

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**

121 Seventh Place East, Suite 350  
St. Paul, Minnesota 55101-2147

In the Matter of the Application of  
Enbridge Energy, Limited Partnership  
and Enbridge Pipelines (Southern  
Lights) L.L.C. for a Certificate of Need  
for the Alberta Clipper and Southern  
Lights Diluent Projects

MPUC Docket No. PL9/CN-07-465  
OAH Docket No. 8-2500-19094-2

In the Matter of the Application of  
Enbridge Energy, Limited Partnership  
and Enbridge Pipelines (Southern  
Lights) L.L.C. for a Routing Permit  
for the Alberta Clipper and Southern  
Lights Diluent Projects

MPUC Docket No. PL9/PPL-07-361  
OAH Docket No. 8-2500-19094-2

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**ANSWER TO THE MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY'S  
PETITION FOR RECONSIDERATION**

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**I. INTRODUCTION**

The Minnesota Public Utilities Commission (“MPUC”) issued orders under the above-captioned dockets granting a Certificate of Need and Pipeline Routing Permit<sup>1</sup> on December 29 and 31, 2008, respectively, to Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) L.L.C. (collectively, “Enbridge”). On January 20, 2009, the Minnesota Center for Environmental Advocacy (“MCEA”) filed a Petition asking the MPUC to Reconsider or Rehear its Certificate of Need and Routing Permit Decisions (the “Petition”) for the Alberta Clipper and Southern Lights Diluent Projects (collectively, “Projects”). Enbridge respectfully submits this Answer to the Petition. The Petition must be denied because the MCEA has not demonstrated that the MPUC’s decisions were unreasonable or unlawful.

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<sup>1</sup> The Pipeline Routing Permit did not determine the portion of the route between Mileposts 1056.1 and 1073.0 in Carlton County, Minnesota.

## II. OBJECTION TO LATE-FILED INFORMATION AND INTERNAL AGENCY MEMORANDA

Enbridge objects to the MCEA's unlawful attempt to file information after the record closed and the MCEA's reliance on unofficial, internal documents from a staff member of the Department of Natural Resources (DNR).

MCEA's Petition relies heavily upon the Annual Energy Outlook Early Release 2009 ("AEO 2009"). The AEO 2009 must be disregarded because it was filed after the record closed. The MCEA claims that Minn. Stat. 216B.27 and Minn. R. 7829.3000 somehow authorize the inclusion of this information in the record. In fact, these provisions simply require the MCEA to specify the grounds relied on in the Petition.<sup>2</sup> They do not alter the scope of the record. A petition for reconsideration must show how the petitioner believes the MPUC's decision was unlawful or unreasonable.<sup>3</sup> The decision, made by vote of the MPUC on November 25, 2008, was based on the record which closed *on that day*, as provided by Minn. Stat. § 14.61. Minn. Stat. § 216B.27 and Minn. R. 7829.3000 do not overrule or modify Minn. Stat. § 14.61. The MCEA must therefore show how the decision was unreasonable or unlawful based on the record before the MPUC when it voted to approve the certificate of need and pipeline routing permit. Because it cannot meet that requirement, it now attempts to add material after the record closed.

The MCEA asserts that the decision in *Trout Unlimited v. Minnesota Department of Agriculture*<sup>4</sup> mandates inclusion of the AEO 2009 in the record.<sup>5</sup> The *Trout Unlimited* decision does not support the MCEA's position. That court held that "[i]f the disputed documents *were available and in the possession* of the [agency], they are part of the record *as defined by the*

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<sup>2</sup> Minn. Stat. 216B.27; Minn. R. 7829.3000.

<sup>3</sup> Minn. Stat. § 216B.27, Subd. 2.

<sup>4</sup> 528 N.W.2d 903, 908 (Minn.Ct.App. 2003)

<sup>5</sup> Petition at 18, n.5.

statute . . .”<sup>6</sup> The *Trout Unlimited* court did not address whether information provided after the record closed could be considered in a petition to reconsider an agency decision, but rather whether documents in the record other than “comments” must be considered.<sup>7</sup> Minn. Stat. §§ 14.60 and 14.61 define the record, which closed on November 25, 2008. The AEO 2009 was released sometime in December 2008<sup>8</sup> and provided to the MPUC by the MCEA on January 20, 2009.<sup>9</sup> The MPUC made its decision in November, 2008. The AEO 2009 is therefore not part of the record, and must not be considered.

Public policy also requires that the record close when required by law. The Projects have been under review for more than 19 months.<sup>10</sup> Under the MCEA’s reasoning, no utility project proponent would be able to complete the permitting process. The need to respond to new forecasts and other information released after the agency decision would make it impossible to finalize any decision. The MCEA’s strained interpretation of the law would harm Minnesota citizens by preventing the permitting of necessary energy projects. Enbridge and the MPUC should be entitled to rely on the substantial record developed through the extensive review process.

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<sup>6</sup> *Trout Unlimited*, 528 N.W.2d at 908 (emphasis added).

<sup>7</sup> *Id.* at 907-08.

<sup>8</sup> See Energy Information Administration, Annual Energy Outlook 2009 Early Release, available online at <http://www.eia.doe.gov/oiaf/aeo/index.html> (last visited January 24, 2009).

<sup>9</sup> Affidavit of Kevin Reuther. The MCEA has previously asserted that the AEO “has a poor track record of predicting the assumptions underlying demand forecasts and as a result, is not very reliable for the demand forecasts themselves”, MCEA Post-Hearing Brief at 9 (available online at

<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5242601>), and that the AEO is “often wrong due to the simple extrapolation methods that it uses.” MCEA’s Post-Hearing Reply Brief at 3 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5262779>). The MCEA’s witness, Dr. John Durkin, called the AEO’s methodology “inherently unreliable.” Pre-Filed Testimony of John T. Durkin, p. 6 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5009654>). The MCEA fails to note how the 2009 AEO has overcome these alleged faults to become, as the MCEA now calls it, “highly regarded” (Petition at 18) and “accurate, reliable, and credible.” Petition at 18, n. 5

<sup>10</sup> Enbridge’s applications were submitted on June 22, 2007.

Enbridge also objects to the remaining material filed by the MCEA after the record closed. The supplemental tables to the AEO 2009,<sup>11</sup> map of the Northshore Mining facility,<sup>12</sup> Reuters Article<sup>13</sup> and radio station website page are all outside the record.<sup>14</sup> This material must be disregarded.

The so-called DNR memorandum relied on by the MCEA must also be disregarded. This internal memorandum (“Stolen Memo”) was from one DNR staff member, Paul Stolen, to another.<sup>15</sup> Neither Stolen nor the DNR provided it to the MPUC. The Stolen Memo was written to assist another DNR representative, Matt Langan, in the preparation of an official DNR comment letter to the MPUC.<sup>16</sup> That letter, sent by Matt Langan on November 13, 2008,<sup>17</sup> must be taken as the official comments of the DNR. The vast majority of the material from the Stolen Memo quoted in the Petition does not appear in the official DNR comments, indicating that the Stolen Memo does not represent the agency’s position.<sup>18</sup> Enbridge strongly disagrees with the contents of the Stolen Memo. Unfortunately, the author of the Stolen Memo was not subject to cross examination at the contested case hearing and Enbridge was not made aware of the existence of the Stolen Memo until the day prior to the hearing before the MPUC. The MPUC is

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<sup>11</sup> Exhibits 2 and 3 to the Affidavit of Kevin Reuther.

<sup>12</sup> Exhibit 4 to the Affidavit of Kevin Reuther.

<sup>13</sup> Exhibit 5 to the Affidavit of Kevin Reuther.

<sup>14</sup> Exhibit 6 to the Affidavit of Kevin Reuther.

<sup>15</sup> Petition at 12-14.

<sup>16</sup> Stolen Memo at 1 “This memo responds to your request of November 7<sup>th</sup> regarding a letter to the PUC staff you are preparing . . .” (Available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5651190>).

<sup>17</sup> The November 13 letter was submitted to OES EFP staff before the record closed on November 25, 2008. However, that letter was not provided to Enbridge by the DNR or OES EFP staff and was never e-filed with the MPUC. The November 13 letter is attached as Exhibit 1 to the Affidavit of John Gasele because it was never e-filed. Enbridge does not concede, however, that this letter is part of the record.

<sup>18</sup> Compare, Stolen Memo, supra, n. 16; November 13 letter from Matt Langan, DNR, to Larry Hartman, OES EFP Staff (Gasele Aff., Exhibit 1).

not required to look beyond the official comments issued by the DNR.<sup>19</sup> The MPUC should disregard both the Stolen Memo and all portions of the Petition that look to it for support.

### **III. CORRECTION OF FACTS**

The Petition misstates or ignores important information in the record. Enbridge only responds to the most egregious errors or omissions. These errors include a fundamental misunderstanding of the capacity of the Projects and Minnesota's utility regulatory system, omission of a substantial portion of the record demonstrating need for the Alberta Clipper Project, failure to acknowledge any part of the record related to the Southern Lights Diluent Project, and failure to acknowledge the presence of significant environmental data in the record.

#### **A. The MPUC correctly analyzed the size of the Projects as required by Minnesota law.**

The MCEA misunderstands the size of the Projects and the structure of Minnesota's regulatory system. The MCEA asserts that the ultimate capacities of both Projects must be considered because Enbridge could upgrade the capacity of the pipelines at a later date.<sup>20</sup> This is incorrect. The Alberta Clipper pipeline will have the capacity to transport 450,000 barrels-per-day ("bpd").<sup>21</sup> The Southern Lights Diluent pipeline will have the capacity to transport 180,000 bpd.<sup>22</sup> Enbridge would need a new certificate of need from the MPUC to upgrade the pipelines to transport the ultimate capacities.<sup>23</sup> The MCEA inappropriately asks the MPUC to reconsider a decision that has not been made.<sup>24</sup>

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<sup>19</sup> *Nat'l Audubon Society v. MPCA*, 569 N.W.2d 211, 216 (Minn.Ct.App. 1997).

<sup>20</sup> Petition at 4.

<sup>21</sup> Order Granting Certificate of Need at 8.

<sup>22</sup> Order Granting Certificate of Need at 8.

<sup>23</sup> Minn. R. 7853.0030, D.

<sup>24</sup> Petition at 4.

**B. The MCEA fails to acknowledge that the record contains substantial information about the need for a secure, reliable supply of crude oil from Canada.**

The record contains significant information that contradicts the MCEA's assertions. The record indicates, for example, that there will be increased demand for crude oil and refined petroleum products. The AEO 2007, in effect at the time the applications were filed, indicates increased demand for crude oil.<sup>25</sup> The AEO 2008 also indicates that demand will increase, but at a lower rate than predicted in the AEO 2007.<sup>26</sup> The MCEA alleges that this change is only due to a change in federal fuel economy standards.<sup>27</sup> This assertion fails to acknowledge that the AEO 2008 also states that reduced expectations for economic growth and higher price projections for crude oil also influenced the changes between the AEO 2007 and 2008 reference cases.<sup>28</sup> The record also contains an independent analysis performed by the OES to verify that the Projects are needed. The OES analysis shows that Minnesota's population is expected to grow and require additional refined products, thereby increasing demand for crude oil.<sup>29</sup>

The forecasts in the record also show that a large percentage of the demand for crude oil in the United States will need to be met by importing crude oil from foreign sources.<sup>30</sup> The MCEA did not dispute this fact. Indeed, it cannot. The late-filed AEO 2009 on which the MCEA now relies also shows that the United States will need to import nearly half of its crude

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<sup>25</sup> Application for a Certificate of Need, § 7853.0240 at 6.

<sup>26</sup> ALJ Report, Finding 115, p. 40.

<sup>27</sup> Petition at 25.

<sup>28</sup> AEO 2008 at 2, filed by the MCEA on November 21, 2008 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5635129>).

<sup>29</sup> Exhibit AJH-11 to the pre-filed written testimony of Adam J. Heinen, filed October 5, 2007 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4792047>).

<sup>30</sup> Application for a Certificate of Need, § 7853.0240, p. 6; AEO 2008 at 4, filed by the MCEA on November 21, 2008 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5635129>).

oil supplies long into the future.<sup>31</sup> The record shows that the market prefers to import oil from Canada over other sources outside North America.<sup>32</sup>

The MCEA also ignores evidence in the record about the structure of the crude oil marketplace. Refiners require adequate supplies of crude oil to produce refined products for public consumption. To a refiner, adequacy of supply means “dependable and unfettered access to an array of economically-priced crude grades that are well-suited for processing at its refineries.”<sup>33</sup> Minnesota refineries have very limited access to crude oil supplies from sources other than the Enbridge system.<sup>34</sup> The record indicates that Canadian oil production will increase significantly in the future.<sup>35</sup> The Alberta Clipper pipeline will be used to transport this oil to refineries in Minnesota and the surrounding region.

The Enbridge system is nearing capacity, and as the record demonstrates, will go into apportionment (forced reduction of expected product) in the very near future unless the Alberta Clipper project is approved and constructed.<sup>36</sup> When that happens, no shipper will be able to transport the quantities of crude oil it needs through the Enbridge system.<sup>37</sup> Minnesota’s refineries will then face increased costs to receive the amount of crude oil required to meet regional demand for refined products.<sup>38</sup>

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<sup>31</sup> Reuther Aff., Exhibit 1. Enbridge in no way concedes that the AEO 2009 is part of the record.

<sup>32</sup> ALJ Report, Finding 115, p. 40.

<sup>33</sup> Exhibit 312 (Rebuttal Testimony of Neil K. Earnest) at 6.

<sup>34</sup> ALJ Report, Finding 173, p. 49.

<sup>35</sup> ALJ Report, Finding 111, p. 39.

<sup>36</sup> ALJ Report, Finding 166, p. 47.

<sup>37</sup> Rebuttal Testimony of Neil K. Earnest at 9 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5144079>).

<sup>38</sup> *Id.*; ALJ Report, Finding 166, p. 47.

**C. The record contains substantial evidence that the Southern Lights Diluent Project will benefit the citizens and refineries in Minnesota.**

The MCEA also asserts that there is no evidence in the record that demonstrates need in Minnesota for the Southern Lights Diluent pipeline.<sup>39</sup> The record shows that significant quantities of diluent are required to transport heavy Canadian crude oil by pipeline.<sup>40</sup> The supply of diluent in Canada is insufficient to meet industry needs to facilitate pipeline transportation of heavy crude oil, thereby requiring the importation of diluent to Canada.<sup>41</sup> The MPUC reasonably and lawfully determined that the Alberta Clipper project is needed to transport crude oil to Minnesota and the surrounding states.<sup>42</sup> Additionally, the Southern Lights Diluent Project is needed because the oil that will be moved by the Alberta Clipper pipeline cannot be transported without diluent.<sup>43</sup> The Southern Lights Diluent Project will benefit Minnesota by creating a valuable market link between the Midwest and Canadian oil producers.<sup>44</sup>

**D. The MCEA fails to acknowledge the environmental review information in the record.**

The MCEA makes numerous complaints about environmental review of the Projects.<sup>45</sup> Careful examination of the record reveals a thorough analysis of environmental effects. This analysis was conducted through the statutorily-approved alternative environmental review process, and addresses the same issues as would preparation of an Environmental Impact Statement.<sup>46</sup>

The environmental information in the record is comprehensive. The record contains information regarding rivers, streams and wetlands, including classifications, crossing locations

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<sup>39</sup> Petition at 4.

<sup>40</sup> Application for a Certificate of Need, § 7853.0240 at 2-3.

<sup>41</sup> Application for a Certificate of Need, § 7853.0240 at 3-4.

<sup>42</sup> Order Granting Certificate of Need at 14-15.

<sup>43</sup> Application for a Certificate of Need, § 7853.0240 at 2-3.

<sup>44</sup> ALJ Report, Finding 175, p. 49.

<sup>45</sup> Petition at 10-14.

<sup>46</sup> Order Granting Pipeline Routing Permit at 9.

and crossing methods.<sup>47</sup> The record also reflects consideration and mitigation of impacts to wildlife and impacts caused by vegetation removal.<sup>48</sup> Information regarding rare and endangered species is included in the record.<sup>49</sup> The record also includes a thorough review of alternatives and mitigation measures to reduce or eliminate environmental impacts.<sup>50</sup> A thorough discussion of alternatives is included in the Application for a Certificate of Need and the Environmental Assessment Supplement (“EAS”).<sup>51</sup>

The EAS also contains substantial information about mitigation measures.<sup>52</sup> Mitigation plans included in the record as part of the alternative environmental review process include the Agriculture Mitigation Plan, Environmental Mitigation Plan, Spill Prevention Containment and Control Plan, Petroleum-Contaminated Soil Management Plan and Drilling Mud Containment Response and Notification Plan.<sup>53</sup>

The record also contains a review of the cumulative impacts of related or anticipated future pipeline construction.<sup>54</sup> All of this information was evaluated by staff.<sup>55</sup>

#### **IV. ARGUMENT**

The MCEA petitioned for reconsideration, and now bears the burden to demonstrate that the MPUC’s decisions granting a Certificate of Need and Pipeline Routing Permit were unreasonable or unlawful.<sup>56</sup> As discussed below, the MCEA has failed to meet this burden.

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<sup>47</sup> MPUC Supplemental Findings of Fact Nos. 40, 45, 46, 49, 50, 58, 63.

<sup>48</sup> MPUC Supplemental Findings of Fact Nos. 41, 61.

<sup>49</sup> MPUC Supplemental Finding of Fact No. 42.

<sup>50</sup> Order Granting Pipeline Routing Permit at 9, 16 (Adopting ALJ Report Conclusions 11-20); Order Granting Certificate of Need at 12, 14 (Adopting ALJ Report Findings 138-164 and Conclusions 11-20) and Supplemental Findings of Fact 79-82, 88-106.

<sup>51</sup> Application for a Certificate of Need, § 7853.0540; Application for a Pipeline Routing Permit, Tab C, § 2.0.

<sup>52</sup> Order Granting Pipeline Routing Permit at 9, Supplemental Findings of Fact 79-82, 88-106.

<sup>53</sup> Application for a Pipeline Routing Permit, Appendices B-C and E-G.

<sup>54</sup> Order Granting Pipeline Routing Permit at 14.

<sup>55</sup> Order Granting Pipeline Routing Permit at 9.

<sup>56</sup> Minn. Stat. § 216B.27.

**A. The MCEA has failed to demonstrate that the MPUC’s decision to grant a Certificate of Need for the Projects was unreasonable or unlawful.**

**1. The MCEA misstates its burden of proof obligations.**

The MPUC properly determined that Enbridge satisfied its burden to demonstrate need for the Projects.<sup>57</sup> To justify denial of a certificate of need, an opponent to a project must show that there is a more reasonable and prudent alternative to the proposed project.<sup>58</sup> The MPUC found that the MCEA, advocating a no-build alternative, failed to carry this burden.<sup>59</sup> The MCEA attempts to evade its burden by arguing that Enbridge failed to demonstrate need, and therefore MCEA need not meet its burden by demonstrating a reasonable and prudent alternative. The MCEA can only make this argument by distorting the criteria set out by statute and rule and by ignoring significant parts of the record. Review of the full record under the proper criteria is fatal to the MCEA’s position.

The MCEA attempts to distort the criteria. First, it misrepresents the text of Minn. Stat. § 216B.243, Subd. 3 by arguing that it requires a showing of increased demand.<sup>60</sup> This statute requires an applicant to demonstrate need, but does not specify exactly what shape that need must take. Second, the MCEA distorts Minn. R. 7853.0130, which implements Minn. Stat. § 216B.243. The first criterion by which the MPUC evaluates an application for a certificate of need is whether “the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of the energy supply to the applicant, the applicant’s customers, or to the people of Minnesota and neighboring states.”<sup>61</sup> The MCEA argues that under this rule, “[p]resumably denial of a new pipeline would only adversely affect supply if there were, in fact,

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<sup>57</sup> Order Granting Certificate of Need, December 29, 2008, p. 13.

<sup>58</sup> Minn. R. 7853.0130, Subp. B.

<sup>59</sup> Order Granting a Certificate of Need at 13, paragraph B.2.

<sup>60</sup> Petition at 1.

<sup>61</sup> Minn. R. 7852.0130, Subp. A. Five sub-factors are also provided.

a demonstrated demand for more oil.”<sup>62</sup> This narrow reading does not reflect the broad and unambiguous language of the rule. The rule looks to whether denial of the application for a certificate of need would adversely impact energy supplies. The record demonstrates that the Projects are needed to serve increased demand and to provide reliable supplies of imported crude oil, as discussed in the following sections.

**2. All evidence in the record indicates that the Alberta Clipper pipeline is urgently needed to import supplies of crude oil to Minnesota and the United States.**

Enbridge demonstrated need for the Alberta Clipper Project. This is the conclusion reached by both the OES after its independent review of Enbridge’s materials and information from other sources, and the ALJ after his review of the complete record, including the MCEA’s exhibits and arguments.<sup>63</sup> The MPUC reasonably and lawfully arrived at the same conclusion.<sup>64</sup> The MCEA now asks the MPUC to ignore the record and use distorted standards to reach the opposite conclusion. The Petition should be denied because the forecasts in the record show increasing demand for crude oil; the Alberta Clipper Project will increase the security and reliability of crude oil supplies to Minnesota and the surrounding region; denial of a certificate of need would adversely impact crude future energy supplies; and no reasonable and prudent alternative to the Alberta Clipper pipeline exists.

Minnesota and the United States need additional crude oil to meet future demand, as indicated by the AEO forecasts from 2007 and 2008.<sup>65</sup> The OES analysis revealed that local

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<sup>62</sup> Petition at 17.

<sup>63</sup> Order Granting Certificate of Need at 12.

<sup>64</sup> Order Granting Certificate of Need at 16.

<sup>65</sup> Application for a Certificate of Need, § 7853.0240, p. 6; ALJ Report, Finding 115, p. 40.

population trends indicate that Minnesota will need additional refined products in the future.<sup>66</sup> Crude oil is required to produce refined products.

The MCEA also argues that the AEO 2008 showed a lower increase in demand created only by the change in federal fuel economy standards.<sup>67</sup> That argument oversimplifies the evidence in the record. The difference in the reference cases between AEO 2007 and 2008 was also due to lowered economic growth predictions and the increased cost of oil.<sup>68</sup> The MPUC evaluated the change between AEO 2007 and AEO 2008, and concluded that forecasts may change from year to year.<sup>69</sup> The MPUC also recognized that the Alberta Clipper Project will be in service for decades.<sup>70</sup> Responsibly planning for different potential future demand levels by approving the Alberta Clipper Project was a reasonable and lawful decision.

The Alberta Clipper Project will be used to satisfy demand for crude oil long into the future. The MCEA's Petition glosses over the fact that even the AEO 2009, which it now finds credible, shows that the United States will need to import 41% of the crude oil it needs to meet demand in 2030.<sup>71</sup> AEO 2007 and 2008, which, unlike AEO 2009, are part of the record, also show the need to import massive quantities of crude oil in 2030.<sup>72</sup> Canadian oil production rates will increase over that same time period.<sup>73</sup> The MCEA argues that production forecasts are irrelevant.<sup>74</sup> That is false. Refineries in Minnesota enjoy a massive price advantage due to the lower cost to transport a barrel of oil from Canada instead of from the Middle East or other

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<sup>66</sup> Exhibit AJH-11 to the pre-filed written testimony of Adam J. Heinen, filed October 5, 2007 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4792047>).

<sup>67</sup> Petition at 25.

<sup>68</sup> AEO 2008 at 2, filed by the MCEA on November 21, 2008 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5635129>).

<sup>69</sup> Order Granting Certificate of Need at 13.

<sup>70</sup> *Id.*

<sup>71</sup> Petition at 22-23.

<sup>72</sup> Application for a Certificate of Need, § 7853.0240, p. 6; AEO 2008 at 4, filed by the MCEA on November 21, 2008 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5635129>).

<sup>73</sup> ALJ Report, Finding 111, p. 39.

<sup>74</sup> Petition at 9, n. 1.

production sources.<sup>75</sup> Given the undisputed need to import oil in the future, it is logical that Minnesota's refineries will prefer the lower cost and growing and reliable supply of Canadian crude and turn to Canada for their crude oil needs. The MCEA argues that the ultimate capacity of the Alberta Clipper pipeline will be equal to 230 tankers the size of the Exxon Valdez.<sup>76</sup> As Commissioner O'Brien noted, "We can continue to rely on oil shipped by tankers from Mideast countries, or we can expand our pipeline capacity and receive product from our northern neighbors."<sup>77</sup> The decision to approve an economically efficient, safe and reliable system to transport oil that will undisputedly be needed in the future was both reasonable and lawful.

The record also shows that the Enbridge system will soon enter apportionment unless it is expanded.<sup>78</sup> Apportionment means that all shipments of crude oil on the Enbridge system will be reduced in a pro-rata, non-discriminatory manner.<sup>79</sup> As explained by Enbridge witness Neil K. Earnest, if nominations for shipment exceed capacity by 10%, every shipper will have its volumes reduced by that amount.<sup>80</sup> The destination of the oil does not matter.<sup>81</sup> If the system goes into apportionment, a Minnesota refinery that needs a 160,000-barrel shipment to meet local demand will only be able to transport 144,000 barrels from Canada. Consumers in Minnesota and the surrounding region will then suffer the economic consequences of a shortfall between availability and demand for refined products. Denial of the certificate of need for the Alberta Clipper Project would adversely affect the adequacy and efficiency of energy supplies to Minnesota and the surrounding region.

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<sup>75</sup> ALJ Report, Finding 168, p. 48.

<sup>76</sup> Transcript, MPUC Hearing, November 25, 2008 at 18.

<sup>77</sup> Transcript, MPUC Hearing, November 25, 2008 at 41.

<sup>78</sup> ALJ Report, Finding 166, p. 47.

<sup>79</sup> Rebuttal Testimony of Neil K. Earnest, p. 9 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5144079>).

<sup>80</sup> *Id.*

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

The record also demonstrates that the Projects will help provide security and reliability of crude oil supplies to Minnesota and the surrounding region. The ALJ reviewed the record and testimony of the witnesses and concluded that there would be “degradation in the security of supply to the upper parts of the United States” without the Alberta Clipper Project.<sup>82</sup> The Alberta Clipper Project will also allow shippers and refiners to respond to disruptions in supply.<sup>83</sup> This is critical, as many other sources of crude oil are geopolitically unstable and supplies from these sources are subject to disruption.<sup>84</sup> Pipelines are also significantly safer than other crude oil transportation methods.<sup>85</sup>

There are no reasonable and prudent alternatives to the Alberta Clipper Project.<sup>86</sup> Enbridge provided substantial information about alternative methods to transport crude oil and diluents,<sup>87</sup> but the MCEA did not even present information about alternatives until the hearing before the MPUC in November, 2008. The MCEA now argues that any future demand can be met by existing infrastructure.<sup>88</sup> The MCEA bases this argument largely on the previously-permitted LSr project and the non-affiliated TransCanada pipeline.<sup>89</sup> The LSr Project is a replacement for existing capacity on the Enbridge system.<sup>90</sup> The LSr Project, standing alone, is not large enough to function as an alternative to the Alberta Clipper Project. The MCEA’s argument that the LSr Project will meet demand is undercut by its own lawsuit against the MPUC to invalidate the LSr permits.<sup>91</sup> The TransCanada pipeline does not serve the Minnesota

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<sup>82</sup> ALJ Report, Finding 174, p. 48-49.

<sup>83</sup> ALJ Report, Finding 172, p. 49.

<sup>84</sup> Direct Testimony of Adam J. Heinen, at 35-36 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4792047>).

<sup>85</sup> ALJ Report, Finding 224, p. 57.

<sup>86</sup> Order Granting Certificate of Need at 12.

<sup>87</sup> Application for a Certificate of Need, § 7853.0540.

<sup>88</sup> Petition at 31-32.

<sup>89</sup> Petition at 31-32.

<sup>90</sup> Order Granting Certificate of Need at 12.

<sup>91</sup> MCEA vs. Minnesota Public Utilities Commission, et. al., Clearwater County Court File No. 15-CV-08-865.

market.<sup>92</sup> The MPUC acknowledged these facts and made the reasonable and lawful decision that these are not valid alternatives to the Alberta Clipper and Southern Lights Diluent Projects.<sup>93</sup>

The MPUC's decision to approve the Alberta Clipper Project was reasonable and lawful. The decision was made under the proper standards after a thorough review of the full record. The Petition should be dismissed.

**3. The MPUC properly rejected the alleged and speculative policies that the MCEA argues eliminate need for the Alberta Clipper project.**

The MCEA asserts that the MPUC's decision was unreasonable due to the failure to consider alleged and speculative policies that it believes will eliminate need.<sup>94</sup> The MCEA asserts that statements of elected officials and election of a new administration will somehow halt demand for oil.<sup>95</sup> In asking the MPUC to put its faith in laws that may or may not even be enacted, the MCEA asks the MPUC gamble with Minnesota's future energy security. The MPUC reasonably and lawfully acknowledged and rejected this argument.<sup>96</sup>

The MCEA anchors its argument on a variety of alleged policies. The MCEA first relies on Minn. Stat. §216H.02, which sets goals for reducing greenhouse gas emissions.<sup>97</sup> The MCEA fails to acknowledge in the Petition that this statute merely sets goals and orders development of a plan.<sup>98</sup> This statute provides no specifics that can be evaluated with any certainty. The MCEA then turns to Minn. Stat. § 216H.07, which again merely sets out a policy development process

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<sup>92</sup> Transcript, MPUC Hearing, November 25, 2008 at 38; ALJ Report, Finding 155, p. 46; Application for a Certificate of Need, § 7853.0540 at 3.

<sup>93</sup> Order Granting Certificate of Need at 12.

<sup>94</sup> Petition at 27.

<sup>95</sup> Petition at 27.

<sup>96</sup> Order Granting Certificate of Need at 9, 10, 12.

<sup>97</sup> Petition at 28.

<sup>98</sup> Minn. Stat. § 216H.02.

and requests proposed legislation.<sup>99</sup> The MCEA cannot point to a part of either statute that will have an impact on demand for oil.

The MCEA next refers to the Minnesota Climate Change Advisory Group (“MCCAG”).<sup>100</sup> There are two flaws in the MCEA’s argument that the work of the MCCAG represents a state policy that demonstrates no need for the Projects. First, the report of an unelected group that will make recommendations to the legislature can hardly be considered state policy. Second, the MCEA’s own witness, Charles Dayton, was a member of the MCCAG, yet could not explain what will become of the group’s report.<sup>101</sup> It is hardly reasonable to expect the MPUC to know how this group’s work will impact future demand for petroleum products when a member of the group cannot predict the fate of the report.

The MCEA also looks to the Midwest GHG Accord for support.<sup>102</sup> The MCEA has again failed to provide specifics of how this group’s policies will impact demand for petroleum. Stating that Minnesota will work toward a goal does not guarantee any outcome that can be considered by the MPUC.

Finally, the MCEA speculates that President Obama will persuade Congress to pass legislation with various impacts on the need for oil. Enbridge simply notes in response that winning an election does not guarantee success in presidential legislative initiatives. Moreover, there is no way to predict the specifics of any law that might pass in this area.

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<sup>99</sup> Petition at 28; Minn. Stat. § 216H.07.

<sup>100</sup> Petition at 28; Transcript, May 13, 2008 Evidentiary Hearing, MPUC Docket 07-465 at 104.

<sup>101</sup> Transcript, May 13, 2008 Evidentiary Hearing, MPUC Docket 07-465 at 103-116.

<sup>102</sup> Petition at 28.

The ALJ reviewed these policy assertions and concluded that the MCEA had not demonstrated that any of these activities will result in reduced demand for crude oil.<sup>103</sup> It was not unreasonable or unlawful for the MPUC to reach the same conclusion.

**4. The record contains ample evidence supporting the MPUC's determination that the Southern Lights Diluent pipeline is needed.**

The MCEA's assertion that the Southern Lights Diluent Project is not needed is contrary to the evidence. Diluent is required to transport heavy crude oil by pipeline.<sup>104</sup> The supply of diluent in Canada is insufficient to meet industry needs to facilitate pipeline transportation of heavy crude oil, thereby requiring the importation of diluent to Canada.<sup>105</sup> The Southern Lights Diluent Project is needed because the oil that will be moved by the Alberta Clipper pipeline cannot be transported without diluent. The Southern Lights Diluent Project will also create a valuable market link between the Midwest and Canadian oil producers.<sup>106</sup> The record also supports the MPUC's determination that there is no reasonable or prudent alternative to the Southern Lights Diluent Project, and that a certificate of need should be granted.<sup>107</sup>

**B. Environmental review was conducted according to Minnesota law**

The MCEA's arguments against the environmental review of the Projects are fundamentally flawed. The MCEA repeatedly asserts deficiencies in the environmental review under Chapter 4410 of the Minnesota Rules.<sup>108</sup> Environmental review of the Projects, however, took place under the alternative review process found in Chapter 7852.<sup>109</sup> This process was

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<sup>103</sup> ALJ Report, Findings 123-125, p. 41 and Memorandum, p. 86.

<sup>104</sup> Application for a Certificate of Need, § 7853.0240, p. 2-3.

<sup>105</sup> Application for a Certificate of Need, § 7853.0240, p. 3-4.

<sup>106</sup> ALJ Report, Finding 175, p. 49.

<sup>107</sup> Order Granting Certificate of Need at 2, adopting the ALJ Report, Finding 175 and Conclusions 10, 11, 16, 18, 21-29.

<sup>108</sup> Petition at 34-38.

<sup>109</sup> Order Granting Pipeline Routing Permit at 9.

lawfully adopted by the EQB, and remained valid after the responsibility to review pipeline routing permits was later moved to the MPUC.<sup>110</sup> The MCEA has failed to demonstrate that the MPUC's decision regarding environmental review was unreasonable or unlawful under Chapter 7852 of the Minnesota Rules.<sup>111</sup>

The MPUC determined that environmental review was conducted appropriately under Chapter 7852. The record reflects that the MPUC reviewed Enbridge's Environmental Assessment Supplement ("EAS") and determined that it contained the information required by law.<sup>112</sup> Accordingly, the MPUC determined that the review conducted for the Projects satisfied the requirements of the Minnesota Environmental Policy Act.<sup>113</sup>

The MCEA also incorrectly asserts that the MPUC must use the draft EIS being prepared by the United States Department of State. The MCEA relies on Minn. R. 4410.3900, Subp. 3. The rules in Chapter 7853, however, do not require use of a federal EIS when a pipeline routing permit application is undergoing the alternative environmental review process.

The MCEA has failed to demonstrate that environmental review of the projects was unreasonable or unlawful under Chapter 7852 of the Minnesota Rules.

**C. The MPUC made a reasonable and lawful decision to waive the notice requirement of Minn. R. 7829.2500, Subd. 4.**

The MCEA argues that other, unnamed parties were "likely prejudiced" because notice of Enbridge's certificate of need application was inadvertently not published in the State

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<sup>110</sup> *In re. Minnesota Pipe Line Company*, No. A07-1318, Slip. Op. at 5 n.1, 7. (attached as Exhibit 2 to the Affidavit of John Gasele).

<sup>111</sup> The MCEA purports to speak for the DNR in raising objections to the outcome of the environmental review process. Petition at 37. The DNR, however, has not requested amendment or reconsideration of the MPUC's decision.

<sup>112</sup> Order Granting Pipeline Routing Permit at 9.

<sup>113</sup> Order Granting Pipeline Routing Permit at 16, ¶ 2 (adopting ALJ Conclusion 53).

Register.<sup>114</sup> The MCEA has not identified a specific party that suffered prejudice. No other party filed a Petition requesting reconsideration based on prejudice related to this issue. The MPUC undertook a thorough examination of the extensive notice and opportunity to comment provided to the public through the lengthy review process.<sup>115</sup> Based on that review, the MPUC made the reasonable determination that the public had received extensive notice and opportunity to comment on Enbridge's application for a Certificate of Need.<sup>116</sup>

The decision to grant a waiver from Minn. R. 7829.2500, Subp. 4 was also lawful. The MPUC is *required* to grant a waiver from its own rules when the test in Minn. R. 7829.3200 is satisfied. As noted by the MPUC, all three factors denominated in Minn. R. 7829.3200 were present.<sup>117</sup> Following the directive of Minn. R. 7829.3200 by waiving the State Register notice requirement was a lawful decision.

## **V. CONCLUSION**

The MCEA has not demonstrated that the MPUC's decisions were unreasonable or unlawful. The MPUC engaged in a thorough review of an extensive record developed over the course of 19 months, including multiple public and contested case hearings. The MPUC's decisions were made under the proper criteria and are supported by substantial evidence in the record. The Orders issued by the MPUC represent the result of a well-reasoned evaluation of the need for the Projects and the careful measures that will be required to minimize and mitigate environmental impacts. The Petition must be denied.

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<sup>114</sup> Petition at 38.

<sup>115</sup> Order Granting Certificate of Need at 1-4, 6-7, 14.

<sup>116</sup> Order Granting Certificate of Need at 6-7, 14.

<sup>117</sup> *Id.* at 6-7.

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Dated: January 30, 2009

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