

**STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION**

Katie Sieben
Valerie Means
Matthew Schuerger
Joseph K. Sullivan
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**In the Matter of Honor the Earth's
October 27, 2020 Petition for
Investigation and Complaint Concerning
the Capacity of the Enbridge Mainline
System**

Docket No. PL9/C-20-801

**HONOR THE EARTH'S REPLY TO ENBRIDGE ENERGY, LIMITED
PARTNERSHIP'S ANSWER TO HONOR THE EARTH'S COMPLAINT**

INTRODUCTION

On October 27, 2020, Honor the Earth submitted its Petition for Investigation and Complaint Concerning the Capacity of the Enbridge Mainline System. This document requested two distinct actions by the Minnesota Public Utilities Commission ("Commission"): (1) an investigation of Enbridge's possible knowing use of incorrect data in the forecasts it provided to the Commission in the Line 3 Replacement Project Evidentiary Hearing; and (2) a complaint that Enbridge has not informed the Commission of its intention to increase the actual throughput of the Mainline System via an increase in the average annual capacities of Enbridge's Lines 4 and 67. In response, the Commission initiated docket PL9/C-20-801 and on November 5, 2020, issued a "Notice of Comment Period" that required Enbridge to provide an answer by November 25, 2020, and for replies to Enbridge's answer to be filed by December 15, 2020. On November 5, Honor the Earth submitted a letter to the Commission pointing out that the process established by this notice completely failed to comply with the procedural requirements of Minn. R.

7829.1800 and 1900. In response, on November 10, 2020, the Commission issued an Amended Notice of Public Comment Period setting a public comment deadline of December 21, 2020.

Honor the Earth asserts that this Amended Notice also does not comply with regulatory procedural requirements. On November 25, 2020, Enbridge filed its Answer to Honor the Earth's Complaint. Honor the Earth hereby replies to Enbridge's Answer.

ARGUMENT

I. PETITION FOR INVESTIGATION.

A. Summary of Petition for Investigation

Honor the Earth requested that the Commission undertake an investigation into the possibility that Enbridge Energy, Limited Partnership ("Enbridge"), may have provided material false evidence during the evidentiary hearing for the Line 3 Replacement Project, Docket PL9/14-916 ("L3RP"), related to the baseline capacity of its Mainline System.¹ In particular Honor the Earth provided documents showing:

- an inconsistency between, on the one hand, Enbridge's testimony that its Mainline System in 2017 had and through 2035 would continue to have an "effective" capacity limit of 92 percent of the system's total average annual capacity; and on the other hand, Enbridge's reports to the Canadian Energy Regulator ("CER") (formerly the National Energy Board of Canada), that the Mainline System had an "available" capacity of 97 percent on average in 2016; 99 percent on average in 2017; and similarly higher "available" capacities in 2019 and 2020;
- in 2016 before the L3RP evidentiary hearing, Enbridge had begun to implement a plan to add significant new capacity, "effective" or otherwise, to the Mainline System

¹ Honor the Earth Petition for Investigation at 30-34.

via efficiency improvements and/or upgrades to its existing Mainline System pipelines;

- Enbridge increased actual crude oil exports from Canada from 2016 through the first quarter of 2020, such that the Mainline System was not operating “at capacity” during the 2017 evidentiary hearing as claimed by Enbridge; and
- Enbridge currently has an ongoing plan to further increase the capacity of the Mainline System beyond the claimed baseline capacity provided in the L3RP evidentiary hearing.

The foregoing information indicates that Enbridge’s claim in the L3RP evidentiary hearing that the Mainline System’s “effective” capacity was capped at 92 percent of average annual capacity throughout the forecast years established by Minn. R. 7853.0010, subp. 10, was incorrect and not in accordance with ongoing Enbridge efforts to increase the “effective” capacity of the Mainline System. Since Enbridge used the assumption of a 92 percent effective capacity as the baseline numbers used to calculate its forecasts of need and apportionment, it appears that the forecasts provided to the Commission pursuant to Minn. Stat. § 216B.243, subd. 3(1), were calculated using baseline capacity data that Enbridge, at the time of the evidentiary hearing, knew or should have known was incorrect.

B. Summary of Enbridge Response to Petition for Investigation.

Enbridge responded to the Petition for Investigation by claiming that the Commission has no jurisdiction to investigate Honor the Earth’s allegations and evidence.² Specifically, Enbridge asserts that the Commission’s investigatory powers under Minn. Stat. § 216B.14 are limited to “public utilities.” Enbridge completely fails to address any of the foregoing factual allegations

² Enbridge Answer at 12.

related to the evidence of existing capacity it presented during the evidentiary hearing, and instead responded exclusively to Honor the Earth's Complaint, which is related to Enbridge's proposed capacity additions to Line 4 and 67. While Enbridge is not required to respond to a petition for investigation, as it is to a Complaint, Enbridge's decision to not respond to Honor the Earth's evidence of an inaccurate baseline data in Enbridge's forecast calculations is unfortunate, because the Commission does not have the benefit of Enbridge's perspective.

C. The Commission Has Statutory Authority to Investigate Possible Knowingly Incorrect Testimony on Materials Facts.

To the extent that the Commission finds that it does not have authority under Minn. Stat. § 216B.14 to investigate Enbridge because it is not a "public utility," Honor the Earth instead petitions the Commission under Minn. Stat. § 216A.05, subd. 1 ("The functions of the commission shall be legislative and quasi-judicial in nature. It may make such investigations . . . with respect to the control and conduct of the businesses coming within its jurisdiction as the legislature itself might make but only as it shall from time to time authorize."). Honor the Earth asserts that the Commission has the power to investigate whether or not an applicant for a certificate of need knowingly provided incorrect statements to the Commission during an evidentiary hearing, because such alleged action is within the Commission's jurisdiction and its power to protect the integrity of its proceedings. If the Commission finds that it does not have authority under Minn. Stat. § 216A.05, subd. 1, then Honor the Earth requests that the Commission consider the facts and claims related to Enbridge's apparently incorrect statements related to Mainline System capacity as a complaint under Minn. Stat. § 216.13 and/or Minn. Stat. § 216B.14. Enbridge essentially argues that the Commission may not hear any complaint against Enbridge, regardless of its actions and the veracity of its evidence. The Commission should not

agree that it has no jurisdiction to investigate or consider a complaint about possible wrongdoing by pipeline companies committed during Commission evidentiary hearings.

D. The Baseline “Effective” Capacity of the Mainline System Was an Important and Material Fact in the Line 3 Replacement Project Evidentiary Hearing, and Enbridge Knew or Should Have Known at the Time of the L3RP Evidentiary Hearing that Its Claimed Effective Capacity Cap Was Incorrect

The baseline capacity of the Mainline System was a critical numerical input into both the apportionment forecast provided by Enbridge witness Glanzer³ and the pipeline capacity need analysis prepared by Enbridge Witness Earnest.⁴ The following is the table in Mr. Glanzer’s testimony showing that Mainline System “effective” capacity “Without L3R” would not increase over the forecast period from 2019 to 2035.

³ Direct Testimony of John Glanzer, Schedule 2 at 1 (Table 3.5.2-3 Glanzer Rebuttal Testimony, Schedule 3 page 3 of 26 (table entitled “Enbridge Mainline Throughput and Apportionment — Gretna to Clearbrook”, and particularly the lines under “Mainline Capacity Pre-Project”); Schedule 3 page 5 (Table 2.5.2-5).

⁴ Direct Testimony of Neil Earnest, Schedule 2 at 63 (“However, the effective aggregate capacity of the Enbridge Mainline System is less than the sum of the individual pipeline capacities. Accordingly, a utilization factor is applied to the sum of the individual line capacities. For both the heavy and light crude oil pipelines, the utilization factor is 92 percent. The effective utilization factor is based upon historical experience of Enbridge of the impact of operational issues such as late crude oil receipts from shippers, refineries unable to accept deliveries because of their own operational problems, and various crude oil terminal constraints. The effective utilization factor was provided by Enbridge. The utilization factors are the same for the Gretna to Clearbrook segment and the Clearbrook to Superior segment for the respective light and heavy crude oil pipelines. Thus, prior to the L3R Program, the effective light and heavy crude oil capacities of the Gretna to Clearbrook segment are 949 and 1,468 kb/d, respectively, as shown in Table 8 below.”); *see also* data tables in Direct Testimony of Neil Earnest, Schedule 2 at 97, 98, 100, 102, 104.

Table 3.5.2-3 Apportionment without Line 3 Replacement

Apportionment Forecast Without L3R (kbpd)									
Without Line 3R (Hvy/Light)	2019	2020	2021	2022	2023	2024	2025	2026	2027
Heavy Throughput	1970	1954	1971	1971	1964	1957	1969	1973	1992
Light/Medium Throughput	787	804	785	786	793	800	789	785	765
Total Throughput	2757	2757	2756	2757	2757	2757	2757	2757	2757
Effective Heavy Capacity ex Western Canada	1468	1468	1468	1468	1468	1468	1468	1468	1468
Excess Heavy Capacity ex Western Canada	-502	-485	-503	-503	-496	-488	-500	-504	-524
Heavy System Utilization	100%	100%	100%	100%	100%	100%	100%	100%	100%
Heavy Apportionment ex Western Canada	25%	25%	26%	26%	25%	25%	25%	26%	26%
Effective Light Capacity ex Western Canada	949	949	949	949	949	949	949	949	949
Excess Light Capacity ex Western Canada	161	145	164	162	155	148	160	164	183
Light System Utilization	83%	85%	83%	83%	84%	84%	83%	83%	81%
Light Apportionment ex Western Canada	0%	0%	0%	0%	0%	0%	0%	0%	0%

L3R (kbpd)								
2027	2028	2029	2030	2031	2032	2033	2034	2035
1992	2000	2007	2007	1939	1927	1969	1975	1976
765	757	750	750	818	831	789	783	781
2757	2757	2757	2757	2757	2757	2757	2757	2757
→ 1468	1468	1468	1468	1468	1468	1468	1468	1468
-524	-532	-539	-539	-471	-458	-500	-506	-508
100%	100%	100%	100%	100%	100%	100%	100%	100%
26%	27%	27%	27%	24%	24%	25%	26%	26%
→ 949	949	949	949	949	949	949	949	949
183	191	199	198	131	118	160	166	168
81%	80%	79%	79%	86%	88%	83%	83%	82%
0%	0%	0%	0%	0%	0%	0%	0%	0%

When the heavy and light crude oil effective capacity figures “ex western Canada” are added together the sum is 2,417 kbpd. The evidence provided by Honor the Earth shows that the “effective” capacity of the Mainline System at the time of the evidentiary hearing was greater than shown in this table, that “effective” capacity increased substantially over the past 5 years, and that Enbridge had a plan to increase “effective” capacity starting in 2016.

Since Enbridge tracks its actual throughput on an ongoing basis and at the time of the evidentiary hearing it was actually shipping a larger volume of crude oil than its claimed “effective” capacity cap, and Enbridge also provided the CER with monthly “available” capacity figures during this time, it appears that Enbridge knew or should have known that the Mainline System’s actual effective capacity was hundreds of thousands of barrels per day greater than the cap claimed by Mr. Glanzer. Also, at the time of the evidentiary hearing, Enbridge knew or

should have known that it had developed and was implementing a plan to increase the “effective” capacity of the Mainline System. Specifically, Mr. Glanzer, Enbridge’s Director, Infrastructure Planning & Lifecycle Effectiveness, testified that he was responsible for “planning and lifecycle evaluations of physical assets, capacity and energy management and hydraulic modeling for Enbridge’s liquids pipeline system . . . ,” and that his responsibilities included infrastructure planning related to system capacity.⁵ During the evidentiary hearing he informally stated that his role in Enbridge was “to find the most expeditious way to enable the flows of energy to go where they need to go.”⁶ He also testified that Enbridge was also “constantly looking for ways to utilize the available space” on the Mainline System,⁷ and that Enbridge tracks actual shipments of crude oil on an ongoing basis.⁸ Therefore, Mr. Glanzer likely knew or should have known that the Enbridge Mainline System was transporting more oil at the time of the L3RP evidentiary hearing than the “effective” capacity cap he presented in the hearing, and likely knew or should have known that Enbridge planned to increase the “effective” capacity of the Mainline System. Yet, Mr. Glanzer did not revise his testimony to reflect these extant and planned changes to “effective” capacity. Mr. Glanzer’s failure to update or revise his testimony despite these extant and planned changes at least calls into question whether Mr. Glanzer had a good faith belief that his statements of fact were true and correct at the time of the evidentiary hearing with regard to the baseline capacity of the Mainline System.⁹ Enbridge may have a reasonable explanation for Mr. Glanzer’s lack of discussion of its plans to increase the Mainline System’s “effective” capacity, but Enbridge’s decision to not address these issues in its Answer creates questions about Mr. Glanzer’s testimony.

⁵ Glanzer Direct Testimony at 2.

⁶ Evidentiary Hearing Transcript, Vol. 1B (Nov. 1, 2017) at 46.

⁷ *Id.* at 67.

⁸ *Id.* at 78-79, 80.

⁹ Minn. R. 7829.0250.

The “effective” capacity percentage of the Mainline System was expressly in dispute between Mr. Glanzer and Honor the Earth witness Mr. Stockman,¹⁰ because the assumption of the quantity of crude oil that could be transported by existing infrastructure is critical to a determination of need for additional capacity. Mr. Stockman relied on the 95 percent effective capacity assumption of the Canadian Association of Petroleum Producers, and Mr. Glanzer insisted that the Mainline System could transport no more than 92 percent. Yet, Mr. Glanzer’s testimony did not include any information about any extant or planned future changes to effective capacity, even though Enbridge had initiated a plan to increase the Mainline System’s effective capacity the year before, according to an Enbridge response to an Honor the Earth information request.

Moreover, Honor the Earth had no opportunity at the time of the November 2017 evidentiary hearing to independently know about Enbridge’s plans to increase the effective capacity of the Mainline System, nor did it have access to data showing actual shipments at the time of the evidentiary hearing, because Enbridge did not file 2017 Q4 shipment data with FERC until April 18, 2018, approximately five months after the evidentiary hearing.

With regard to the type of crude oil transported by the increase in Mainline System “effective” capacity, the following graphic from CER shows that the increased throughput on the Mainline System has been comprised almost entirely heavy crude oil,¹¹ the predominant type of crude oil that would be transported by the L3RP. Further, the CER data shows that the volume of “foreign light import” crude oil (Bakken crude oil imported into Canada from North Dakota for transportation south on the Mainline System) represented a very small amount of total

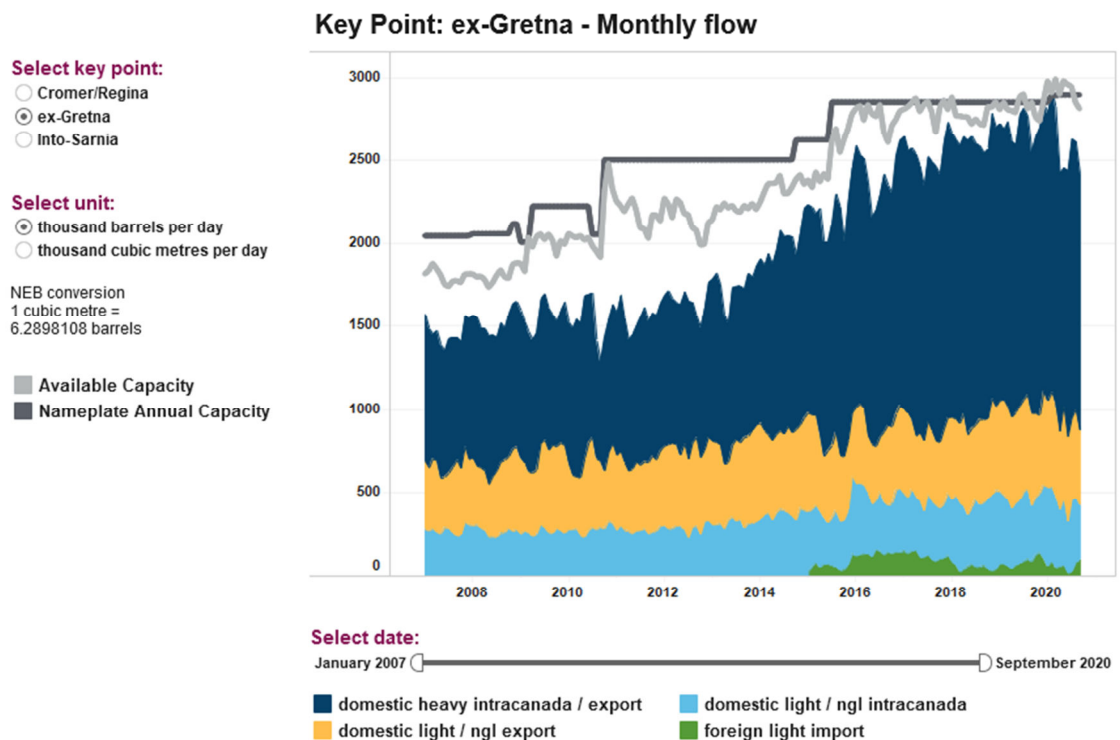
¹⁰ Rebuttal Testimony of John Glanzer at 6.

¹¹ Graphic and data available at: <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/pipeline-profiles/pipeline-profiles-enbridge-mainline.html>

Mainline System shipments, such that the vast majority of movements on the Mainline System are of Canadian crude oil.

Throughput and capacity

Section updated quarterly (early March, mid-May, mid-August and mid-November)



Therefore, the evidence provided by Honor the Earth indicates that Enbridge knew it had plans to expand the effective capacity of the Mainline System starting in 2016, and by 2017 had increased its “available” ex Gretna (export) capacity to an average of 99 percent of average annual capacity, and that it had plans for further increases in “effective” capacity, with the result that Enbridge has increased actual exports of crude oil from Canada by hundreds of thousands of barrels per day more than it alleged was possible during the evidentiary hearing in 2017.

II. COMPLAINT

A. The Commission Has Jurisdiction to Recertify Pipelines When their Capacity Is Increased by Ten Percent or More.

Enbridge claims that Honor the Earth's Complaint is outside of the Commission's jurisdiction because:

- The Commission lacks jurisdiction over claims related to Lines 4 and 67 due to the pendency of the appeal of the L3RP;¹²
- The Commission lacks authority to hear complaints related to pipelines under Minn. Stat. § 216.13;¹³ and
- Minn. R. 7853.0800 applies only “to changes made after the Commission issues a Certificate of Need but before a pipeline is constructed or placed in-service.”¹⁴

Each of these arguments is discussed below.

1. The Commission Has Not Lost Jurisdiction Over the Capacity Additions to Lines 4 and 67 Due to the Pending Appeal of the L3RP Orders, Because Investigation of the Possible Future Expansions of These Pipelines Does Not Interfere with Court of Appeals Consideration of the Appeal Claims.

Enbridge cites a number of cases for the proposition that “[t]he filing of a writ of certiorari suspends the authority of an administrative body to issue an order affecting the original order or judgment,”¹⁵ including *Little v. Arrowhead Reg'l Corr.*, 773 N.W.2d 344 (Minn. Ct. App. 2009).¹⁶ This case held that once an appeal is perfected, agency jurisdiction over matters affecting the decision being appealed is suspended, but that the agency retains authority over

¹² Enbridge Answer at 11.

¹³ *Id.* at 13.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 11.

¹⁶ Enbridge also cites *In re N. Metro Harness, Inc.*, 711 N.W.2d 129, 135–36 (Minn. Ct. App. 2006).

collateral matters not affecting the decision being appealed.¹⁷ More specifically, this case cited Minn. R. Civ. App. P. 108.01, subd. 1, which states: “[T]he filing of a proper and timely appeal suspends the authority of the trial court to make any order necessarily affecting the order or judgment appealed from.” The court in *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 824 (Minn. 1984), clarified that “Pending a duly executed appeal, the jurisdiction of a trial court is *suspended* only to those matters necessarily involved in the appeal, not as to those matters which are independent of, or which are supplemental to, the appeal or collateral to the proceeding in which the appealed order or judgment was rendered.” (emphasis in original), *quoting State v. Barnes*, 249 Minn. 301, 302–03, 81 N.W.2d 864, 866 (1957). Thus, not all actions of an agency are suspended. Rather, only those actions “necessarily affecting the order . . . appealed from” are prohibited. Actions that are independent of or supplemental to the appeal or collateral to the administrative proceeding are allowed. In both of the cases cited by Enbridge the issue was whether the agency could reconsider the merits of the order appealed and not an independent, supplemental, or collateral matter, such that these cases are not useful here.

An investigation of possible future changes to the capacities of Lines 4 and 67, which is the purpose of the Complaint, is an independent, supplemental, and/or collateral matter that does not necessarily affect the Commission’s L3RP orders. Further, Commission investigation of these other pipelines would not necessarily interfere with Court of Appeals’ review of L3RP appeal claims. These are entirely different pipelines whose future operations are being changed to allow greater throughput entirely apart from the L3RP. If the Commission were to find that it must recertify these pipelines, such process would not prevent the Court of Appeals from rendering any judgment it might see fit with regard to the L3RP. Accordingly, Enbridge’s argument that the Commission loses jurisdiction over anything that touches on pipeline capacity

¹⁷ *Little*, 773 N.W.2d at 346.

pending resolution of the L3RP appeals is overly broad and should be disregarded by the Commission.

2. The Commission Has Jurisdiction to Hear Complaints Against All “Common Carriers” Under Minn. Stat. § 216.13.

Enbridge argues that Minn. Stat. § 216.13 does not authorize the Commission to hear complaints against common carrier pipeline companies, because this statute applies only to common carriers that are no longer regulated by the Commission.¹⁸ The issue that Enbridge fails to address is why did the legislature retain the language in Minn. Stat. § 216.13 (and other procedural language in that chapter) despite the fact that it repealed the provisions of law to which this section originally applied? The intention of the legislature should be understood to ensure that the Commission would have ongoing authority to hear complaints related to all “common carriers” over which it has jurisdiction, even if the Commission lost authority over some of them. The authority to hear complaints related to any matter within its jurisdiction is consistent with the broad powers given to the Commission by Minn. Stat. ch. 216A. Moreover, if the Commission finds that it has no jurisdiction to hear complaints related to pipeline company compliance with the Commission’s procedural and substantive requirements, the Commission would in effect lose its ability to require pipeline company compliance with law and create a regulatory gap. Such gap would create a significant question about the efficacy of the complaint process established by the Commission to ensure Enbridge compliance with its L3RP orders. The Commission should find that it has jurisdiction to hear complaints that allege Enbridge non-compliance with law and Commission permit conditions.

3. The Plain Language of Minn. R. 7853.0800 Does Not Apply Only “to Changes Made After the Commission Issues a Certificate of Need But Before a Pipeline Is Constructed or Placed In-Service.”

¹⁸ Enbridge Answer at 13-16.

Enbridge argues that the Commission has no jurisdiction to hear a complaint related to Minn. R. 7853.0800 because “[t]he Legislature did not vest the Commission with an ongoing, supervisory role after pipelines meeting the definition of a “large energy facility” were permitted, constructed, and in operation.”¹⁹ Enbridge asserts that “Rule 7853.0800 only fits within the purpose of Chapter 7853—and the scope of the Commission’s statutory and rule-making authority, if it is read to apply to changes made after the Commission issues a Certificate of Need but before a pipeline is constructed or placed in-service.”²⁰ In a footnote, Enbridge points out Minn. R. 7849.0400, asserting that it is an analogous provision that relates only to recertification before a facility is placed in service.²¹ Enbridge asserts that implementation of Minn. R. 7853.0800 to operating pipelines would result in an “ongoing, supervisory role over any change in a pipeline other than those listed in subp. 2 throughout the life of the pipeline.”²²

Honor the Earth does not entirely agree with Enbridge’s assertion that the Commission has not applied the regulation in “analogous circumstances”,²³ because it appears the Commission has never implemented this regulation in any circumstances, analogous or otherwise.²⁴ Honor the Earth notes that the plain language of Minn. R. 7853.0800 does not limit the Commission’s authority only to modifications made before a pipeline is placed into service. Honor the Earth asserts that the situation with regard to the electric facilities subject to 7849.0400 is not analogous, because the Commission has ongoing broad oversight authority over large electric generation facilities and the utilities that operate them under Minn. Stat. chs. 216A and 216B, such that it has no need for separate authority to oversee implementation of certificate

¹⁹ *Id.* at 16.

²⁰ *Id.* at 17.

²¹ *Id.*

²² Enbridge Answer at 17 (footnote omitted).

²³ *Id.* at 17.

²⁴ Honor the Earth Complaint at 35.

of need and other permit terms after completion of construction. In contrast, as noted by Enbridge, the Commission does not have a general authority to oversee ongoing pipeline operations, such that there is a need for the Commission to be able to ensure that pipeline companies are complying with certificate of need terms following construction.

Further, the Commission is not obligated to undertake an ongoing supervisory role over any change, but rather only changes that materially affect an ongoing condition imposed by a certificate of need, even those changes that take effect after construction. Essentially, Minn. R. 7853.0800 could be read to allow the Commission to ensure that a pipeline company cannot after construction change important Certificate of Need terms, such as a ten percent or greater capacity addition, without at least informing the Commission via a request for recertification.

Further, Minn. R. 7853.0800 does not specify what “recertification” entails. It contains no obligation for the Commission to have an ongoing supervisory role with regard to pipelines to which it previously issued a certification of need, except on matters related to certificate of need terms. That the Commission may find a change other than as described in subpart 2 acceptable without recertification²⁵ indicates that the Commission has discretion to limit recertification hearings to only major post-construction changes that impact the ongoing terms of a certificate of need. Accordingly, the Commission should not limit the scope of Minn. R. 7853.0800 to only proposed changes made before operation of a pipeline.

²⁵ Minn. R. 7853.0800, subp. 3.

B. The Information Provided by Honor the Earth and Enbridge Shows that Enbridge Intends to Increase the Average Annual Capacity of Lines 4 and 67 Beyond the Average Annual Capacity Approved by the Commission in the Certificate of Need Dockets for These Pipelines.

Enbridge's argument here is that because it does not intend to increase the maximum daily throughput on Lines 4 and 67 above their design capacities, that therefore its use of these pipelines is not greater than the average annual capacities permitted by the Commission. Much of Enbridge's argument here turns on how the Commission defines the capacity it approves in certificates of need. Enbridge essentially argues that a certificate of need authorizes operation of an approved pipeline well beyond the average annual capacity approved by the Commission – and that the “design” capacity of a pipeline can become the “average annual” capacity of a pipeline. Given that certificate of need hearings focus on demand for crude oil based on average annual capacities of pipelines and average societal demand, the Commission should recognize that the capacity it approves in certificate of need hearings is defined in terms of average annual capacity.

Enbridge provides data showing 2019 actual annual average throughput for Lines 4 and 67, and shows that these historical throughputs are less than ten percent of their permitted average annual capacities.²⁶ However, the question raised by Honor the Earth is whether Enbridge plans to increase future throughput above ten percent, particularly after Enbridge physically modifies its Superior Terminal to allow Enbridge to operate Lines 4 and 67 at higher capacities. Enbridge does not directly address such possible future use.

In fact, Enbridge admits that its prior Superior Terminal permits were based on the average annual capacities for Lines 4 and 67 previously approved by the Commission (796,000 bpd and 800,000 bpd), and that now it plans to increase average annual throughput up to the

²⁶ Enbridge Answer at 20.

design capacities of these pipelines.²⁷ The WIDNR application table provided by Enbridge (Table 1-4) on page 21 of its Answer shows the “Maximum Annual Design Capacity” of a number of pipelines, as shown below:²⁸

Table 1-4
Enbridge Energy, Limited Partnership - Superior, WI Terminal
Superior Terminal Enhancements 2020
Permitted Maximum Terminal Throughput Capacity Summary⁽¹⁾

Inbound Pipeline Number	Maximum Annual Pipeline Design Capacity (m ³ /day)	Maximum Annual Pipeline Design Capacity (bbl/day)	Maximum Annual Pipeline Design Capacity (gal/day)	Comments
1	38,000	237,000	9,954,000	No Change
2b	70,000	442,000	18,564,000	No Change
3	121,000	760,000	31,920,000	No Change
4	140,624	884,500	37,149,000	Proposed increase from 796,000 bbl/day
67	141,483	889,900	37,375,800	Proposed increase from 800,000 bbl/day
Total	511,107	3,213,400	134,962,800	

It should be noted that the so-called “design capacities” in this table for Lines 1, 2b, and 3 have always in previous filings with the Commission and in other public descriptions provided by Enbridge²⁹ been their average annual capacities, and not their “design” capacities.³⁰ This table therefore suggests that Enbridge intends to continue operating Line 1 and 2b, and plans to operate the L3RP, at their average annual capacities as reported to the Commission, but now seeks changes to the Superior Terminal to allow it to operate Line 4 and 67 at capacities higher than their previously recognized and permitted average annual capacities. Further, the comments section of this table states that Enbridge plans to increase the throughput of Lines 4 and 67 by the amounts alleged by Honor the Earth.

Enbridge has attempted to discount the significance and size of its planned capacity additions by redefining its capacity terms, but this much is clear. Enbridge has requested

²⁷ *Id.* at 21.

²⁸ *Id.*

²⁹ See Honor the Earth Complaint, Attachment C (Enbridge System Configurations for the years 2016 to 2020).

³⁰ *E.g.*, Enbridge Application for a Certificate of Need at page 8-3.

Wisconsin Department of Natural Resource (“WDNR”) approval of physical modifications to Enbridge’s Superior Terminal that will allow the terminal to pass up to an additional 178,000 bpd through it without violating clean air laws, and that this increase in flow will be the result of a higher average use of Lines 4 and 67. The higher volume of crude oil transportation permitted through the Superior Terminal will be possible if and only if Enbridge essentially considers the historical design capacities of Lines 4 and 67 to be equal to their new average annual capacities.

Given that Enbridge’s definition of “average annual capacity” is based on an assumption that pipelines cannot operate without some downtime due to maintenance, unexpected repairs, power outages, operational inefficiencies, etc., and it must be assumed that Enbridge has not been able to make these limitations disappear such that it cannot operate these pipelines perfectly day-in, day-out for an entire year, this indicates that Enbridge has also increased the “design” capacities of Lines 4 and 67 above their historical and previously reported “design” capacities, but has not disclosed what the new design capacities for these pipelines might be.

Ultimately, the evidence shows that Enbridge does intend to transport up to over ten percent more crude oil through Lines 4 and 67 on an average annual basis than it represented to the Commission in its certificate of need hearings for these pipelines. As such, the Commission should recertify these pipelines.

CONCLUSION

The question in the first phase of a complaint hearing under Minn. R. 7829.1800 and 1900 is not whether the complainant has proven its case, but rather whether it has provided sufficient information to warrant investigation by the Commission. Here, neither Honor the Earth nor the Commission have had the benefit of a formal investigation or discovery, such that it is not possible for Honor the Earth to acquire and provide all relevant information related to

Enbridge's plans to transport a larger amount of crude oil through Lines 4 and 67. Honor the Earth asserts that it has provided sufficient information to the Commission to justify Commission review of the merits of Honor the Earth's Complaint. Further, given the complexity of this matter, Honor the Earth asserts that Commission review of its Complaint should be via a contested case hearing.

In addition, Honor the Earth asserts that it has provided sufficient information for the Commission to investigate whether Enbridge knowingly provided incorrect information in the L3RP hearing related to the "effective" capacity of the Mainline System, and thereby corrupted the forecasts it provided under Minn. Stat. § 216B.243, subd. 3(1), to prove a need for the L3RP.

Therefore, Honor the Earth respectfully requests that the Commission continue its review of Honor the Earth's Complaint related to the capacities of Lines 4 and 67 via a contested case hearing and also open an investigation into whether Enbridge knowingly provided the Commission with incorrect Mainline System capacity information.

Dated: December 21, 2020

Respectfully submitted,

/s Paul C. Blackburn

Paul C. Blackburn

Staff Attorney

Honor the Earth

607 Main Avenue

Callaway, MN 56521

612-599-5568

paul@honorearth.org

Frank Bibeau

51124 County Road 118

Deer River, Minnesota 56636

218-760-1258

frankbibeau@gmail.com

Attorneys for Honor the Earth