

Staff Briefing Papers

Meeting Date: April 29, 2021

Agenda Item **1

Company: Enbridge Energy, Limited Partnership and Enbridge Inc. (collectively Enbridge)

Docket No. PL9/C-20-801

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

Issues: Does the Commission have jurisdiction over the issues raised in Honor the Earth's filing?

Are there reasonable grounds to investigate the allegations related to Enbridge's Line 3, Line 4, and Line 67 pipelines?

If there are reasonable grounds to investigate, what procedures should be applied to conduct the investigation or investigations?

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| ✓ Relevant Documents | Date |
|---|------------|
| Petition for Investigation and Complaint of Honor the Earth | 10/27/2020 |
| Notice of Comment Period | 11/05/2020 |
| Honor the Earth Letter | 11/05/2020 |
| Commission Response to Honor the Earth Letter | 11/10/2020 |
| Amended Notice of Public Comment Period | 11/10/2020 |
| Enbridge's Answer to Honor the Earth's Complaint | 11/25/2020 |
| Honor the Earth's Reply to Enbridge's Answer | 12/21/2020 |

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| Commission Staff's Information Request to Enbridge | 03/03/2021 |
| Enbridge Response to Information Request | 03/09/2021 |

I. STATEMENT OF THE ISSUES

- Does the Commission have jurisdiction over the issues raised in Honor the Earth's filing?
- Are there reasonable grounds to investigate the allegations related to Enbridge's Line 3, Line 4, and Line 67 pipelines?
- If there are reasonable grounds to investigate, what procedures should be applied to conduct the investigation or investigations?

II. PROCEDURAL HISTORY

On October 27, 2020, Honor the Earth filed a *Petition for Investigation and Complaint*. The filing alleges that Enbridge presented materially false information related to the capacity of its Mainline System during the evidentiary hearing for the Line 3 Replacement Project ("L3RP") and has increased or intends to increase the capacities of its line 4 and 67 pipelines by more than 10 percent. Honor the Earth is requesting that the Commission (i) open an investigation into capacity additions to the Enbridge Mainline System and whether Enbridge presented materially false information during the L3RP evidentiary hearing; and (ii) open an investigation into whether Line 4 and Line 67 must be recertified.

On November 5, 2020, the Commission issued a Notice of Comment Period. The notice requested that Enbridge provide an answer to the *Petition for Investigation and Complaint* by November 25, 2020 and requested reply comments to Enbridge's answers by December 15, 2020.

Also on November 5, 2020, Honor the Earth filed a letter that requested clarity on the Notice of Comment Period. Honor the Earth questioned whether the procedural steps being taken by the Commission conformed to the formal complaint process identified in Minn. R. 7829.1800 and 7829.1900.

On November 10, 2020, in response to Honor the Earth's request for clarity, the Commission issued a letter explaining that the comment period was provided to ensure that the public had an opportunity to provide input and that the Commission was fully informed before making a decision on jurisdiction, reasonable grounds, and procedures to be followed. To ensure there was no confusion, the notice was amended to clarify that the comment period was open to the public. The notice was reissued on November 10, 2020, with the comment period deadline

extended to December 21, 2020. In addition to the present docket, the notice was filed to the two Line 3 dockets and the Line 4 and Line 67 dockets.

On November 25, 2020, Enbridge filed an Answer to the *Petition for Investigation and Complaint*.

On December 21, 2020, Honor the Earth filed a Response to Enbridge's Answer. The Commission also received several comments from members of the public. The public comments however were specifically related to the L3RP and indicated concerns with construction or either opposition or support for the project. None of the commenters responded to matters related to the *Petition for Investigation and Complaint*.

On March 2, 2021, Commission staff filed an information request ("IR") on Enbridge. Staff requested capacity data of the Mainline System as a whole and of the individual pipelines in the Mainline System from 2012 to present.

On March 9, 2021, Enbridge filed an IR Response with the capacity information requested by Commission staff.

III. STAUTES AND RULES

Minn. Stat. § 216.13 – Commencing Proceedings Before Commission.

Proceedings before the commission against any such carrier or public warehouse operator shall be instituted by complaint, verified as a pleading in a civil action, stating in ordinary language the facts constituting the alleged omission or offense. The parties to such proceedings shall be termed, respectively, "complainant" and "respondent."

Minn. Stat. § 216B.14 – Investigation.

The commission upon complaint or upon its own initiative and whenever it may deem it necessary in the performance of its duties may investigate and examine the condition and operation of any public utility or any part thereof. In conducting the investigations, the commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording the affected parties a hearing.

Minn. R. 7829.1700, Subparts 1 and 2 – Formal Complaint.

A formal complaint must include the following information: the name and address of the complainant; the name and address of complainant's counsel, if any; the name and address of respondent; the name and address of respondent's counsel, if known; the statute, rule, tariff, or commission order alleged to have been violated; the facts constituting the alleged violation; and the relief sought by complainant.

A formal complaint must be mailed to the respondent, the department, and the Office of the Attorney General, as well as filed with the commission. Formal complaints may also be filed in a manner consistent with the electronic filing requirements of Minnesota Statutes, section 216.17, subdivision 3. If filed electronically, a formal complaint does not need to be mailed to the state agencies.

Minn. R. 7853.0800 – Certificate of Need Modifications.

Subpart 1. Authority of commission. Issuance of a certificate may be made contingent upon modifications required by the commission.

Subpart 2. Changes not requiring recertification. The following changes in a facility previously certified by the commission shall not require recertification:

- A. capacity additions or subtractions of less than ten percent of the capacity approved by the commission;
- B. pipeline length additions or subtractions of less than ten percent of the length approved by the commission; and
- C. changes of less than two years in the in-service date.

Subpart 3. Procedure in case of other changes. If an applicant determines that a change greater or other than those specified in subpart 2 is necessary or desirable, it shall inform the commission of the desired change, accompanied by a written statement detailing the reasons for the proposed change. The commission shall evaluate these reasons and within 45 days of receipt of the application notify the applicant whether the proposed change is acceptable without recertification.

Minn. R. 7853.0030 – Scope of Rules.

Each petroleum supplier applying for a certificate of need for one of the following types of large energy facilities shall provide all information required by this chapter:

- A. a new large LPG storage facility;
- B. a new large petroleum pipeline facility;
- C. any project that, within a period of one year, would expand the LPG storage capacity of an existing LPG storage facility in excess of either 20 percent of capacity of 100,000 gallons, whichever is greater; and
- D. any project that, within a period of two years, would expand an existing large petroleum pipeline in excess of either 20 percent of its rated capacity or 10,000 barrels per day (bpd), whichever is greater.

IV. PIPELINE CAPACITY DEFINITIONS

Design Capacity: The maximum volume of oil that a pipeline and its pumping facilities are designed to transport, assuming ideal operating conditions.¹

Annual Average Capacity or Nameplate Capacity: The annual average capacity is the average sustainable volume of oil that a pipeline will achieve over a year, assuming historic average annual operating conditions. Operating conditions include scheduled and unscheduled maintenance, typical operating issues that arise, and crude supply availability.² The annual average capacity is typically a number that is calculated by taking a percentage of the design capacity. The annual average is the capacity that the Commission uses when issuing a certificate of need for a pipeline.

Effective Capacity or Available Capacity: Generally, effective capacity is based on actual historic volumes of oil transported. The effective capacity is typically less than the annual average capacity because of various maintenance operations, pressure restrictions, and other issues resulting in an overall lower annual system capacity.³ Basically, the effective capacity is based on the resources available and is a percentage of the annual average capacity.

V. BACKGROUND ON MAINLINE SYSTEM

The Enbridge Mainline System in Minnesota consists of six crude oil pipelines (lines 1, 2b, 3, 4, 65, and 67). Following is information for each pipeline in the Enbridge Mainline System:⁴

Line 1 – Line 1 is an 18 to 20-inch-diameter 1,098-mile pipeline with a design capacity of 264,000 barrels per day (“bpd”) and an annual average capacity of 237,000 bpd. Line 1 carries light crude, refined products, and natural gas liquids and originates at Enbridge’s Edmonton Terminal in Edmonton, Alberta, Canada and terminates at its Superior terminal in Superior, Wisconsin.

Line 2b – Line 2 is a 24 to 26-inch-diameter 502-mile pipeline with a design capacity of 491,000 bpd and an annual average capacity of 442,000 bpd. Line 2 carries light crude

¹ L3RP Certificate of Need (“CN”) Application at 15 and Administrative Law Judge (“ALJ”) Report Finding 369 at 123.

² L3RP CN Application at 15 and ALJ Report Finding 370 at 123.

³ L3RP CN Application at 2-6 and ALJ Report Finding 373 at 124.

⁴ John Glanzer Direct Testimony (“Glanzer Direct”), January 31, 2017, Schedule 7; Enbridge Energy, Enbridge Energy Infrastructure Assets, last updated January 29, 2021 (https://www.enbridge.com/~media/Enb/Documents/Factsheets/FS_EnergyInfrastructureAssets.pdf?la=en); and Enbridge IR Response Table 3A (Year 2020).

and originates at Enbridge's Cromer Terminal in Cromer, Manitoba, Canada and terminates at its Superior Terminal.

Line 3 – The existing Line 3 that is being replaced is a 34 to 36-inch-diameter pipeline with a design capacity of 478,000 bpd and an annual average capacity of 430,000 bpd.⁵ The new Line 3 will be a new 34 to 36-inch-diameter 1,099-mile pipeline with annual average capacity of 760,000 bpd. The new Line 3 will carry heavy and light crude and will originate at Enbridge's Edmonton Terminal and terminate at its Superior Terminal.

Line 4 – Line 4 is a 36 to 48-inch-diameter 1,100-mile pipeline with a design capacity of 883,000 bpd and an annual average capacity of 796,000 bpd. Line 4 carries heavy, medium, and light crude, refined products, and originates at Enbridge's Edmonton Terminal and terminates at its Superior Terminal.

Line 65 – Line 65 is a 20-inch-diameter 313-mile pipeline with a design capacity of 206,000 bpd and an annual average capacity of 186,000 bpd. Line 65 carries medium and light crude and originates at Enbridge's Cromer Terminal and terminates at its Clearbrook Terminal in Clearbrook, Minnesota.

Line 67 – Line 67 is a 36-inch-diameter 1,112-mile pipeline with a design capacity of 889,000 bpd and an annual average capacity of 800,000 bpd. Line 67 carries heavy crude and originates at Enbridge's Edmonton Terminal and terminates at its Superior Terminal.

The following lines mentioned by Honor the Earth are either not considered part of the Mainline System or are located in another state:

Line 13 – Line 13 is a 20-inch-diameter 1,588-mile pipeline with an annual average capacity of 180,000 bpd. Line 13 carries diluent and originates at Manhattan, Illinois, and terminates at Enbridge's Edmonton Terminal.

Express Pipeline – The Express Pipeline is a 785-mile pipeline with an annual average capacity of 280,000 bpd. The Express Pipeline carries heavy, medium, and light crude and originates at Hardisty, Alberta, Canada and terminates at Casper, Wyoming.

⁵ As provided in Enbridge's IR Response, the existing Line 3 design capacity increased from 433,000 to 478,000 bpd and the average annual capacity increased from 390,000 to 430,000 bpd in December 2019 with the in-service of the Canadian portion of the L3RP.

VI. COMMISSION JURISDICTION

Staff is not aware of any previous Commission decisions that have addressed similar questions or disputes related to pipeline companies. Staff recommends that the Commission speak with counsel about these jurisdictional issues.

VII. HONOR THE EARTH PETITION FOR INVESTIGATION AND COMPLAINT

Honor the Earth's *Petition for Investigation and Complaint* has two separate parts: a *Petition for Investigation* and a *Complaint*.

A. Petition for Investigation

In its *Petition for Investigation*, Honor the Earth alleges that Enbridge has been increasing the capacity of its Mainline System, in excess of the amounts that it represented the Mainline System was capable of during the L3RP evidentiary hearing. Honor the Earth also argues that Enbridge has not disclosed to the Commission the upgrades and efficiency-based capacity increases to its Mainline System from 2016 to present. Honor the Earth requests that the Commission open an investigation into completed or planned capacity additions to the Mainline System, and whether Enbridge knowingly provided incorrect information about Mainline System capacity during the L3RP evidentiary hearings.

Honor the Earth's principal claim is that during the L3RP evidentiary hearing Enbridge indicated that the effective capacity of the Mainline system was 92 percent of the annual average capacity or 2,417,000 bpd and that it was capped at that volume through 2035. As it pertains to its *Petition for Investigation*, Honor the Earth argues that the 2,417,000-bpd effective capacity is the baseline that should be used when determining whether Enbridge has increased Mainline System capacity subsequent to the L3RP proceedings.

Honor the Earth asserts that actual shipments on the Mainline System as reported by Enbridge to the Federal Energy Regulatory Commission (FERC) and Canadian Energy Regulator (CER) show steadily increasing shipments on the Mainline System beginning in 2016, before the L3RP evidentiary hearings. Staff summarizes Honor the Earth's main allegations below, but recommends that the Commission review Honor the Earth's *Petition* for a complete account of its allegations.

- Fourth quarter 2017 FERC data indicates that during the L3RP evidentiary hearings Enbridge was transporting 2,602,265 bpd of crude on the Mainline System, approximately 185,000 bpd more than the 2,417,000-bpd baseline cited by Honor the Earth.

- First quarter 2020 FERC data indicates that 2,826,172 bpd of crude was shipped on the Mainline System, approximately 400,000 bpd more than the 2,417,000-bpd baseline cited by Honor the Earth.
- Second quarter 2020 FERC data indicates crude shipments on the Mainline System were reduced to 2,430,259 bpd, leaving approximately 400,000 bpd of unutilized capacity compared to first quarter 2020.
- Similar to the FERC data, CER data shows that actual shipments of crude on the Mainline System are greater than the 2,417,000-bpd effective capacity provided during the L3RP evidentiary hearings. The utilization of the Mainline System is also greater than the 92 percent that was presented at the hearings.
- Enbridge-confirmed that it has added 370,000 bpd of capacity to its Mainline System through capacity recovery efforts and optimizations (220,000 bpd new capacity between 2016 and 2018; and 150,000 bpd between 2019 and 2020). As of January 1, 2020, the effective Mainline System capacity was calculated to be 97 percent of the annual average capacity, five percent greater than what was presented during the L3RP hearings.
- Capacity additions to Line 4 and Line 67 of 178,400 bpd contained in Enbridge's PSD permit application to the WIDNR further add to the capacity of the Mainline System and exceed Commission-permitted limits for those pipelines.
- Although not part of the Mainline System, Honor the Earth asserts that Enbridge plans to reverse its Line 13, which would add another 150,000 bpd of new import capacity; and has completed 50,000 bpd capacity additions to its Express Pipeline.

Based in part on the above information, Honor the Earth asserts that the need for the L3RP has actually been met by these other alleged capacity additions, and that Enbridge knew or should have known about these capacity additions during the L3RP proceedings. Honor the Earth suggests that, if these capacity additions had been part of the L3RP proceedings, Enbridge would not have been able to demonstrate a need for the additional capacity provided by the L3RP.

1. Enbridge Answer to Petition for Investigation

Enbridge argues that the Commission does not have jurisdiction to take up the issues in the *Petition for Investigation*. Enbridge did not provide any substantive response to the allegations in Honor the Earth's *Petition for Investigation* and does not appear to dispute any of Honor the Earth's allegations.

Enbridge argues that the Commission does not have authority to consider Honor the Earth's *Petition for Investigation* because the Commission's Line 3 Replacement Project orders are pending before the Minnesota Court of Appeals and because the allegations presented by Honor the Earth are based on a considerable amount of information contained within the record of the L3RP proceedings. Because of this Enbridge did not discuss matters raised in the *Petition for Investigation* that are related to the L3RP Appeal.

Enbridge argues that the Commission lacks the authority under Minn. Stat. § 216B.14 to open an investigation as requested by Honor the Earth because Enbridge is not a public utility for the purposes of the statute.

Enbridge argues that the Commission lacks jurisdiction over Honor the Earth's complaint under Minn. Stat. § 216.13 because Enbridge is not a carrier (public warehouse, telephone company, or railroad and express company doing business as a common carrier) for the purposes of the statute.

Enbridge argues that Minn. R. 7829.1700 is a process provision related to a formal complaint and does not assign jurisdiction over a complaint.

B. Complaint

In its *Complaint*, Honor the Earth alleges that Enbridge has increased the capacity of Line 4 and Line 67 by 10 percent or more, and that the two lines must be recertified pursuant to Minn. R. 7853.0800. Honor the Earth asks that the Commission open an investigation into whether Line 4 and Line 67 must be recertified.

Honor the Earth refers to Enbridge's August 2020 application to the Wisconsin Department of Natural Resources ("WDNR") for a Prevention of Significant Deterioration ("PSD") permit. Honor the Earth asserts that the PSD permit application indicates that Enbridge has requested permission to modify the Superior Terminal to allow increased crude oil deliveries from pipelines across Minnesota from 3,035,000 bpd to 3,213,400 bpd, an increase of 178,400 bpd. Specifically, Honor the Earth points to the annual average capacity increase of Line 4 from 796,000 bpd to 884,500 bpd (an 88,500 bpd increase or 11.1 percent) and of Line 67 from 800,000 bpd to 889,900 bpd (an 89,900 bpd increase or 11.2 percent).

1. Enbridge Answer to Complaint

Enbridge argues that the Commission does not have jurisdiction to hear Honor the Earth's *Complaint*, and that even if it did, the allegations in the *Complaint* are incorrect.

a. Jurisdictional Arguments about Complaint

Enbridge argues that the Commission's authority granted by the Legislature is to approve certificates of need and pipeline routing permits but does not provide the Commission with an ongoing supervisory role of pipelines meeting the definition of a "large energy facility" that have been permitted, constructed, and are in operation (*e.g.*, lines 4 and 67). As such, Enbridge argues that Minn. R. 7853.0800 does not apply to already constructed and in-service interstate crude oil pipelines. Enbridge maintains that Minn. R. 7853.0800 must be interpreted to only apply to changes made to a pipeline after the Commission issues a certificate of need but before a pipeline is constructed or placed in service. In support of its interpretation, Enbridge poses the following questions:

- Would a greater than 10 percent reduction in the capacity of a pipeline due to federal regulations, maintenance, or pressure restrictions require Commission recertification?
- Why would an already constructed pipeline be shortened or lengthened by more than 10 percent after being approved by the Commission?
- How would the in-service date of a pipeline change, and be subject to recertification after the pipeline is in-service?

Enbridge maintains that the Commission would be exceeding its authority by considering pipeline operations.

Enbridge also points to Minn. R. 7853.0030(D), and argues that the Commission has already established under that rule that an existing pipeline does not require a certificate of need for capacity increases unless the increase is more than 20 percent of the rated capacity or 10,000 bpd, whichever is greater.

b. Substantive Answer to Complaint

Concerning Honor the Earth's assertion of capacity increases on Line 4 and Line 67, Enbridge indicated that it has not added capacity and has no plans to increase the capacity of either pipeline. Enbridge provided capacity figures of actual monthly throughput volumes between January 2014 and September 2020⁶ as summarized in the table below. Enbridge indicated that the volumes were increased to better represent the potential throughput capacities for air emission purposes because at times throughput is higher than the average annual capacity.

⁶ See Table at page 20 of Enbridge Answer; and Affidavit of Maury Porter, Director of Facilities Planning and Optimization for Enbridge (Attachment to Enbridge Answer).

| | Annual Average Capacity (bpd) ⁷ | 10 Percent Increase in Annual Average Capacity (bpd) ⁸ | Highest Actual Annual Average Capacity (through 2019) |
|---------|--|---|---|
| Line 4 | 796,000 | 875,600 | 808,000 |
| Line 67 | 800,000 | 880,000 | 864,000 |

C. Honor the Earth Response to Enbridge

In its response, Honor the Earth generally reaffirmed the arguments made in its *Petition for Investigation and Complaint* and also clarified that it was asking the Commission to undertake an investigation into the possibility that Enbridge may have provided materially false evidence related to the baseline capacity of its Mainline System during the L3RP evidentiary hearings.

1. Jurisdictional Response

First, Honor the Earth suggests that the Commission would also have jurisdiction to investigate alleged misrepresentations during the L3RP proceedings pursuant to Minn. Stat. § 216A.05, subd. 1, which provides that the Commission has legislative and quasi-judicial authority and “may make such investigations . . . with respect to the control and conduct of the businesses coming within its jurisdiction as the legislature itself might make” Honor the Earth argues that the Commission must have authority to investigate the possibility that an applicant knowingly provided incorrect testimony, in order to protect the integrity of its proceedings.

Second, Honor the Earth continues to assert that the Commission has authority to investigate its claims under Minn. Stat. §§ 216.13 and 216B.14.

2. Factual Response

Concerning its allegation of Mainline System capacity increases, Honor the Earth reasserts that the baseline effective capacity of the Mainline System provided during the L3RP proceeding was 2,417,000 bpd or 92 percent of the average annual capacity, and that the Mainline System was limited to this baseline effective capacity through 2035. Honor the Earth continues to argue that the actual effective capacity of the Mainline System at the time of the L3RP proceedings was greater than 2,417,000 bpd, and that actual shipment data indicates capacity on the Mainline System has steadily increased since the Line 3 proceeding.

⁷ These are the amounts certified by the Commission in Line 4 and Line 67 proceedings.

⁸ This is calculated as 110% of the certified annual average capacity certified by the Commission.

Based on these assertions, Honor the Earth maintains that that the capacity of the Mainline System was actually greater than the baseline effective capacity data Enbridge used to calculate its forecast of need and apportionment.

Concerning its allegation of capacity increases on lines 4 and 67, Honor the Earth points out that the design capacities presented in Table 1-4 of Enbridge's WIDNR PSD permit application (see below) for Lines 1, 2b, and 3 have in previous filings been the average annual capacities. Whereas the capacities provided in the table for lines 4 and 67 represent capacities greater than the permitted annual average capacities of 796,000 bpd and 800,000 bpd, respectively. Honor the Earth argues that "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."

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 | |

Source: Enbridge PSD Permit Application at Appendix B and Attachment F to Honor the Earth Petition.

VIII. STAFF DISCUSSION

A. Jurisdictional Issues

Staff recommends that the Commission speak with counsel about these jurisdictional disputes. However, if the Commission finds that it does not have jurisdiction, then the *Petition for Investigation*, the *Complaint*, or both should be dismissed.

B. Petition for Investigation

A principal argument in Honor the Earth's *Petition for Investigation* is that the baseline effective capacity of the Mainline System as represented by Enbridge during the L3RP proceedings was 2,417,000 bpd, that it was derived using a 92-percent utilization factor, and that the Mainline System was restricted to this volume through 2035.⁹ Honor the Earth argues that the documented capacity increases between 2016 and 2020 should have been known and should have been included in Enbridge's modeling for the L3RP.

Staff believes Honor the Earth is correct that the effective capacity for purposes of the January 2017 *Muse Stancil Report* was 2,417,000 bpd which represents 92 percent of the sum of the individual pipeline capacities.¹⁰ Also, the table referenced by Honor the Earth which presents the apportionment forecast data without the Line 3 replacement indicates that the effective capacity of 2,417,000 would remain constant through 2035.¹¹

Alternatively, staff points to the certificate of need application which also provided the Mainline System capacity volumes (summarized in the table below).¹² The baseline effective capacity with no L3RP provided in the certificate of need application is 2,333,000 or 89 percent of the annual average capacity. However, the certificate of need application does not provide any projections indicating whether the effective capacity would be restricted to a certain volume through the year 2035.

Mainline System Capacities from L3RP Certificate of Need Application

| | Annual Average Capacity (bpd) | Effective System Capacity (bpd) |
|--|-------------------------------|---------------------------------|
| Mainline System without Line 3 Replacement | 2,621,000 | 2,333,000 |
| Mainline System with Line 3 Replacement | 3,221,000 | 2,867,000 |

Note: The certificate of need application indicated that the effective capacity of the Enbridge Mainline System is 89 percent (utilization factor) of the annual average capacity, based on 2014 operations data.

⁹ Honor the Earth indicated that its understanding was that the effective capacity is a percentage (utilization factor) of the average annual capacity, in this case, 92 percent.

¹⁰ Earnest Direct Testimony (January 31, 2017), Schedule 2 (January 2017 *Muse Stancil Report*) at 63.

¹¹ Glanzer Direct, Schedule 2 at 1 (Table 3.5.2-3 Apportionment without Line 3 Replacement). This table updates the same table that was included in the certificate of need application at 3-26. Honor the Earth derived the 2,417,000 bpd by adding the Effective Heavy Capacity ex Western Canada (1468 kbps) and the Effective Light Capacity ex Western Canada (949 kbps).

¹² L3RP CN Application at 2-6. This information was also referenced in the ALJ Report Finding 373 at 124. Enbridge also provided these volumes as part of its March 9 IR Response (Tables 1A and 2A (Year 2015)).

Additionally, in reviewing the Line 3 record, staff noted that the utilization factor used was represented as 89, 92, or 95 percent depending on where one looks in the record. The *Muse Stancil Report* used 92 percent to calculate the effective capacity of the Mainline System. Enbridge used 89 percent in the certificate of need application.¹³ The initial April 2015 *Muse Stancil Report*, included as an appendix to the certificate of need application, initially used 95 percent as the utilization factor.¹⁴ Enbridge, during the L3RP proceedings, indicated that historical and forecast apportionment would still persist on the Mainline System even if 95 percent utilization was assumed.¹⁵

Because effective capacity is the percent utilization of the annual average capacity, the different effective capacity volumes are a result of using different utilization factors. For example, in the table below, staff has represented the effective capacity using the three different utilization factors used in the Line 3 proceeding. Staff uses year 2015 as the example because the L3RP CN Application was filed that year. As is shown, the utilization factor being applied can affect the forecasted effective capacity. The table also shows that using a 92-percent utilization factor results in an effective capacity of 2,411,000 bpd which is noticeably close to the 2,417,000-bpd asserted by Honor the Earth.

| | | | |
|---|-----------|-----------|-----------|
| Mainline System Average Annual Capacity in bpd (2015) | 2,621,000 | 2,621,000 | 2,621,000 |
| Utilization Factor | 89 | 92 | 95 |
| Mainline System Effective Capacity in bpd (2015) | 2,333,000 | 2,411,000 | 2,490,000 |

Lastly, staff requested that Enbridge provide certain additional capacity information on its Mainline System and on the individual pipelines within the system to provide further clarity on this issue.¹⁶ The table below provides the Mainline System effective capacity volumes and average annual capacity volumes provided by Enbridge in its IR Response.¹⁷ These capacity volumes reflect the Mainline System with no L3RP.

| | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Annual Average Capacity of Mainline System (bpd) | 2,501,000 | 2,621,000 | 2,851,000 | 2,851,000 | 2,851,000 | 2,851,000 | 2,891,000 |
| Effective Capacity of Mainline System (bpd) | 2,226,000 | 2,333,000 | 2,580,000 | 2,623,000 | 2,718,000 | 2,775,000 | 2,862,000 |
| Utilization Factor ¹⁸ | 89 | 89 | 90 | 92 | 95 | 97 | 98 |

¹³ Line 3 Certificate of Need Application at 2-6.

¹⁴ Line 3 Certificate of Need Application, Footnote 16 at 3-25.

¹⁵ Glanzer Rebuttal Testimony (October 11, 2017) at 6.

¹⁶ Enbridge Information Request Response (March 9, 2021).

¹⁷ IR Response (Tables 1A and 2A).

¹⁸ The utilization factor was calculated by staff and was not provided by Enbridge.

Staff provides the following observations:

- A Mainline System effective capacity of 2,417,000 bpd calculated using a 92 percent utilization factor was used for the forecast period of the 2017 *Muse Stancil Report*.
- The capacity data (average annual, effective, and utilization) provided by Enbridge in its IR Response for the year 2015 matches the data it provided in its April 2015 certificate of need application.
- The Mainline System average annual capacity data provided by Enbridge in its IR Response correctly reflects the sum of the separate annual average capacities of the six pipelines that make up the Mainline System. The data also correctly reflects the capacity increases on Line 67 and existing Line 3.
- Through capacity additions, recovery efforts, and optimizations Enbridge has increased overall utilization on the Mainline System which has in turn resulted in a higher effective capacity since the L3RP proceedings.

Concerning the matter of overall capacity increases on the Mainline System. Staff has reviewed the actual shipment data cited by Honor the Earth in its *Petition for Investigation and Complaint*, and it appears that the volumes are within recognized limits of the Mainline System. Staff did not find evidence indicating Enbridge is exceeding the capacities authorized by the Commission in the respective certificates of need. Therefore, staff does not recommend opening a broad and open-ended investigation into the Mainline System and its components.

Concerning the matter of incorrect information provided during the L3RP proceedings. There appears to be disagreement about the correct utilization factor and effective capacity, how the specific data was calculated and applied, and whether the data implied that the Mainline System was restricted to the alleged baseline capacity of 2,417,000 through 2035. Staff cannot reconcile the identified ambiguities and inconsistencies using the information that has been provided in this specific case record.

Questions the Commission may want to consider asking:

- What is the correct baseline effective capacity of the Mainline System for purposes of the L3RP proceedings?
- Is the 2,417,000-bpd effective capacity alleged by Honor the Earth being interpreted and applied correctly?

- Why was the effective capacity of 2,417,000 bpd as alleged by Honor the Earth and as presented in Mr. Glazer's Direct Testimony constant through 2035, whereas Enbridge in its IR Response indicates the effective capacity changes year to year and is increasing?
- Are pipeline utilization factors constant or do they change? Why has the utilization factor of the Mainline System changed since the L3RP proceedings?

C. Complaint

Concerning Honor the Earth's *Complaint* that Enbridge has or will increase the design capacities of its Line 4 and Line 67 pipelines by ten percent or more. Staff does not believe information contained within Enbridge's PSD Permit Application to the WIDNR is evidence that Enbridge has imminent plans to increase the capacities of its Line 4 and Line 67 pipelines. The Commission has recognized the design capacities of lines 4 and 67 to be 884,000 bpd, and 880,000 bpd, respectively.

On page 9 of its Answer, Enbridge provided throughput data indicating that the average annual capacity of Line 4 reached a high of 808 million bpd in 2020, and that Line 67 reached a high of 864 million bpd in 2019 (see table below).

| | Approved Average Annual Capacity (bpd) ¹⁹ | Highest Annual Average Throughput (bpd) ²⁰ | Percentage Increase |
|---------|--|---|---------------------|
| Line 4 | 796,000 | 808,000 (2020) | 1.5% |
| Line 67 | 800,000 | 864,000 (2019) | 8% |

This data appears to indicate that neither line has exceeded its annual average capacity more than 10 percent. This conclusion is consistent with information provided in response to the staff information request, which also indicates that neither Line 4 or Line 67 have exceeded their average annual capacity by 10 percent.²¹

Staff notes that the data provided in Enbridge's Reply appears to be different than the data included in the WIDNR PSD Permit Application. Enbridge explained in its Answer that the PSD Permit Application was based on potential throughput capacities, representing the fact that

¹⁹ Enbridge Answer, at 8.

²⁰ Enbridge Answer, at 9.

²¹ The highest average annual percent utilization in information request 1 is slightly higher for Line 4, where it is reported at 3% for the year of 2020. This appears to be because Enbridge had complete data for 2020 at the time the information request was filed, but did not have complete 2020 data at the time it filed its Reply Comments.

there are times when throughput is higher than the average annual capacity. Enbridge explained that the reason for the throughput change in Wisconsin was because they were measuring air emissions rather than capacities. Because the Commission certifies annual average capacity (or design capacity), and the PSD Permit Application is using actual throughputs, there is a difference in the data.

The Commission, however, may want clarification as to why Table 1-4 from the PSD Permit Application, and included in Enbridge's Answer, incorrectly uses the recognized annual average capacities as design capacities for lines 1, 2b, and 3 and why the design capacities for lines 4 and 67 exceed their recognized design capacities by 500 bpd and 9,900 bpd, respectively.

D. Scope and Process of Investigation

If the Commission determines to open an investigation, it will need to define the scope and outline the procedures it wants to apply.

Potential options for scope include: 1) an investigation into how the actual capacity of the Mainline System compare to the representations in Enbridge's forecast during the L3RP Proceedings; and 2) an investigation into whether Line 4 or Line 67 require recertification, and what recertification would mean.

Once the Commission has established the scope of any investigation, it should determine whether it wants to proceed using a public notice and comment process or refer the matter to the Office of Administrative Hearings for a contested case.

IX. COMMISSION DECISION OPTIONS

Petition for Investigation

A. Jurisdiction

1. Determine that the Commission does have jurisdiction to investigate the allegations in the *Petition for Investigation*.

or

2. Determine that the Commission does not have jurisdiction to investigate the allegations in the *Petition for Investigation*.

B. Investigation

1. Open an investigation as requested by Honor the Earth.

or

2. Decline to open an investigation.

C. Scope and Process of Investigation

1. Direct staff to issue a notice of comment investigating the allegations raised in the *Petition for Investigation*.

or

2. Refer the allegations raised in the *Petition for Investigation* to the Office of Administrative Hearings for a contested case proceeding.

If opening any investigation:

3. Direct that the scope of any investigation into the *Petition for Investigation* should include: 1) the capacity of the Mainline System compared to the capacity used to create the forecasts in the L3RP proceedings; 2) whether the forecasts were accurate based on that comparison; 3) whether Enbridge knew or should have known about any inaccuracies; and 4) what actions the Commission should take based on those conclusions.

or

4. Direct a different scope for the investigation.

Staff Note: These scope and process directions can be adapted as preferred by the Commission.

Complaint

D. Jurisdiction

1. Determine that it does have jurisdiction to investigate the allegations in the *Complaint*.

or

2. Determine that it does not have jurisdiction to investigate the allegations in the *Complaint*.

E. Investigation

1. Open an investigation into the allegations in the *Complaint*.

or

2. Decline to open an investigation into the allegations in the *Complaint*.

F. Scope and Process of Complaint Investigation

1. Direct staff to issue a notice of comment investigating the allegations raised in the *Complaint*.

or

2. Refer the allegations raised in the *Complaint* to the Office of Administrative Hearings for a contested case proceeding.

If opening any investigation:

3. Direct that the scope of any investigation into the allegations raised in the *Complaint* should include: 1) whether there have been any actual increases to the capacity of Line 4 or Line 67 since they were certified; 2) whether there are any planned capacity increases to Line 4 or Line 67; 3) whether recertification is required for either Line 4 or Line 67; and 4) whether recertification should be granted for Line 4 or Line 67.

or

4. Direct a different scope for the investigation.

Staff Note: These scope and process directions can be adapted as preferred by the Commission.