 2d 5, 20 (D.D.C. 2003) (NEPA analysis of an action in a foreign country would be to no avail since U.S. agency is not in a position to control that action).

[102] *Longaker v. Boston Scientific Corporation*, 872 F. Supp. 2d 816, 819 (D. Minn. 2012) (presumption against extra-territorial application of federal statutes similarly applies to state statutes); *In Re St. Paul & K.C. Grain Co*., 94 N.W. 218, 225 (Minn. 1903) (statutes of a state have no effect beyond its own limits, and even if a state legislature should intend its laws to apply to persons or property in other states, such an enactment would be wholly inoperative and void).

MN350/Sierra Club are attempting here to bootstrap state environmental policy to the CN determination process to argue that the MPUC should review the alleged worldwide environmental impact on global climate change of greenhouse gases produced in the extraction of crude oil in Canada. State environmental policy is set forth in Minnesota Statutes Sections 116D.01, 116D.02 and 116D.03 and is very general and broad, as is to be expected. The rules on CN determination are detailed and require specific information to be filed with the MPUC and specific criteria to be evaluated.[103] Statutory provisions containing *specific* provisions are construed as controlling *general* provisions when interpreting statutes.[104] The general environmental policy provisions in MEPA do not control the specific CN process being followed here by the MPUC.

MN350/Sierra Club point to no authority which requires environmental review of global climate change from actions alleged to occur in Canada when evaluating a CN for the Project. In fact, the only claim MN350/Sierra Club cobbled together is that the MPUC has a statutorily imposed duty to "lend support to efforts such as MN350 and the Sierra Club opposition that prevent a decline in the quality of the world environment."[105] The testimony of MN350/Sierra Club witness John Abraham focused on the alleged impacts of global climate change. Specifically, Dr. Abraham expressed concern for $CO_2$ releases relative to the extraction of crude oil in Canada. As an action in a foreign country, the MPUC has no jurisdiction to review it.

## II. MN350/Sierra Club's arguments against the Project ignore the record, misapply the law, and fail to demonstrate that the MPUC should not grant a CN to Enbridge for the Project.

Minn. R. 7853.0130 contains four primary criteria, with a total of 13 sub-factors.[106] It should be noted that MN350/Sierra Club presents arguments about only three of those thirteen sub-factors, and does so only by attempting to avoid facts in the record.

### A. The record contains extensive, reliable forecast data that demonstrates need for the Project.

The bulk of MN350/Sierra Club's argument against the Project is devoted to an attempt to discredit the forecast data prepared by Enbridge, and also avoid forecast data provided by Enbridge but prepared by CAPP, the NEB, the ERCB, the EIA, and concrete evidence of demand in the record. Interestingly, MN350/Sierra Club never challenge Enbridge's forecast of apportionment of heavy crude oil capacity on the Enbridge Mainline System.

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[103] Minn. Stat. § 216B.243; Minn. R. 7853.0100-.0130.

[104] Minn. Stat. § 645.26, Subd. 1; *In the matter of the application for Combined Air and Solid Waste Permit No. 2211-91-OT-1*, 49 N.W.2d 811, 817 (Minn. App. 1992) (MPCA is foreclosed from making a contradictory finding of the likelihood of pollution under the general provisions of Minn. Stat. § 116D.04, Subd. 6 when the Met Council has a specific grant of authority to approve the project).

[105] MN350/Sierra Brief, p. 43.

[106] Not all factors must be evaluated. Minn. R. 7853.0100 allows the MPUC to evaluate the factors listed in Minn. R. 7853.130 "to the extent that the commission deems them applicable and pertinent to each facility proposed pursuant to this chapter."

A "forecast" is defined in the Minnesota rules. It is "a prediction of future demand for some specified time period."[107] There is no rule requirement that the forecast be a single document, or one prepared only by the applicant, as discussed above.

MN350/Sierra Club attack the forecast data in the record in two ways. First, MN350/Sierra Club have attempted to exclude forecast data that MN350/Sierra Club do not want the MPUC to consider. The record contains supply forecast data from CAPP, the NEB, the ERCH, and the EIA, as well as Enbridge's forecast of supplies that will be available for transportation on Line 67. Importantly, MN350/Sierra Club have never challenged Enbridge's forecast of apportionment, and avoiding apportionment is Enbridge's primary goal in serving its shippers by constructing the Project. Enbridge provided multiple forecasts that demonstrate the following: 1) vastly increasing supplies of heavy Canadian crude oil; 2) demand for that crude oil in the areas to be served by the Project; and 3) a forecast of the level of pipeline capacity apportionment between the source of the supply and the locations where demand exists. This information was detailed on pages 14 to 20 of Enbridge's initial brief, and will not be fully repeated here. MN350/Sierra Club apparently seek to exclude this data because, taken together, the data demonstrates that the Project is needed. MN350/Sierra Club primarily challenge only Enbridge's forecast of supplies available to be transported on Line 67.

In their brief, MN350/Sierra Club challenge Enbridge's forecast of supplies that will be available to Enbridge for transportation. Although the MPUC should consider this information, it is not the most important forecast and should be considered along with the forecasts of crude oil supply, the information regarding demand, the limited pipeline capacity between the source of supply and the demand, and the impact of expected apportionment on the Enbridge Mainline System on refineries in Minnesota and beyond.

Also of note is the complete lack of evidence in the record that contradicts Enbridge's forecast of supplies available for transportation on the Enbridge Mainline System. MN350/Sierra Club had Enbridge's forecast of supply available to it for transportation, and even inquired about it during discovery.[108] Yet MN350/Sierra Club never challenged this particular forecast through testimony or introduced a competing forecast. The record does not contain any contradictory forecast evidence, only speculation in the MN350/Sierra Brief.

MN350/Sierra Club's challenge to the forecast data in the record is based on what MN350/Sierra Club perceive as four problems: 1) uncertainty about whether it was CAPP or Enbridge that prepared the basis of Enbridge's internal forecast; 2) uncertainty about which WCSB overall supply forecast was used as the basis for Enbridge's forecast; 3) a claimed lack of data about key factors that could influence the forecast data; and 4) the impact of rail transportation on demand for the Project.[109] Each alleged deficiency in the record is refuted below.

[107] Minn. R. 7853.0010, Subp. 9.
[108] MN350/Sierra Brief, p. 34, note 71.
[109] MN350/Sierra Brief, p. 39-40.

MN350/Sierra Club's first two claims relate to the basis of Enbridge's internal forecast provided in the Revised Section 7853.0520 of the Application.[110] Note that the forecast disputed by MN350/Sierra Club displays Enbridge's estimate of supplies that will be available from Western Canada on the Enbridge Mainline System. It is *not* Enbridge's forecast of when the Enbridge Mainline System will enter into apportionment. That forecast is provided in Ex. 14, Enbridge Revised Response to Department of Commerce Information Request 21A, Trade Secret Version. The apportionment forecast is based not on supply from Western Canada, but on "forecasted annualized average demand with and without a Line 67 Phase II expansion to 800 kbpd [800,000 bpd]."[111] In that context, demand means nominations, since that is how apportionment is calculated.[112] Accordingly, Enbridge's apportionment forecast is based on expected nominations for transportation through the Enbridge Mainline System compared to the capacity of that system.

Enbridge's forecast of supply that is available for transportation on the Enbridge Mainline System is what MN350/Sierra Club dispute, asserting that the MPUC cannot rely on that forecast because it is uncertain who prepared it or which overall forecast of Western Canadian crude oil production was used. The forecast challenged in the MN350/Sierra Club brief was prepared by Enbridge.[113] That forecast, however, is only one of the many forecasts in the record.

Enbridge has already established that the MPUC can and should review all forecast information in the record. As noted by Neil Earnest, the "CAPP, NEB, ERCB, and EIA forecasts differ in the details, but more broadly communicate the same message – the forward outlook for Western Canada is one of massive increases in heavy crude oil supply."[114] The Department agreed that Canadian heavy crude oil output will continue to grow, noting that the NEB predicts that growth will increase by 1.4 million bpd between 2012 and 2020, and by 4.2 million bpd if the time period is extended to 2035.[115]

There are no forecasts in the record that demonstrate anything other than continued expansion of Western Canadian heavy crude oil supplies. Although MN350/Sierra Club now claim that the CAPP and NEB forecasts are unreliable,[116] the basis of that argument is flimsy at best. MN350/Sierra Club first complain that the CAPP forecast is unreliable because Enbridge did not provide any of the foundational data used by CAPP to prepare the forecast.[117] But that data is proprietary and held confidential by CAPP; Enbridge cannot access it.[118] This alleged defect does not diminish the significance of the CAPP, NEB, ERCB, and EIA forecasts all showing general agreement about future production in Canada. Simply put, MN350/Sierra Club have not demonstrated that the CAPP and NEB forecasts are unreliable, and have not provided

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[110] Ex. 4 (public version); Ex. 5 (trade secret version).
[111] Ex. 25.
[112] Ex. 15, p. 5-6, lines 95-101.
[113] *See* MN350/Sierra Brief, p. 32, note 65; Ex. 4, p. 1.
[114] Ex. 7, p. 35.
[115] Ex. 37, p. 16-17.
[116] MN350/Sierra Brief, p. 41.
[117] MN350/Sierra Brief, p. 41.
[118] Evid. Transcript, Vol. 1, p. 80, lines 12-25.

any justification for the MPUC to overturn its long-standing practice of relying on both the CAPP and NEB forecasts when reviewing pipeline CN applications.[119]

MN350/Sierra Club next claim that there is a lack of data in the record regarding key factors that could influence the forecasts. Specifically, MN350/Sierra Club claim that Enbridge's supply forecast is unreliable because, in their view, it does not sufficiently account for Western Canadian crude oil demand or crude oil that will be transported to market by other pipelines or by rail. MN350/Sierra Club can make this argument only by ignoring information in the record and by choosing not to introduce evidence that MN350/Sierra Club possessed.[120]

Regarding the claim that forecasts do not predict refinery demand in Western Canada, the CAPP forecast provides a forecast of Western Canadian refinery demand.[121] Contrary to the assertions of MN350/Sierra Club witness Ms. Denomy, Western Canadian crude oil demand did not rise by 100,000 bpd between May, 2012 and March, 2013.[122] In fact, the CAPP forecast shows that Western Canadian crude oil demand is expected to grow by only 86,000 bpd by 2020.[123] Ms. Denomy had reviewed the CAPP forecast, but chose not to include this contradictory figure in her testimony.[124] That is a very small amount compared to the expected growth in Western Canadian heavy crude oil production. MN350/Sierra Club also claim that substantial fuel will be required to develop oil sands production, but provides no support whatsoever for that statement.[125]

MN350/Sierra Club next argue that other existing and proposed pipelines will make the Project unnecessary.[126] MN350/Sierra Club assert that the record does not contain information about the other pipelines included in Enbridge's forecast of supply available for transportation on the Enbridge Mainline System, yet admit that MN350/Sierra Club possess that data and chose not to introduce it into the record.[127] The MPUC does not need to rely on Enbridge's forecast of supply available for transportation. The record contains figures from CAPP showing predicted supply compared to current and anticipated pipeline capacity, as well as rail capacity.[128] But the most important issue to consider is what other pipelines can meet the demand that will be served by the Project and avoid apportionment on the Enbridge Mainline System. The answer is none.

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[119] *Supra*, notes 83 to 86.
[120] MN350/Sierra Club Brief, p. 34, note 71.
[121] Ex. 16, Attachment F, p. 10.
[122] Compare Ex. 53, p. 5 and Ex. 16, Attachment F, p. 11, Figure 3.3.
[123] Ex. 16, Attachment F, p. 10.
[124] Evid. Transcript, Vol. 3, p. 47, lines 14-24.
[125] MN350/Sierra Brief, p. 34.
[126] MN350/Sierra Brief, p. 34.
[127] MN350/Sierra Brief, p. 34, note 71.
[128] Ex. 1, § 7853.0240, p. 9; Ex. 16, Attachment F, p. 11. MN350/Sierra Club complain that this graph is unreliable because it is not clear why U.S. Bakken movements are included. MN350/Sierra Brief, p. 35, note 72. As explained in the CAPP Forecast, the graph includes U.S. Bakken volumes that could utilize a portion of the pipeline capacity that exits Western Canada. Ex. 16, Attachment F, p. 31. Accordingly, the U.S. Bakken movements are included because they could impact pipeline capacity available for Western Canadian heavy crude oil.

MN350/Sierra Club have not produced any evidence that contradicts the expected growth in refinery demand from the BP Whiting and Marathon Detroit refinery upgrade projects.[129] In fact, MN350/Sierra Club produced evidence indicating that refinery demand for heavy crude oil will increase in Minnesota as well, due to the Flint Hills Resources refinery in Rosemount, Minnesota undertaking an efficiency upgrade.[130] The Enbridge Mainline System is the only pipeline network that serves the Minnesota refineries.[131]

It is illogical to consider the impact on pipelines that will not serve the same region as the Project. Here, the Department reviewed the NEB forecast and concluded that even if Keystone XL, which is not a competitor to the Project for volumes that will move to Minnesota and the Upper Midwest, is constructed, there will still be excess capacity available from Western Canada.[132] Although MN350/Sierra Club made much of the possible construction of the Keystone XL pipeline, it should be noted that the Sierra Club also opposes that project, and MN350/Sierra Club witness Ms. Denomy could not predict when the Keystone XL pipeline will receive permits and begin construction.[133] The other pipelines relied on by MN350/Sierra Club suffer the same uncertainty; MN350/Sierra Club has not demonstrated that the pipelines it asserts will make the Project unnecessary can and will be constructed. MN350/Sierra Club is correct that existing pipelines do transport crude oil from Western Canada to the United States. Those include the Puget Sound Pipeline, the Glacier/Rangeland Pipeline, and the Keystone Pipeline.[134] But MN350/Sierra Club has indicated that these pipelines are well-used already.[135] And the record reflects that additional oil is unlikely to flow through those lines due to limited market demand or pipeline network capacity.[136]

The market will ultimately choose which projects receive shipper support, as it has for the Project. Shippers will use the pipelines that meet their needs, and have done so for the Enbridge Mainline System. CAPP has indicated that it supports the Project, and its members are willing to pay for this infrastructure upgrade to the Enbridge Mainline System.[137] Other entities, including Flint Hills Resources Canada, BP Products North American, and United Refining Company all support the Project.[138] The Flint Hills Resources Pine Bend Refinery in Rosemount, Minnesota went so far as to state that "Without the Alberta Clipper Phase 2 upgrade, Pine Bend projects that it will be short of crude, which could adversely affect consumers and force the refinery to consider other modes of transport for delivering the crude oil it needs to remain competitive in the marketplace."[139] Even MN350/Sierra Club's witness believed that the MPUC should pay attention to the concerns expressed by Flint Hills.[140] MN350/Sierra Club argue that the MPUC cannot consider this evidence of actual demand in the record, but there is

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[129] Ex. 15, p. 10.
[130] Ex. 52, p. 13, lines 324-328.
[131] Evid. Transcript, Vol. 1, p. 97, lines 5-25.
[132] Ex. 35, p. 39, lines 8-14; Ex. 37, p. 17, lines 5-13.
[133] Evid. Transcript, Vol. 3, p. 35, lines 5-12.
[134] Ex. 1, § 7853.0240, p. 9, Figure 7853.0240-C.2.
[135] Ex. 52, p. 6, lines 180-184.
[136] Ex. 15, p. 34-35, lines 702-730.
[137] Ex. 8, Exhibit A, Schedules 1, 2.
[138] Ex. 8, Exhibit A, Schedules 3, 4, 5.
[139] Ex. 12, Exhibit C.
[140] Evid. Transcript, Vol. 3, p. 101, lines 18-22.

no support for that argument.[141] MN350/Sierra Club are simply attempting to avoid consideration of actual evidence of demand, which the MPUC can and should take into account.

Flint Hills and these other shippers, including the members of CAPP, support the Project because apportionment will occur for heavy crude oil on the Enbridge Mainline System if the Project is not completed. When the two pipelines that carry heavy crude oil on the Enbridge Mainline System are under apportionment, shippers are unable to move the full volumes of crude oil that they nominate for shipment.[142] The Enbridge Mainline System has been under apportionment for heavy crude oil in five out of the last 24 months, including three of the most recent five months.[143] Apportionment forces shippers to choose between receiving additional crude by truck or rail,[144] or producing less. Choosing to make up volumes lost to apportionment by rail will cost the shipper between $5.70 and $7.00 per barrel.[145] If the Enbridge Mainline System is under 25.9% apportionment, a realistic scenario if the Project is not constructed,[146] Minnesota refineries could face cost increases of $70 million per year or more to use rail transportation to make up for the volumes they could not transport on the Enbridge Mainline System.[147]

Shippers working to supply refineries in other parts of the United States have also indicated their support for the Enbridge Mainline System, which includes Line 67. The Flanagan South pipeline has shipper commitments to move up to 537,000 bpd on that pipeline, and the only way to move oil to the Flanagan South pipeline is through the Enbridge Mainline System.[148] Accordingly, the shippers that have committed to use the Flanagan South pipeline will be using the Enbridge Mainline System, including Line 67.[149]

MN350/Sierra Club also ignore the fact that Enbridge, not the public, bears the risk of economic harm in the unlikely circumstance that the Project is constructed but not fully used.[150]

MN350/Sierra Club argue in their brief that rail transportation will also impact the volumes of crude oil available for transportation on the Enbridge Mainline System.[151] Rail capacity out of Western Canada has increased over recent years.[152] But that has only happened because heavy crude oil supply has outstripped the available pipeline capacity.[153] The significantly higher cost to use rail over pipelines, up to $7.00 per barrel, indicates that pipeline

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[141] MN350/Sierra Brief, p. 42-43 ("Since none of the market data in the Application or Enbridge witness testimony are a forecast of demand that complies with Minn. Stat. § 216B.243, subd. 3(1) or Minn. R. Ch. 7853, this data does not substitute for or remedy the defects in Enbridge's Line 67 Supply Forecast.").
[142] Evid. Transcript, Vol. 1, p. 185 lines 17-25, p. 186 lines 1-4; Ex. 29, FERC No. 41.6.0 , p. 8, § 14(a).
[143] Ex. 15, p. 4, lines 65-67; *See also* Ex. 13, Exhibit F, Enbridge Response to Department IR21B, Attachment 21B, Schedule 1.
[144] Ex. 15, lines 442-446; Ex. 37, p. 7-8.
[145] Ex. 16, Attachment C.
[146] Ex. 15, p. 19.
[147] Ex. 15, p. 22, Table 1.
[148] Ex. 15, p. 26, lines 317-319, p. 17, lines 346-355.
[149] Ex. 16, p. 17, lines 352-355.
[150] Ex. 22, p. 4, lines 58-60.
[151] MN350/Sierra Brief, p. 36-38.
[152] Ex. 15, p. 31, lines 618-620.
[153] Ex. 15, p. 31, lines 618-620.

transportation will be used over rail.[154] Shippers prefer pipeline transportation over rail tank cars.[155]

MN350/Sierra Club promote use of rail transportation over the Project, but did not consider the environmental or socioeconomic impacts of rail transportation, which are significant. In fact, MN350/Sierra Club did not even analyze rail cars as an alternative to the Project.

MN350/Sierra Club have not demonstrated that the forecasts in the record show anything other than massive increases in Canadian heavy crude oil production, demand for the heavy crude oil to be transported by the Project, and apportionment of pipeline capacity to Minnesota and beyond if the Project is not constructed.

### B. MN350/Sierra Club's arguments regarding climate change do not merit further consideration.

Notwithstanding the fact that the MPUC has no jurisdiction to review alleged environmental impacts caused outside the state of Minnesota, as discussed above, the fundamental flaw in MN350/Sierra Club's argument is related to cause and effect. That is, MN350/Sierra Club assume that constructing the Project will result in an additional 230,000 bpd of production in Canada. However, the record shows that Canadian producers will continue to produce because there is demand for Canadian crude oil not only in the United States, but globally.[156]

Other parts of the world outside of the United States are expanding petroleum consumption. Dr. Cicchetti testified that the countries of the world where great demand growth is coming from are more interested in expanding their economies than reducing oil consumption.[157] Simply, if the product is not shipped to the United States and Minnesota via the Project, it will be shipped through other means, such as rail, and possibly to other locations and countries.

The real choice is whether the established demand in Minnesota, surrounding states and the Gulf Coast will be satisfied by the Project or other means of transport. MN350/Sierra Club argued in favor of rail transportation as an alternative for crude oil transport.[158] The record demonstrates that use of rail traffic to transport 230,000 bpd of crude oil would require moving a massive number of rail cars per day through Minnesota.[159] Increased rail traffic means increased greenhouse gas and other emissions.[160] The Project will have only minor emissions, and is not subject to air permitting requirements.[161] Therefore, in fact, the approval of the Project may *reduce* emissions.

[154] Ex. 15, p. 5, lines 77-78.
[155] Ex. 21, p. 14, lines 246-248.
[156] Ex. 19, p. 9.
[157] Evid. Transcript, Vol. 2 pp. 239-240.
[158] Evid. Transcript, Vol. 3, p. 115, lines 18-23, p. 116, lines 1-22.
[159] Ex. 20, p. 19.
[160] Ex. 1, § 7853.0600, p. 18, Table 7853.0600-3.
[161] Ex. 1, § 7853.0620, p. 2-3.

### C. MN350/Sierra Club has not presented evidence that conservation will eliminate the need for the Project.

MN350/Sierra Club allege that there is no evidence in the record regarding an analysis of federal and state programs related to petroleum conservation, and their effect on demand. That assertion is narrow and wrong.

The evidence shows that the Project will serve Minnesota, the Midwest, and the nation as a whole. The record reflects that global demand is intertwined with the supply of crude oil in Minnesota, the Midwest, and the nation. Therefore, an analysis of conservation cannot be limited to analysis of a few state conservation programs as MN350/Sierra Club seem to insist. Instead, the analysis must take a wide view. Conservation analysis is most probative on a national and even global level. And, ultimately, there is no indication in the record that state or federal programs, however beneficial, will reduce or eliminate the need for the Project.

Dr. Cicchetti testified regarding the wide view of demand-side management (i.e. conservation) at the evidentiary hearing. Despite state and federal efforts to promote conservation, there will remain a global demand that affects this country's stable and reliable crude oil sources. Dr. Cicchetti noted that the countries of the world where great demand growth is coming from are more interested in expanding their economies than conservation.[162] Expanding world population is driving environmental and energy concerns, and these concerns cannot be solved by the countries that are already doing things to improve efficiency.[163] Further, Dr. Cicchetti also testified regarding renewable energy sources. He testified that renewables are often displacing coal, and some natural gas, but they are less likely to displace liquid fuels, such as petroleum.[164]

The best measure in record of the impact of national conservation measures, and their impact on the national need for petroleum, is the Annual Energy Outlook Early Release ("AEO 2014 Early Release").[165] This report provides the U.S. Energy Information Administration's ("EIA") forecast for energy consumption across all sectors through 2040, and takes all known national conservation programs into account. The AEO 2014 Early Release accounts for greenhouse gas emission regulations and increased fuel economy standards.[166] In fact, this most recent report assumes that the Corporate Average Fuel Economy standard will be 37.2 MPG in 2040, increased from 21.5 MPG in 2012.[167] The AEO 2014 Early Release also accounts for alternate vehicle fuels systems, including plug-in hybrid or gasoline electric hybrid vehicles, Ethanol flex-fuel vehicles, and electric vehicles.[168] Yet the AEO 2014 Early Release still predicts that gasoline will power 78% of new light-duty vehicles in 2040.[169] Heavy duty vehicle miles traveled and energy used will increase by an average of 1.9% per year from 2012 to

[162] Evid. Transcript, Vol. 2 , pp. 239-240.
[163] Evid. Transcript, Vol. 2 , pp. 239-240
[164] Evid. Transcript, Vol. 2 , p. 241.
[165] Ex. 13, Exhibit F, Attached to the Enbridge Response to Department of Commerce Information Request No. 9.
[166] Id. p. 8.
[167] Id.
[168] Id.
[169] Id.

2040.[170] The report notes that "[t]otal U.S. consumption of petroleum and other liquids, which was 35.9 quadrillion Btu (18.5 [million barrels per day or "MMbbl/d"]) in 2012, increases to 36.9 quadrillion Btu (19.5 MMbbl/d) in 2018, then declines to 35.4 quadrillion Btu (18.7 MMbbl/d) in 2034 and remains at that level through 2040."[171] Therefore, the AEO 2014 Early Release shows extensive need for petroleum imports through 2040 despite significant improvements in vehicle efficiency and increasing domestic production of petroleum. In fact, imports are expected to drop through 2016, but then rise again through 2040.[172] The Project will allow refineries in the United States to meet that import need from a secure, reliable, and friendly source.

MN350/Sierra Club assert in their brief that several state programs will reduce the need for the Project, but fail to support their assertions.[173] The Minnesota Petroleum Replacement Program, initiated by Minn. Stat. § 239.7911 is one program advanced by MN350/Sierra Club. That statute calls for gradually increasing use of ethanol in gasoline sold in Minnesota, gradually increasing from 14% in 2015 to 30 % in 2025. MN350/Sierra Club, however, failed to disclose that Minn. Stat. § 239.7911 conflicts with Environmental Protection Agency regulations which limit use of ethanol blends greater than 10% in "light-duty vehicles older than model year 2000, any heavy-duty gasoline motor vehicle or engine, any highway or off-highway motorcycle, or any gasoline-powered nonroad engines, vehicles or equipment."[174] Gasoline with 15% ethanol concentration can only be used in a flex-fuel vehicle.[175] Accordingly, it is unlikely that the Minnesota statute can be enforced, given the limits placed on ethanol use by the EPA. As 10% ethanol is permitted at a national level, the AEO 2014 Early Release accounted for ethanol use.

MN350/Sierra Club also suggest that the Minnesota Department of Transportation's Alternative Transportation Finance Program could impact demand for heavy crude oil.[176] This program, however, is focused on funding for transportation projects.[177] It is not a conservation program.[178]

The programs advanced by MN350/Sierra Club all operate only within the State of Minnesota. The Project will serve Minnesota, the surrounding region, and beyond. It is inappropriate to consider only Minnesota-centric programs when the Project is needed in

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[170] Id., p. 9.
[171] Id., p. 11
[172] Id., p. 13.
[173] MN350/Sierra Brief, p. 47-48.
[174] 40 C.F.R § 80.1504(a)(1).
[175] *Id*. at (a)(3).
[176] MN350/Sierra Brief, p. 48.
[177] MnDOT's Alternative Transportation Finance Program, http://dot.state.mn.us/funding/innovative/mndotprogram.html, ("The ATF Program will further the department's desire to continuously identify transportation funding and financing options and fully utilize a wide array of alternative financing approaches in an accountable, transparent and fiscally responsible manner.") (Last visited May 9, 2014).
[178] MN350/Sierra Club also advances the DOT Commuter Challenge Program as a conservation measure, but that program supplies posters and other promotional material for carpooling or using mass transit. There is no indication that this program will have a significant impact on need for the Project. *See* http://dot.state.mn.us/transit/commuter/index.html (Last visited May 9, 2014).

Minnesota and in other states. Minnesota cannot apply its conservation statutes to commercial activity in other states.

The record reflects that demand for a reliable source of imported crude oil will remain despite well intended conservation programs. There is no indication that state or federal conservation programs will reduce or eliminate the need for the Project.

## CONCLUSION

The extensive record supports issuance of a CN to Enbridge for the Project. MN350/Sierra Club failed to demonstrate that the MPUC should deny Enbridge's application for a CN. MN350/Sierra Club ultimately chose to contest only a few of the many factors that the MPUC must consider. The evidence presented by MN350/Sierra Club was unreliable and unconvincing due to witness Mary Ellen Denomy's lack of experience with and knowledge of the petroleum industry, or outside the MPUC's jurisdiction, such as witness John Abraham's testimony about alleged environmental impacts caused by activity outside the scope of the Project in a foreign nation.

The MPUC must consider the full record. There is ample, credible evidence from Enbridge and from refineries that serve Minnesota and the surrounding region that demonstrates the need for the Project. The Enbridge Mainline System has been under apportionment in recent months, and will be under increasing levels of apportionment without the Project. As a result, the refineries that serve Minnesota and the surrounding region will be faced with the choice between vastly increased costs or insufficient crude oil supplies.

Under Minn. R. 7853.0130, a CN must be granted to Enbridge for the Project, because: 1) denying Enbridge's application for a CN will adversely impact the adequacy, reliability, and efficiency of the energy supply to Enbridge's customers and to the people of Minnesota and neighboring states; 2) there are no more reasonable or prudent alternatives to the Project; 3) the consequences to society of granting the CN are far more favorable than the consequences of denial; and 4) Enbridge has demonstrated that the Project will comply with all relevant and applicable policies, rules, and regulations.

Enbridge respectfully requests that the MPUC issue a CN for the Project as soon as possible.

Dated: May 13, 2014

Respectfully submitted,

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# Exhibit A

**FERC Order**

**130 FERC ¶ 61,270 (2010)**

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**Exhibit A**

130 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

| | |
|---|---|
| Enbridge Pipelines (Toledo) Inc. | Docket No. IS10-137-000 |
| CCPS Transportation, LLC | Docket No. IS10-138-000 |
| Enbridge Energy, Limited Partnership | Docket No. IS10-139-000 |
| Suncor Energy Marketing Inc. | Docket No. OR10-5-000 |

ORDER ON TARIFFS AND PETITION FOR DECLARATORY ORDER

(Issued March 31, 2010)

1. This order addresses four filings related to Enbridge Energy, Limited Partnership's (Enbridge Energy) Alberta Clipper Project, an expansion of its mainline capacity from the international border near Neche, North Dakota to Superior, Wisconsin. Each of the tariff filings in the IS dockets establish surcharges to recover costs incurred to complete the Alberta Clipper Project. Enbridge Energy and the Canadian Association of Petroleum Producers (CAPP), who represent almost all the producers that ship crude on this pipeline, agreed to establish the surcharges in a Facilities Surcharge Settlement discussed more fully below. The pipelines request the Commission to permit the tariffs to become effective April 1, 2010. In the petition for declaratory order in Docket No. OR10-5-000, submitted before the three tariff filings, Suncor Energy Marketing Inc. (Suncor) seeks a determination that, due to dramatically changed circumstances, the Commission-approved long-term rate methodology for the U.S. portion of the Alberta Clipper Project will not result in just and reasonable rates in the near term and urges the Commission to deny Enbridge Energy's filings to effectuate the surcharges. The Commission accepts the tariffs effective April 1, 2010, as proposed. The Commission also dismisses Suncor's petition for declaratory order as moot.

**Background**

2. In 1998 Enbridge Energy, successor of Lakehead Pipe Line Company, Limited Partnership, entered into a comprehensive settlement agreement with CAPP regarding the rate recovery of costs incurred for three specific projects to add more capacity and

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broaden the pipeline's capability to transport heavier crude oil.[1] Two of these projects entailed facilities-based surcharges: the System Expansion Project II (SEP II) and the Terrace Expansion Project (Terrace). The Commission approved the 1998 settlement as an uncontested settlement and, pursuant to that approval, Enbridge Energy made annual tariff filings to implement the SEP II surcharge and periodic filings, as necessary, to update the Terrace surcharge. Those filings have all been made without protest or complaint.

3. In 2004, Enbridge Energy received a number of requests for enhancements or modifications to its system to permit greater flexibility in the types of crude handled or greater access by shippers to particular markets or crude types that on an aggregate basis resulted in significant incremental costs to the pipeline. These shipper requests led to the concept of a Facilities Surcharge as negotiated between Enbridge Energy and CAPP, whose members account for more than 98 percent of Canada's oil and gas production and the overwhelming majority of the crude oil transported on Enbridge Energy's system.

4. Enbridge Energy designed the Facilities Surcharge to permit its recovery of the costs associated with particular shipper-requested projects through an incremental surcharge layered on top of the existing base rates and other Commission-approved surcharges already in effect. Enbridge Energy intended the Facilities Surcharge to be a transparent, cost-of-service-based tariff mechanism that it can update annually as of April 1 to account for any new projects approved by the Commission. New project costs are then included and recovered by the surcharge and trued-up each year for any differences between estimated costs and throughput and actual costs and throughput.

5. On June 30, 2004, in Docket No. OR04-2-000, the Commission approved an uncontested offer of settlement negotiated between Enbridge Energy and CAPP (Facilities Surcharge Mechanism Settlement).[2] The purpose of the settlement was to: (1) approve the overall concept for implementing a Facilities Surcharge that is separate from the existing surcharges in its tariff rates but not subject to the Commission's indexing rules; (2) approve the inclusion of four specific projects in the Facilities Surcharge, effective July 1, 2004, in accordance with the terms of the four agreements with CAPP; and, (3) permit Enbridge Energy to submit to the Commission for approval future settlement agreements resulting from negotiations with CAPP where the parties agree that, from their perspective, recovery of the costs through the Facilities Surcharge is desirable and appropriate.

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[1] *Lakehead Pipe Line Co.,* 85 FERC ¶ 61,397 (1998).

[2] *Enbridge Energy, Limited Partnership*, 107 FERC ¶ 61,336 (2004).

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6. On August 14, 2008, the Commission approved an uncontested amendment to the Facilities Surcharge Mechanism Settlement to allow Enbridge Energy to include in the Facilities Surcharge particular-shipper requested projects not yet in service as of April 1 of each year provided there is an annual true-up of throughput and cost estimates.[3]

7. On August 28, 2008, the Commission issued an order approving an uncontested settlement filed pursuant to Enbridge Energy's Facilities Surcharge Mechanism.[4] CAPP supported this settlement that was designed to implement an additional component of the Facilities Surcharge to permit the recovery of the costs of the Alberta Clipper Project. The terms of the cost-of-service calculation supporting the surcharge were agreed upon by CAPP and Enbridge Energy.

**The Filings Related to the Alberta Clipper Project**

8. On January 13, 2010, in Docket No. OR10-5-000, Suncor filed a petition for declaratory order. Suncor seeks a declaratory order determining that, due to dramatically changed circumstances, the Commission-approved long-term rate methodology for the U.S. portion of the Alberta Clipper Project will not result in just and reasonable rates in the near-term and cannot be put into effect. Suncor also seeks a Commission order that establishes a near-term rate treatment for Alberta Clipper costs that will become effective from the Alberta Clipper's in-service date until such time as (a) Enbridge Energy demonstrates to the Commission's satisfaction that the existing pipeline capacity on the Lakehead system (without the Alberta Clipper) is insufficient to transport oil from the U.S./Canadian border to Superior, Wisconsin and (b) the Commission determines the approved long-term rate methodology or other rate methodology is just and reasonable under the circumstances prevailing at the time.

9. Suncor asserts that, absent Commission action, implementation of the Alberta Clipper Surcharge will result in system charges that are unjust and unreasonable and therefore unlawful. Suncor argues that each of the benefits of the Alberta Clipper Project, which formed the foundation for the Commission's approval of the settlement, has been completely undermined by subsequent events. Suncor contends the increased capacity associated with the Alberta Clipper is not required, bottlenecks have not occurred, and new markets have not emerged. Suncor contends Enbridge Energy imprudently pursued the Alberta Clipper even as circumstances changed dramatically.

10. Suncor requests the Commission not allow Enbridge Energy to recover the costs of the Alberta Clipper Project in the Facilities Surcharge Mechanism. Suncor submits

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[3] *Enbridge Energy, Limited Partnership*, 124 FERC ¶ 61,159 (2008).

[4] *Enbridge Energy, Limited Partnership*, 124 FERC ¶ 61,200 (2008).

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that until the shippers need the expansion capacity, Enbridge Energy would continue to collect indexed rates and other surcharges. Suncor states that Enbridge Energy would defer any under-recovery of Alberta Clipper costs until the Commission effectuated the Alberta Clipper Surcharge, at which point these costs would be amortized over the Alberta Clipper's useful life. Suncor states the deferred costs would not include interest or other return on investment. Suncor also asserts that shippers should not have any obligation to supply crude oil to Enbridge Energy for operational and scheduling purposes related to the Alberta Clipper until shippers need this capacity. Suncor therefore urges the Commission to defer any obligation shippers may have to deliver crude oil to Enbridge for such purposes.

11. On February 19, 2010, in Docket No. IS10-139-000, Enbridge Energy filed FERC Tariff No. 38 to be effective April 1, 2010. FERC Tariff No. 38 reflects changes to Enbridge Energy's SEP II, Terrace and Facilities Surcharges currently in effect. Enbridge Energy adjusts the SEP II surcharge to true-up the differences between estimates and actual cost and throughput data, and establishes the Terrace surcharge based on the Terrace Agreement. With respect to the Facilities Surcharge, FERC Tariff No. 38 includes the costs associated with two new projects: the Alberta Clipper Project and the Line 3 Conversion Project.[5] Enbridge Energy calculated the initial Alberta Clipper surcharge based on projected costs and Lakehead System throughput, subject to an annual true-up to actual data. It also adjusts the SEP II surcharge pursuant to the 1998 Settlement Agreement between Enbridge Energy and CAPP. The SEP II surcharge included in FERC Tariff No. 38 reflects 2009 actual and 2010 projected SEP II costs and throughput. The Terrace surcharge was initially established at five cents (Canadian) per barrel, with the surcharge revenue shared between Enbridge Pipelines Inc., in Canada and Enbridge Energy in the U.S. Pursuant to the 1998 Settlement Agreement, when the prior year actual annual average throughput, excluding Clearbrook, is less than 224,999 cubic meters per day, Schedule C to the settlement permits an adjustment to the Terrace surcharge. Enbridge Energy's Terrace surcharge in 2010 amounts to $0.02 per barrel (Canadian) from US/Canadian Border to Griffith for a light crude oil barrel. From 2009 to 2010, this surcharge decreased from $0.04 to $0.02 (Canadian) per barrel (Canadian). Enbridge Energy states the total rate paid by shippers on the Enbridge Energy system will

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[5] On February 19, 2010, in Docket No. OR10-7-000, Enbridge Energy filed a Supplement to the Facilities Surcharge Settlement to allow recovery of Line 3 Conversion Project costs. The project includes modification of existing mainline pump stations to convert Line 3 from mixed crude oil service to light crude oil service from Hardisty, Alberta to Superior, Wisconsin. The filing was supported by CAPP and is uncontested. Contemporaneously with this order, the Commission is issuing a letter order approving the supplement to the settlement.

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equal the sum of the base index rate, the SEP II surcharge, the Terrace surcharge, and the Facilities Surcharge.

12. On February 19, 2010, Enbridge Pipelines (Toledo) Inc. (Enbridge Toledo) also filed FERC Tariff No. 32 to be effective April 1, 2010. FERC Tariff No. 32 is a joint tariff between Enbridge Toledo and Enbridge Energy facilitating movements that originate from the International Boundary near Neche, North Dakota and Clearbrook, Minnesota, destined for delivery to Samaria, Michigan and Oregon, Ohio. The changes proposed by Enbridge Energy in FERC Tariff No. 38 in Docket No. IS10-139-000 are reflected in the joint rates proposed in FERC Tariff No. 32. Enbridge Toledo states the sum of the local rates on file with the Commission is, in all cases, either greater than or equal to the proposed joint rates.

13. On February 19, 2010, CCPS Transportation, LLC (CCPS) filed FERC Tariff No. 33 to be effective April 1, 2010. FERC Tariff No. 33 is a joint tariff between CCPS and Enbridge Energy facilitating movements that originate from the International Boundary near Neche, North Dakota and Clearbrook, Minnesota, destined for delivery to Jacksonville, Missouri and Cushing, Oklahoma. The changes proposed by Enbridge Energy in FERC Tariff No. 38 in Docket No. IS10-139-000 are reflected in the joint rates proposed in FERC Tariff No. 33. CCPS states the sum of the local rates on file with the Commission is, in all cases, either greater than or equal to the proposed joint rates.

**Responsive Pleadings**

14. No protests were filed to Enbridge Toledo's filing in Docket No. IS10-137-000 or CCPS' filing in Docket No. IS10-138-000.

15. However, both Suncor and Imperial Oil filed protests to Enbridge Energy's tariff filing in Docket No. IS10-139-000. They both assert they have standing to file a protest because they are shippers on the system and will be affected by the Facilities Surcharge. In its protest, Suncor reiterates arguments made in its petition for declaratory order. Suncor argues because of changed circumstances the benefits of the Alberta Clipper Project will no longer be realized and implementation of the Alberta Clipper Surcharge at this time will result in unjust and unreasonable rates. It also continues to assert that Enbridge Energy imprudently continued to pursue the Alberta Clipper Project long after changed circumstances became apparent. In addition, Suncor argues that Tariff No. 38 does not appear to apply Commission-approved rate methodologies correctly. Suncor asserts that Enbridge Energy: (1) improperly applied the fixed capital structure for each surcharge, (2) improperly calculated the return on equity for each surcharge, (3) failed to justify the cost of debt for each of the surcharges, (4) failed to justify tax calculations, (5) failed to justify its pipeline integrity costs, (6) failed to justify capital costs, and, (7) failed to justify the rate increase resulting the18 percent decrease in Lakehead system throughput from 2009 to 2010. Suncor requests the Commission reject Tariff No. 38 or suspend the rates for seven months and establish a hearing. If the Commission does not

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reject this tariff, Suncor requests the Commission require Enbridge Energy to file cost, revenue and throughput data supporting its proposed rates as required by Part 346 of the Commission's regulations. Finally, Suncor argues that Enbridge Energy must defer shippers' requirement to contribute line fill volumes for the Alberta Clipper Project. Suncor contends this matter requires the Commission's expedited consideration and action because on March 4, 2010, Enbridge Energy delivered to Lakehead system shippers a letter setting forth its plan for assessing line fill charges to its customers.

16. In its protest, Imperial Oil made many of the same arguments as Suncor and therefore we will not repeat them here. In addition, Imperial Oil contends that Enbridge Energy bears the burden of proof under section 15 of the Interstate Commerce Act (ICA) to show that the facilities are used and useful and the proposed rates are just and reasonable. Imperial Oil asserts that challenging the rates here is not a collateral attack on the 2008 Alberta Clipper settlement. Imperial Oil argues that the original Facilities Surcharge Mechanism settlement in 2004 established how Enbridge would recover these costs but, not what costs would be eligible for recovery. Imperial Oil submits Enbridge Energy must demonstrate that it faithfully implemented the appropriate settlement rate methodology for each component of the facilities surcharge. Imperial Oil contends that, on their face, Enbridge Energy's calculations cannot be verified to ensure Enbridge Energy applied correctly the approved methodology for each component of the Facilities Surcharge. Imperial Oil asserts the filing contains insufficient support for several of the inputs used in the calculations.

17. In Docket No. OR10-5-000, Imperial Oil filed a motion to intervene and statement in support of Suncor's petition for declaratory order. Nova Chemicals (Canada) Ltd. filed a motion to intervene which had a heading stating the intervention was in support of Suncor's petition.

18. On February 19, 2010, in Docket No. OR10-5-000, Enbridge Energy filed a motion to intervene, protest and request for dismissal of Suncor's petition for declaratory order. Enbridge Energy asserts the Commission should dismiss the Suncor petition because it constitutes an unwarranted collateral attack on a prior and final order of this Commission approving a settlement between Enbridge Energy and CAPP relating to the Alberta Clipper expansion project. Enbridge Energy argues that the relief that Suncor requests - an order barring Enbridge Energy from putting the Alberta Clipper project into service and making a tariff filing to recover the costs of that project - is beyond the authority of the Commission to grant. Enbridge Energy categorically denies it acted imprudently in proceeding with construction of the Alberta Clipper project in accordance with the terms of the approved settlement.

19. Enbridge Energy originally expected individual shippers would support the Alberta Clipper project through volume commitment contracts entered into through an open season process. Enbridge Energy states that, acting on behalf of its shipper members, however, CAPP urged Enbridge Energy to operate the Alberta Clipper as a

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pure common carrier pipeline and recover the project costs through mainline tariff rates in Canada and the U.S. Enbridge Energy states that CAPP further emphasized the overriding need to build Alberta Clipper on an expedited schedule so that the new capacity would be available as soon as possible. Indeed, in January 2007, Enbridge Energy states that CAPP agreed that Enbridge should proceed with acquisition of pipe and other long lead time items even before the parties finalized the Alberta Clipper settlement agreement. Further, Enbridge Energy states the final agreement imposed substantial financial penalties if Enbridge Energy did not have Alberta Clipper able to accept crude oil by July 1, 2010.

20. Enbridge Energy states that construction of both the Canadian and U.S. portions of the Alberta Clipper pipeline is essentially complete and the pipeline can accept crude oil on April 1, 2010, consistent with the schedule established in the settlement and shared with the Commission when it approved that settlement. Enbridge Energy submits the costs of the project are in line with the original budget and the revenue requirement supporting the Alberta Clipper surcharge is within the range forecasted when the settlement was reached.

21. Enbridge Energy asserts that Suncor's petition threatens to undo a longstanding course of dealing between CAPP and Enbridge Energy that the Commission relied on and has brought great stability and consensus to the Enbridge Energy ratemaking process. Enbridge Energy argues that it invested billions of dollars in explicit reliance on agreements with CAPP that, once approved by the National Energy Board of Canada (NEB) and the Commission, have always been honored both by Enbridge Energy and its shippers. Enbridge Energy contends that Suncor's action in belatedly challenging the validity of the Commission's approval of the settlement threatens to undo the good will and predictability these agreements have fostered for more than a decade. Enbridge Energy asserts that such a result would have serious detrimental consequences for the ability to construct new infrastructure on a common carrier basis and for the national interest in providing access to secure supplies of crude oil for the United States.

22. Enbridge Energy argues that Suncor's petition poses a potentially mortal threat to any future oil pipeline project being built on a common carriage basis. Enbridge Energy states that while many pipelines require contracts from their shippers to support expansion of existing facilities or the construction of new projects, Enbridge Energy has been willing to undertake new projects based solely on recovering costs through its tariff rates, without requiring shippers to make long-term contractual volume commitments. Enbridge Energy submits that if oil pipelines like Enbridge Energy are exposed to the risk that settlement agreements will not be honored after billions of dollars have been invested in reliance on them, then they will have no choice but to structure any future projects on a contract carriage basis, with direct throughput agreements from major shippers in place to support the recovery of costs.

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23. On March 8, 2010, Suncor filed an answer to Enbridge Energy. Suncor reiterates arguments made in its petition, as well as in its protest to Enbridge Energy's filing in Docket No. IS10-139-000. In addition, Suncor moves for partial summary disposition of its petition for declaratory order and requests the Commission set for hearing issues related to the development of a near-term rate methodology for the Alberta Clipper Project.

24. On March 15, 2010 Enbridge Energy filed an answer in response to the protests of Suncor and Imperial Oil in Docket No. IS10-139-000. Enbridge Energy asserts these protests are untimely collateral attacks on the 2008 Alberta Clipper Settlement and urges the Commission to deny their requests for rejection of the tariff or a seven-month suspension. Enbridge Energy disagrees that the Alberta Clipper Project is unnecessary and will not provide benefits in 2010. Enbridge Energy submits that Alberta Clipper will realize the numerous benefits contemplated in the 2008 CAPP Settlement, including delivery of new capacity in 2010, elimination of a light crude bottleneck of approximately 140,000 barrels per day (bpd) upstream of Superior, Wisconsin, and production of substantial operating efficiencies and increased flexibility to segregate products in different lines. Moreover, Enbridge Energy contends that Alberta Clipper is currently needed to assure that Enbridge Energy's Lakehead system can adequately serve its customers' requests for service. In addition, Enbridge Energy argues that line fill cannot be an issue in this tariff proceeding because Enbridge Energy has not proposed to change the line fill requirement in its rules tariff. Enbridge Energy concludes the scope of the Commission's review is defined by the formula in the settlement and is limited to the question of whether Enbridge Energy appropriately implemented the settlement.

## Discussion

25. The tariff filings under review and the petition for declaratory order all relate to Enbridge Energy's recovery of the costs of the Alberta Clipper Project in its Facilities Surcharge Mechanism. The Commission is faced with opposing positions. Enbridge Energy states it filed the Alberta Clipper Project costs pursuant to the 2008 uncontested settlement with CAPP and that various parties' opposition to the recovery attempts to undo a settlement. Suncor and Imperial Oil claim the parties based the settlement on certain project benefits and since they have not materialized, the resulting rates are unjust and unreasonable. They request the Commission direct Enbridge Energy to redo the rates for the Alberta Clipper Project in the near term and consequently, defer the obligations of shippers to provide line fill volumes.

26. At the outset, as a procedural matter, the Commission will dismiss Suncor's petition for declaratory order as moot. Whether to consider providing declaratory relief is discretionary with the Commission.[6] Further, the purpose of a declaratory order is to

[6] *See e.g. Express Pipeline Partnership,* 75 FERC ¶ 61,303, at 61,967 (1996).

remove uncertainty or terminate a controversy. While a declaratory order may have been appropriate in the absence of an actual tariff filing by Enbridge Energy, that is no longer the case and any issues concerning the recovery of the costs of the Alberta Clipper Project are properly addressed in the tariff filing proceeding in Docket No. IS10-139-000. Since Suncor raises the same issues in its protest to Enbridge Energy's tariff filing as in its petition for declaratory order and has the additional benefit of commenting on the actual Alberta Clipper Project costs contained in the Facilities Surcharge Mechanism, it is not prejudiced by this decision.

27. The Commission reviewed the arguments of the various parties and accepts Enbridge Energy's Tariff No. 38 in Docket No. IS10-139-000, effective April 1, 2010, as proposed. Suncor and Imperial Oil asserted the Alberta Clipper Project costs may not have been calculated in accordance with the approved methodology and Enbridge Energy should address those issues. In its answer to the protests, Enbridge Energy addressed specific cost elements in the tariff filing that the protesters averred it failed to address. These items are discussed below. Suncor and Imperial Oil also requested cost support for other cost elements. The Commission rejects such requests for further cost support. As Enbridge Energy stated in its answer, Enbridge was not required to include such justifications or additional data in its tariff filing, which included precisely the same level of detail as similar settlement implementation filings going back for many years. The Commission finds that generalized assertions by Suncor and Imperial Oil are not enough to require further cost support, let alone formal discovery.

28. Suncor argues Enbridge Energy improperly applied its capital structure for each surcharge, because it allegedly failed to use the capital structure of 55 percent equity and 45 percent debt included in the settlements. Enbridge Energy states it appropriately applied the stipulated capital structure as an input to the deferred return methodology set forth in Opinion No. 154-B. Enbridge Energy states the Opinion 154-B methodology starts with the capital structure ascribed to the regulated pipeline as an input. Enbridge Energy states that the 2008 CAPP Settlement (like prior settlements) adopted a stipulated capital structure to avoid the need to redetermine the actual capital structure on an annual basis. Enbridge Energy states that for purposes of implementing the Opinion 154-B methodology (which explicitly governs the cost-of-service based surcharges), it is necessary to adjust the weighted average cost of capital to assure that the pipeline's deferred earnings receive an equity rate of return (since deferred earnings constitute deferred equity return from prior periods). Enbridge Energy states it appropriately made that adjustment in all of its cost-of-service surcharge calculations, just as it has done going back for more than a decade without objection from CAPP, which carefully monitors both the settlements and Enbridge Energy's compliance with them.

29. Suncor asserts Enbridge Energy improperly calculated the return on equity for the SEP II surcharge. It states Enbridge Energy applied a rate of 11.88 percent, when it should have used a rate of 11.52 percent. Enbridge responds that Suncor failed to

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consider that the nominal equity rate of return for SEP II must be adjusted for inflation in the prior year as has been consistently done since 1998. Enbridge Energy states that, in this case, the prior year's inflation was negative, which slightly increased the real return on equity. Enbridge Energy states it made a corresponding adjustment to reduce deferred earnings by the same negative inflation percentage, so the net effect over time is a wash. Suncor alleges that the SEP II Surcharge settlement requires Enbridge Energy to adjust the return on equity depending on volumes, and that it is unclear whether Enbridge Energy adjusted the return on equity correctly. Enbridge Energy states that it expects to fully utilize the SEP II capacity in 2010. Therefore, the nominal rate of return is the NEB multi-pipeline rate plus 3.00 percent. With respect to the Southern Access Expansion component of the Facilities Surcharge, Suncor argues that Enbridge Energy is entitled to a fixed return on equity of 9 percent, plus the inflation rate. It claims Enbridge Energy should reduce the 9 percent real return on equity by 0.361 percent to account for a negative inflation rate in the prior year. Enbridge Energy counters that the applicable settlement does not provide for a reduction below the stipulated 9 percent return on equity, but only for upward adjustments for inflation. Therefore, Enbridge Energy states it correctly calculated the return on equity. Finally, Suncor argues the total return on equity for the Alberta Clipper component of the Facilities Surcharge should be 10.77 percent, but that Enbridge only used 9.07 percent in its calculations. Enbridge Energy states Suncor again failed to take inflation into account; the 9.07 percent return on equity is a real rate of return after deduction of the forecast inflation rate for 2010, the first year of operation of Alberta Clipper.

30. Suncor argues that Enbridge claims a return for pipeline integrity work on non-SEP II facilities under the SEP II surcharge. Since Enbridge has been incorporating such costs under the SEP II surcharge since 1996, Enbridge Energy is unclear why Suncor is only now challenging this practice. Enbridge Energy states that CAPP approved these integrity cost charges for years, and Suncor, as a member of CAPP presumably has long been aware of them.

31. Suncor asserts FERC Tariff No. 38 filing indicates that there has been a drop in throughput of approximately 18 percent from 2009 to 2010. Suncor argues this decrease in throughput accounts for significant rate increases under the tariff, and supports Suncor's argument that Alberta Clipper is unnecessary. Enbridge Energy asserts that, again, Suncor fails to understand the facts. Enbridge Energy notes that in 2009, it based its throughput numbers on a full year's data for all projects. However, in 2010, it adjusted the throughput numbers to take into account that Alberta Clipper would not be in service for the full year (but only the last three quarters). Enbridge Energy states that it similarly reduced its projected costs in 2010 to match the period of time that Alberta

Clipper will be in service, so that the cost and throughput projections match and the resulting rate is the same as it would be for a full year. As a result, Enbridge Energy states that comparing the raw throughput figures in the 2009 and 2010 filings produces a spurious result. Enbridge Energy states that Suncor's calculation relies on a light crude equivalent (LCE) measurement, which is a complex calculation that takes into account not only volume but type of crude and distance traveled. Enbridge Energy states that as such, LCE is meaningful in a tariff calculation, but not in addressing capacity usage on the Lakehead System. For capacity purposes, one must look at actual volumes (the number of barrels), not distance, since the pipeline's capacity is constrained by the number of barrels that can be accommodated at the bottleneck location (i.e., the point where nominated volumes are highest relative to the Lakehead System capacity at that point). Enbridge Energy states that when one compares the 2010 forecast to 2009 actual volumes, the forecast decline is only about 2 percent on average, while Lakehead System capacity (exclusive of Alberta Clipper) declines by 6 percent in 2010 because Line 13's reversal. Thus, contrary to Suncor's allegations, Enbridge Energy states these throughput numbers do not call into question the need for Alberta Clipper, nor do they drive a substantial part of the tariff increase in 2010.

32. The Commission finds that Enbridge Energy has adequately responded to the protests in Docket No. IS10-139-000 and has shown that its tariff filing conforms to the methodology contained in the Alberta Clipper settlement as well as the other relevant settlements with CAPP on the Facilities Surcharge Mechanism. The Commission finds that no further review is necessary.[7]

33. The Commission will not reject Enbridge Energy's tariff, delay implementation of the surcharge, or defer shippers' obligations to provide the Enbridge Energy system with line fill based on arguments that Enbridge Energy's proposed rates are unjust and unreasonable because certain parties assert the benefits of the Alberta Clipper Project will not be realized. The protesters' speculative arguments concerning the benefits of the project are not sufficient to abrogate the settlement or find that the proposed rates are unjust and unreasonable. Any such actions would indeed undo the uncontested

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[7] Imperial Oil and Suncor filed answers to Enbridge Energy's response essentially reiterating many arguments that they have already made. Suncor continues to challenge Enbridge Energy's throughput volumes for the Alberta Clipper and asserts that Enbridge Energy is incorrectly linking the Line 13 reversal to the Alberta Clipper project. While these arguments are cast as problems with Enbridge Energy's compliance with the settlement methodology, they are in fact further collateral attacks on the settlements and will not be addressed. In fact, in its answer Suncor continues to assert that the primary benefit of the Alberta Clipper Project will not occur. *See*, March 22, 2010 Suncor Answer at 5.

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settlement that Enbridge Energy implements here through its rate filing. Further, the rate mechanism for recovering these costs was agreed upon by CAPP, an association representing the protesting parties here. The Commission will not undo a settlement because certain parties now argue that the deal turned out differently than they thought.[8] This would fly in the face of the settlement which contained no contingencies for changed circumstances and in fact placed a stiff monetary penalty on Enbridge Energy if the Alberta Clipper Project was not in service by July 1, 2010.

34. The filings by Enbridge Toledo in Docket No. IS10-137-000 and CCPS in Docket No. IS10-138-000 are not protested. Those filings contain joint rates that incorporate the rates filed by Enbridge Energy in Docket No. IS10-139-000 reflecting the costs of the Alberta Clipper Project in the Facilities Surcharge Mechanism. Since the Commission accepts the tariffs in Docket No. IS10-139-000, effective April 1, 2010, the Commission will also accept the tariffs in Docket Nos. IS10-137-000 and IS10-138-000 to also become effective April 1, 2010, without conditions.

The Commission orders:

(A) Enbridge Energy's Tariff No. 38 in Docket No. IS10-139-000 is accepted effective April 1, 2010.

(B) Enbridge Toledo's Tariff No. 32 in Docket No. IS10-137-000 is accepted effective April 1, 2010.

(C) CCPS' Tariff No. 33 in IS10-138-000 is accepted effective April 1, 2010.

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[8] The Commission will not relieve customers from what those customers claim to be unfavorable contractual bargains merely because they turn out to be unfavorable. *See, e.g., PPL University Park, LLC v. Commonwealth Edison Co.,* 109 FERC ¶ 61,190 at P 20 (2004), *reh'g denied,* 110 FERC ¶ 61,117 (2005); *Pontook Operating Limited Partnership v. Public Service Co. of New Hampshire,* 94 FERC ¶ 61,144 at 61,551-52 (2001) (*Pontook*); *Southern Company Services, Inc.*, 43 FERC ¶ 61,003 at 61,014, *reh'g denied,* 43 FERC ¶ 61,394 (1988), *aff'd mem. sub nom. Gulf States Utilities Co. v. FERC,* 886 F.2d 442 (D.C. Cir. 1989); *accord Potomac Electric Power Co. v. FERC,* 210 F.3d 403, 409 (D.C. Cir. 2000).

(D) Suncor's Petition for declaratory order in Docket No. OR10-5-000 is dismissed as moot.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.