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June 4, 2008

The Honorable Eric L. Lipman
Office of Administrative Hearings
P.O. Box 64620
St. Paul, MN 55164-0620

**VIA US MAIL AND
E-FILING**

**Re: 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 Pipeline Project and the Southern Lights Diluent Project
MPUC Docket No. PL9/CN-07-465
OAH Docket No. 8-2500-19094-2**

Dear Judge Lipman:

Attached herewith for filing is Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC's Reply to the Post-Hearing Briefs of the Minnesota Center for Environmental Advocacy and Jon Erik Kingstad. Also attached is our Affidavit of Service.

Sincerely,

/s/ John R. Gasele

John R. Gasele

Enclosures

cc: Attached Service List

OAH Docket No. 8-2500-19094-2

**MPUC Docket No. PL-9/CN-07-465 (Certificate of Need)
MPUC Docket No. PL-9/PPL-07-361 (Route)**

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
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FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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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/PPL-07-465

OAH Docket No. 8-2500-19094-2

**REPLY BRIEF OF ENBRIDGE ENERGY, LIMITED PARTNERSHIP
AND ENBRIDGE PIPELINES (SOUTHERN LIGHTS) L.L.C.
TO THE POST-HEARING BRIEFS OF THE
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
AND JON ERIK KINGSTAD**

JUNE 4, 2008

INTRODUCTION

Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) L.L.C. (collectively “Enbridge”) submit the following reply to the Post-Hearing Briefs of the Minnesota Center for Environmental Advocacy (the “MCEA”) and the amicus brief filed by Jon Erik Kingstad (“Kingstad”).¹ In their arguments against the Alberta Clipper and Southern Lights Diluent Projects (collectively, the “Projects”), the MCEA and Kingstad either ignore or distort significant parts of the record and fail to acknowledge applicable Minnesota law that is contrary to their positions. Enbridge has thoroughly demonstrated that there is need for the Projects, that all relevant policies or rules have been considered, and that the Projects have undergone thorough environmental review that complies with Minnesota law.

CORRECTION OF THE MCEA’S MISSTATEMENTS OF FACT

There are three egregious misstatements presented by the MCEA as facts that must be corrected. First, the MCEA falsely implies that Enbridge will direct the flow of oil past Minnesota refineries to wherever it will make the most profit.² To accept MCEA’s flawed arguments, one must also necessarily accept the MCEA’s misstatements such as this as true, and also believe that the facts established in the record by Enbridge with credible evidence are false. The fact is that Enbridge is a common-carrier,³ meaning that it transports oil and is compensated

¹ Kingstad’s petition to intervene was denied, but the Sixth Prehearing Order invited him to file an amicus brief on the “no-build” alternative, which he addresses on pages 14 to 16 of his Post-Hearing Brief. The vast majority of Kingstad’s brief assumes facts that are not in evidence (and which Enbridge would hotly contest were they properly admitted) or makes assertions that are unsupported by the evidence in the record. Because Kingstad was limited to filing a brief on the no-build alternative, this reply will address only that relevant portion of his brief, which fails to acknowledge the same point of law as the MCEA’s arguments regarding the scope of environmental review.

² MCEA Post-Hearing Brief at 14. The MCEA depends on stringing several answers of different witnesses together to construct this alleged fact.

³ Ex. 300, § 7853.0530 at 1; Transcript, May 13 Contested Case Hearing, p. 195 (Testimony of Adam J. Heinen, “as a common carrier, they don’t have a say in where the final product will go.”)

at a rate set by a federally-regulated tariff.⁴ Enbridge does not produce or own the oil transported through its interstate pipelines⁵ and has no control over the oil's destination or the ultimate end user.⁶ Therefore, Enbridge obviously cannot refuse to deliver oil purchased by a refinery or any other party in order to sell it at some other location or to some other party.

Secondly, the proposed Texas Access project is not "currently pending before the Illinois Commerce Commission," as stated by the MCEA.⁷ The proposed Texas Access project is a proposal that is still in the early stages of evaluation by Enbridge.⁸ There is nothing in the record to support the MCEA's false assertion.

Third, the diluent transported in the proposed Southern Lights Diluent pipeline will not be used for Canadian oil production, as asserted by the MCEA.⁹ Diluent is used to thin or dilute the heavy crude oil to facilitate more efficient transportation by pipeline.¹⁰ Enbridge has no ownership or control over the diluent. Enbridge and the Projects that are the subject of this application are not in any way involved in Canadian oil production, which will undoubtedly continue even if the Projects are not constructed.¹¹ Unfortunately, if these Projects are not constructed, Canadian producers will have to seek other markets.

⁴ Ex. 312 at 9, n. 9 (Rebuttal Testimony of Neil Earnest).

⁵ Ex. 300, § 7853.0230 contains an extensive review of Enbridge's business operations. Crude oil production is not listed, and there is no information in the record to support the MCEA's assertion.

⁶ Transcript, May 13 Contested Case Hearing, p. 195.

⁷ MCEA Post-Hearing Brief at 14. The source of this alleged fact is unclear, because it is not contained in Exhibit 314, cited by the MCEA as the source of this information.

⁸ Ex. 314 at 3 (written rebuttal testimony of Mark Sitek).

⁹ MCEA Post-Hearing Brief at 1.

¹⁰ Ex. 300, § 7853.0230 at 8.

¹¹ See Transcript, Contested Case Hearing, May 13, 2008, p. 29 (Testimony of Neil Earnest).

ARGUMENT

I. Enbridge has met its burden of proof and thoroughly demonstrated the strong need for the Projects.

Enbridge has met its burden of proof by showing that there is need for the Projects. The Office of Energy Security (“OES”) analyzed Enbridge’s Application for a Certificate of Need and supporting materials,¹² conducted its own review of independent sources,¹³ and concluded that there is need for the Projects.¹⁴ The MCEA and Kingstad must ignore the full record and all evidence presented by Enbridge in order to assert that Enbridge has relied solely on the OES’s evidence to meet its burden of proof.¹⁵ The record contains Enbridge’s Application for a Certificate of Need¹⁶ and the direct and rebuttal testimony provided by Enbridge witnesses,¹⁷ all of which provide information relevant to the showing required to obtain a Certificate of Need under Minnesota law. MCEA and Kingstad’s assertion also ignores the law as interpreted by the Minnesota Court of Appeals, which has stated that an applicant for a certificate of need fails to meet its burden of proof when *another party* demonstrates a more reasonable and prudent alternative.¹⁸

The complete record demonstrates that the Projects are needed to avoid apportionment, satisfy increasing demand, and help create security of supply. Each reason is discussed below.

¹² See Ex. 307 (Direct Testimony of Bryan J. Minder, repeatedly noting that he has evaluated information *provided by Enbridge*); Ex. 308 at 4 (Direct Testimony of Adam J. Heinen, *stating that he has evaluated Enbridge’s application and supporting materials*).

¹³ See Ex. 308, pp. 13-31, 35-40 and accompanying exhibits; Ex. 316, pp. 4-33 and accompanying exhibits.

¹⁴ Ex. 307, p. 29 (Direct Testimony of Bryan J. Minder).

¹⁵ MCEA Post-Hearing Brief at 6; Kingstad Post-Hearing Brief at 2.

¹⁶ Ex. 300.

¹⁷ Exhibits 303, 304, 305, 306, 312, 313 and 314.

¹⁸ *In re Application of the City of Hutchinson (Hutchinson Utilities Commission) for a Certificate of Need to Construct a Large Natural Gas Pipeline*, Minn. App. A03-99, September 23, 2003 at 11 (attached as Exhibit A to Enbridge’s Proposed Findings of Fact, Conclusions of Law, and Recommendation).

A. Minnesota and regional refineries will be unable to obtain enough oil to meet demand unless the Projects are constructed on schedule.

First and foremost among the factual evidence demonstrating a need for the Projects is the critical necessity to avoid the adverse consequences of apportionment on the existing Enbridge system.¹⁹ These facts directly address Minn. R. 7853.0130, C, which requires the MPUC to issue a Certificate of Need if the consequences to society of approval are more favorable than the consequences of denial.

Minnesota and regional refineries will be unable to obtain the crude oil that they need to meet public demand unless the Projects are approved and constructed. It is undisputed that this would have a negative impact on Minnesota and regional consumers by increasing petroleum prices.

The existing Enbridge Mainline System is near capacity.²⁰ Once capacity runs out in 2012,²¹ only three years after the planned in-service date of the Alberta Clipper pipeline²² and just two years after the planned in-service date of the Southern Lights Diluent pipeline,²³ the system will go into apportionment.²⁴ When that happens, each and every refinery connected to the Enbridge system will have its shipments reduced by the amount that demand for shipment space exceeds actual capacity.²⁵ As a result, refiners will be unable to receive as many barrels as would have otherwise been available to them.²⁶

¹⁹ The MCEA's argument against the Projects fails to address apportionment or its effects on consumers.

²⁰ Ex. 300, § 7853.0510 at 2.

²¹ See Transcript, Contested Case Hearing, May 13, 2008, p. 79 (Testimony of Mark Sitek).

²² Ex. 300, § 7853.0230 at 9.

²³ Ex. 300, § 7853.0230 at 9.

²⁴ Transcript, Contested Case Hearing, May 13, 2008, p. 79 (Testimony of Mark Sitek).

²⁵ Ex. 314 at 6 (Rebuttal Testimony of Mark Sitek).

²⁶ Transcript, Contested Case Hearing, May 13, 2008, p. 22 (Testimony of Neil Earnest).

When the Enbridge system goes into apportionment, the delivered price of crude oil for all refineries that obtain crude oil through the Enbridge system will increase.²⁷ In that situation, a refiner only has two options. It could purchase crude oil from the south, which carries a significantly higher transportation cost, or “buy” the right to ship oil on the Enbridge system from another shipper that has obtained some space on the system.²⁸ Either option will, in turn, will drive up prices for consumers.²⁹ Avoiding apportionment is certainly more favorable than allowing that situation to arise by failing to grant a Certificate of Need for the Projects.

B. It is vital to meet demand with an economically-efficient method of crude oil transportation.

Evidence in the record demonstrates that there is increasing demand for crude petroleum. All forecasts and testimony relied on by Enbridge and the OES are accurate and reliable. The MCEA has not provided any forecast information. Instead, it attempts to discredit the factual analysis conducted by others through the myth of the “true low” case, by misrepresenting and distorting the testimony of Enbridge and OES witnesses with unsubstantiated arguments of counsel, and by relying on illogical testimony from an economist whose opinions are not supported by any facts, evidence or reliable studies.

i. The record contains accurate forecasts that predict increasing demand for the petroleum to be transported by the Projects.

The record contains supply and demand forecasts from different sources. Several forecasts focused on supply, including a market growth assessment from the Canadian National Energy Board,³⁰ a production forecast from the Canadian Association of Petroleum Producers,³¹

²⁷ Transcript, Contested Case Hearing, May 13, 2008, p. 22 (Testimony of Neil Earnest).

²⁸ Ex. 312 at 9.

²⁹ Transcript, Contested Case Hearing, May 13, 2008, p. 23 (Testimony of Neil Earnest).

³⁰ Ex. 300, Exhibit E.

and Enbridge's own internal long-range forecast.³² On the demand side, forecast evidence included several versions of the Energy Information Administration's Annual Energy Outlook ("AEO"),³³ and the Office of Energy Security witnesses conducted their own independent analysis of future demand for refined petroleum products in Minnesota.³⁴

The MCEA incorrectly argues that the AEO is inaccurate because it fails to examine what the MCEA refers to as the "true low" case.³⁵ What the MCEA refers to as the "true low" case is a fallacy crafted to attempt to discredit factually-based forecast information. According to the MCEA, the "true low" case happens when there are high petroleum prices, low income, and high adoption of conservation technologies.³⁶ The MCEA argues that current economic conditions of high prices and limited income growth created this situation.³⁷ However, MCEA offers no evidence to support this fallacy, and no explanation of how consumers will pay to adopt new technology if incomes are low. It is telling that Dr. Durkin, the MCEA's chief proponent of the "true low" case, failed to provide or cite to any forecast that makes predictions based on this myth.

The MCEA also alleges that the Annual Energy Outlook is unreliable because it uses the past to help predict future trends.³⁸ The MCEA over-simplifies the analysis supporting the AEO,³⁹ and fails to provide an alternative method to create a forecast of future petroleum needs. The record contains the most recent version of the AEO.⁴⁰ This forecast, like all others, still

³¹ Ex. 300, Exhibit D.

³² Ex. 300, Exhibit F.

³³ AEO 2007 is cited in the AC/SLD CON Application (Ex. 300) and discussed in Exhibits 308 and 312; AEO 2008 is discussed in Exhibits 312 and 316; and Exhibits 352 and 353 present excerpts of AEO 2005 and 2006.

³⁴ Exhibits 308 and 316 (Direct and Rebuttal Testimony of Adam J. Heinen).

³⁵ MCEA Post-Hearing Brief at 8-9.

³⁶ MCEA Post-Hearing Brief at 8.

³⁷ *Id* at n. 8.

³⁸ MCEA Post-Hearing Brief at 9-11.

³⁹ *See* Ex. 312 at 16-17.

⁴⁰ Ex. 312 at 17-18; Ex. 316 at 24-32.

predicts growth in demand for refined petroleum products. Again, the MCEA has failed to provide an alternative forecast supporting its arguments to be evaluated in this proceeding.

ii. The record demonstrates that the Projects will provide Minnesota refineries with access to increased supplies at a tremendous competitive advantage.

The MCEA's arguments that construction of the Projects will not benefit Minnesota are without merit. The MCEA's arguments are not based on facts or evidence and are illogical. The MCEA's arguments lack a fundamental understanding of the crude oil marketplace, and are contradicted by the facts and evidence which comprises the record in this proceeding. Accordingly, these arguments must be disregarded.

Dr. Durkin's testimony is not credible. The MCEA relies on Dr. Durkin's unsworn, unsupported testimony and conclusory assertions that the Projects will have no impact on petroleum prices.⁴¹ Dr. Durkin makes that statement because, in his words,

[t]he only way the pipeline expansion could impact local crude prices would be if it impacted national or international prices by impacting the national or international supply of crude, but this pipeline expansion has no impact on the national or international supply of crude. There are several ways for Canadian tar sands crude to get to refineries in the US and internationally other than the Enbridge pipeline system, so while the Alberta Clipper project will impact who gets paid to supply the crude, it has no impact on the total national or international supply of crude.⁴²

Most of Dr. Durkin's testimony is based on this illogical and unsupported statement, and the MCEA's arguments are in turn based on Dr. Durkin's flawed understanding of the crude oil market.

A degree in economics is not required to spot the logical and factual mistakes in Dr. Durkin's testimony. First, Dr. Durkin fails to explain how adding 450,000 barrels per day

⁴¹ MCEA Post-Hearing Brief at 13.

⁴² Ex. 350 at 3.

("bpd") of crude oil to the national marketplace "has no impact on the national or international supply of crude."⁴³ The Projects will bring an *additional* 6,898,500,000 gallons⁴⁴ of crude oil into the United States every single year. That number can be increased to 12,264,000,000 gallons per year with the addition of more pumps.⁴⁵ Dr. Durkin does not acknowledge that the Projects will be *new* pipelines—and can be used in addition to other existing pipelines—when he asserts that there are other ways for Canadian crude oil to get to the United States. Minnesota refineries will be connected to this newly-increased supply of crude oil entering the United States,⁴⁶ and will be able to use it to obtain needed supplies of crude oil. The MCEA's arguments about oil flowing only to the highest bidder are contradicted by the record.

In addition to access to increased crude oil supplies, refineries that supply Minnesota will enjoy a tremendous cost advantage if the Projects are constructed. There are two components to the amount a refinery pays for a barrel of Canadian crude oil. First, there is the cost of the oil when it is purchased in Canada. This price does not vary based on the location of the purchaser.⁴⁷ Second, there is the cost to transport that barrel of oil from the source to the purchaser's destination point or refinery.⁴⁸ This cost varies significantly based on the distance of the destination from the source.⁴⁹ The transportation cost influences the price per barrel of oil. The per-barrel price for Canadian crude is generally set to make that barrel competitive with other sources at the Gulf, given the cost of moving that barrel of oil the greater distance to the

⁴³ *Id.*

⁴⁴ 450,000 barrels per day x 42 gallons per barrel (Minn. R. 7853.0010, Subp. 5) x 365 days = 6,898,500,000 gallons per year.

⁴⁵ The ultimate capacity of the proposed Alberta Clipper Project is 800,000 bpd. Transcript, Carlton County Public Hearing, April 9, 2008 (Testimony of Mark Sitek).

⁴⁶ Ex. 300, § 7853.0240 at 7.

⁴⁷ Transcript, Contested Case Hearing, May 13, 2008, p. 24 (Testimony of Neil Earnest).

⁴⁸ Transcript, Contested Case Hearing, May 13, 2008, p. 35 (Testimony of Neil Earnest).

⁴⁹ *See* Ex. 312 at 4.

Gulf.⁵⁰ Refineries that supply Minnesota, however, do not pay as much to move a barrel of Canadian oil as a refinery located in the Mid-Continent region or on the Gulf Coast, giving the Minnesota refiner a distinct cost advantage.⁵¹

The scope of this cost advantage can be illustrated through a hypothetical example. Assume the price per barrel of crude from Venezuela, including delivery, is \$100/barrel for a refinery in Texas. That refiner, however, wants to process Canadian crude to avoid the risk of relying on supplies produced in Venezuela. Both the refiner and the Canadian oil producer know that it will cost approximately \$6.00 per barrel in transportation costs to move that barrel of oil from Canada to the Gulf.⁵² The Canadian producer therefore offers to sell the barrel of oil to the Texas refinery for \$94/barrel, making the end cost for the refiner in Texas equal to that of the barrel of Venezuelan crude. The Canadian producer cannot discriminate based on the geographic location of the purchaser, so a Minnesota refiner will also pay \$94 per barrel.⁵³ The Minnesota refiner, however, will pay significantly less to transport the barrel of oil from Canada, making the end cost to the Minnesota refiner approximately \$95.69 per barrel.⁵⁴

The lower transportation cost is what gives refineries in Minnesota an advantage over those in other areas.⁵⁵ Based on the example above, the Minnesota refinery will save \$4.31/barrel in transportation costs as compared to a Gulf coast refiner. It is easy to see how this advantage makes Canadian crude from the Enbridge system economically attractive for a refinery such as Flint Hills in Rosemount, Minnesota, which has a capacity of 280,000 barrels

⁵⁰ Transcript, Contested Case Hearing, May 13, 2008, p. 37 (Testimony of Neil Earnest).

⁵¹ Ex. 312 at 4.

⁵² See Ex. 312 at 4.

⁵³ Transcript, Contested Case Hearing, May 13, 2008, p. 24 (Testimony of Neil Earnest).

⁵⁴ See Ex. 312 at 4.

⁵⁵ Transcript, Contested Case Hearing, May 13, 2008, p. 25 (Testimony of Neil Earnest).

per day.⁵⁶ The MCEA's arguments on this point are readily refuted and have no basis in the record.⁵⁷

The Projects are the only way for the Minnesota refineries to obtain this cost advantage. It is more expensive for a Minnesota refinery to move a barrel of Arab Light crude from the Gulf Coast to Minnesota.⁵⁸ Minnesota's alternative supply options are poor,⁵⁹ and other pipeline systems have longer routes,⁶⁰ making transportation costs higher. The record contains ample evidence of need for the Projects.

C. The Projects will help create a reliable, secure supply of crude oil to the benefit of Minnesota consumers.

The Projects will substantially increase the supply of crude oil from a secure and reliable source. Obtaining greater supplies of crude oil from Canada will mitigate the increases in refined product prices caused by disruptions in supply from other areas. According to the Federal Trade Commission, even small, short-term disruptions in supply to the Midwest result in spikes in the price of refined products.⁶¹

The MCEA fails to recognize that the crude oil to be transported by the contemplated Projects can be used to replace more expensive oil purchased from less reliable sources.⁶² According to the 2008 AEO, the United States will need to import millions of barrels per day of crude oil and refined products long into the future.⁶³ Many of the countries outside North

⁵⁶ Ex. 300, § 7853.0240 at 7.

⁵⁷ The MCEA's arguments on this point, beginning on page 19 of its Post-Hearing Brief, rely on distorting the record.

⁵⁸ Transcript, Contested Case Hearing, May 13, 2008, p. 35 (Testimony of Neil Earnest).

⁵⁹ Transcript, Contested Case Hearing, May 13, 2008, p. 68 (Testimony of Neil Earnest).

⁶⁰ Transcript, Contested Case Hearing, May 13, 2008, p. 69 (Testimony of Neil Earnest).

⁶¹ Ex. 312 at 20.

⁶² Ex. 312 at 18-19.

⁶³ *Id.* at 18.

America that supply the United States with its imports are not secure or reliable.⁶⁴ Refineries in Minnesota and the United States can utilize crude oil from Canada, which is second only to the United States in terms of security and reliability,⁶⁵ to replace imports from these less desirable and more risk-prone sources.

Canada is the second most reliable source country for crude oil supplies.⁶⁶ Only domestic production within the United States presents lower risk.⁶⁷ The risk faced by a refinery that obtains oil from Canada is much lower than the risk faced by one that looks to the Middle East for supplies.⁶⁸

Supplies from Canada are also much less prone to disruptions caused by weather.⁶⁹ In 2005, Midwestern refineries were forced to cut their output because of disruptions in supplies of crude oil moving into the Midwest from the Gulf, created by Hurricanes Katrina and Rita.⁷⁰ This caused refined product prices to rise.⁷¹ The Projects will help avoid this problem in the future by adding capacity to supply the Midwest with oil from Canada.⁷²

Adding additional capacity to the Enbridge system by constructing the Projects will also help ensure that Midwestern refineries that rely on Canadian crude oil can still obtain adequate supplies if there is a disruption in another Enbridge line.⁷³

The record shows that the Projects will help mitigate price spikes in the Midwest caused by disruptions in crude oil supplies created by international politics, weather, or pipeline system outages.

⁶⁴ See Ex. 312 at 19.

⁶⁵ Ex. 312 at 19.

⁶⁶ Ex. 312 at 19.

⁶⁷ Ex. 312 at 19.

⁶⁸ Ex. 312 at 19.

⁶⁹ Ex. 312 at 19-20.

⁷⁰ Ex. 312 at 19-20.

⁷¹ Ex. 312 at 19-20.

⁷² Ex. 312 at 19-20; Ex. 316 at 11-12.

⁷³ Transcript, Contested Case Hearing, May 13, 2008, p. 27-28 (Testimony of Neil Earnest).

III. The record contains substantial information about other government policies that must be considered, and demonstrates that none of these policies will impact the need for the projects or be violated by the design, construction, or operation of the Projects.

The MCEA argues that a Certificate of Need cannot be granted for the Projects because, in its view, the record does not contain an analysis of relevant government policies.⁷⁴ This is incorrect for multiple reasons. First, the MCEA has contributed substantial information about several proposed policies that are still in the consideration stage to the record through its witness, Charles Dayton.⁷⁵ These proposed policies⁷⁶ are being evaluated as part of this process. The majority of these proposals have not yet been passed into law.⁷⁷ Second, the record does contain significant analysis of the impact on demand that may be caused by the few applicable policies or statutes that contain enough information to allow evaluation.⁷⁸ Third, the MCEA ignores the fact that these policies and statutes will not be violated by the design, construction or operation of the Projects.

The testimony and exhibits contributed to the record by Charles Dayton contain information about the recommendations of the Intergovernmental Panel on Climate Change that have been embodied in state law through the standards for greenhouse gas reduction,⁷⁹ creation and recommendations of the Minnesota Climate Change Advisory Group (“MCCAG”),⁸⁰ and the work of Governor Pawlenty with the Midwest Governor’s Association.⁸¹ These policies,

⁷⁴ MCEA Post-Hearing Brief at 22.

⁷⁵ Ex. 351 and accompanying exhibits.

⁷⁶ The MCEA incorrectly includes proposed legislation regarding California-style clean car requirements, carbon fuel requirements, and reduction of vehicle miles traveled as “policies” of the State of Minnesota. Proposed legislation backed by an advocacy group such as the MCEA or Clean Energy Minnesota should not be considered official policy of the state until passed by the Legislature and signed into law by the Governor, then promulgated into rules or regulations.

⁷⁷ See Transcript, Contested Case Hearing, May 13, 2008, pp. 110-111 (Testimony of Charles Dayton).

⁷⁸ The MCEA argues that OES witnesses Adam J. Heinen and Bryan J. Minder should have undertaken greater analysis of these statutes, yet it failed to have Dr. Durkin, its own economist witness, conduct such an analysis.

⁷⁹ Ex. 351 at 6.

⁸⁰ Ex. 351 at 6-8, 9-14 and accompanying exhibits 5, 6, 6A, 6B, 6C, 6D, 6E, 6F, 6G.

⁸¹ Transcript, Contested Case Hearing, May 13, 2008, p. 107, 110-111 (Testimony of Charles Dayton).

however, do not demonstrate that the Projects are not needed, nor do they bar the MPUC from granting a Certificate of Need to Enbridge.

Regarding need, Mr. Dayton argues that the work of the MCCAG will result in lower demand for petroleum because of the eventual result of the MCCAG's recommendations.⁸² Mr. Dayton, however, admitted that the MCCAG's recommendations to achieve the ambitious greenhouse gas reduction goals must be developed into specific policy objectives and passed into law before they can take effect,⁸³ and that at this time, the process of determining how those goals will be met is just beginning.⁸⁴ It is illogical for the MCEA to argue that another Party's witnesses should have evaluated the impact of MCCAG's goals when its own witness admits that the mechanisms for reaching the goals are still in development.

The only statutes identified by the MCEA, Minn. Stat. § 216C.05⁸⁵ and Ch. 216H,⁸⁶ do not bar the construction of petroleum pipelines, and do not modify the criteria for the MPUC to use in evaluating an application for a Certificate of Need. Minn. Stat. §§ 216C.05 to 216C.053 all address electricity generation, not petroleum pipelines. Minn. Stat. Ch. 216H only directs the creation of a study about climate change⁸⁷ and bars construction of some new power plants.⁸⁸ If the Minnesota Legislature had intended these statutes to apply to pipeline development, language to that effect would have been included.

The record also contains thorough analysis of the impacts of federal legislation aimed at energy conservation and efficiency. Unlike the recommendations of the MCCAG, the federal energy legislation has taken effect. OES witness Adam Heinen presented extensive discussion of

⁸² Ex. 351 at 8-14.

⁸³ Transcript, Contested Case Hearing, May 13, 2008, p. 110-111 (Testimony of Charles Dayton).

⁸⁴ Transcript, Contested Case Hearing, May 13, 2008, p. 110-111 (Testimony of Charles Dayton).

⁸⁵ Ex. 351 at 5.

⁸⁶ MCEA Post-Hearing Brief at 22, n. 18.

⁸⁷ Minn. Stat. § 216H.02.

⁸⁸ Minn. Stat. § 216H.03.

how the most recent AEO 2008 incorporates the EISA 2007⁸⁹ legislation which established more stringent Corporate Average Fuel Economy standards.⁹⁰ This is one of the laws that the MCEA argues will reduce the need for petroleum.⁹¹ Mr. Heinen also analyzed the impact on need of increased adoption of biofuels,⁹² which is another event that the MCEA argues will reduce the need for the petroleum to be transported by the Projects.⁹³ After reviewing this material, the OES concluded that demand for petroleum will continue to increase, and that a Certificate of Need should be issued for the Projects. The record contains ample review of other policies, rules and regulations, as required by Minn. Stat. 216B.243, Subd. 3.

The design, construction and operation of the Projects will not fail to comply with the relevant policies of other state and federal agencies and local governments.⁹⁴ The Intergovernmental Panel on Climate Change, the MCCAG, and the Midwest Governor's Association are not state or federal agencies, nor are they local governments. Nevertheless, the Projects simply transfer petroleum from one point to another, and will not be sources of airborne emissions during operation.⁹⁵ As a result, none of the statutes or policies advanced by the MCEA will be violated by the design, construction and operation of the Projects. This also supports issuance of a Certificate of Need for the Projects under Minn. R. 7853.0130, D.

The record contains substantial information regarding the policies, rules and statutes of the state of Minnesota and the federal government, contrary to the MCEA's arguments that these policies have not been considered. The MPUC should issue a Certificate of Need for the Projects.

⁸⁹ Energy Independence and Security Act of 2007.

⁹⁰ Ex. 316 at 27-29.

⁹¹ Ex. 351 at 12-13.

⁹² Ex. 316 at 29-30.

⁹³ Ex. 351 at 8-9.

⁹⁴ This is the fourth factor under Minn. R. 7853.0130.

⁹⁵ Ex. 300, § 7853.0620 at 4.

IV. The Projects have undergone full environmental review according to applicable law.

Both the MCEA⁹⁶ and Kingstad fail to present legally or factually supported arguments regarding environmental review. The MCEA is correct that the rules governing environmental review must be read as a whole and to give meaning to all parts.⁹⁷ However, both the MCEA and Kingstad arguments fail to acknowledge the law governing environmental review of the Projects. The MCEA also continues to ignore portions of the record that are contrary to its arguments.

A. Environmental impacts created by upstream Canadian oil production, downstream refinery activities, and vehicle emissions are outside the scope of environmental review of the Projects required by Minnesota law.

Both the MCEA and Kingstad argue that environmental review of the projects should extend well beyond the impacts of the Projects in Minnesota.⁹⁸ This argument is refuted by Minnesota Law. Minn. R. 4410.2000, conveniently not cited by the MCEA or Kingstad, governs the scope of environmental review under an EIS. For pipelines, that rule states that

[f]or proposed projects such as highways, streets, *pipelines*, utility lines, or systems where the proposed project is related to a large existing or planned network, for which a governmental unit has determined environmental review is needed, the RGU shall *treat the present proposal as the total proposal* or select only some of the *future elements* for present consideration in the threshold determination and EIS. These *selections must be logical* in relation to the design of the total system or network and must not be made merely to divide a large system into exempted segments.⁹⁹

⁹⁶ By making these arguments under the docket number of the Certificate of Need Application, the MCEA is attempting to ignore the entire record of the Pipeline Routing Permit Process. The MCEA requested and was granted party status under that MPUC docket number, yet failed to file testimony, advocate for alternative routes, attend any of the 13 public hearings, or even file a brief.

⁹⁷ MCEA Post-Hearing Brief at 30.

⁹⁸ MCEA Post-Hearing Brief at 25; Kingstad Brief at 14-16.

⁹⁹ Minn. R. 4410.2000, Subp. 4.

Minnesota Environmental Policy Act (“MEPA”) is only concerned with impacts within the state.¹⁰⁰ This rule and statutory subdivision must be considered in order to apply all portions of the law governing environmental review.

Review of Canadian oil production practices, as requested by Kingstad,¹⁰¹ is not logical in relation to the design of the Projects because it is conducted in a foreign nation, outside the reach of Minnesota law, and will undoubtedly continue whether or not the Projects are constructed.¹⁰² Review of greenhouse gas emissions and other alleged impacts, as requested by the MCEA, are outside the scope of environmental review for the Projects.

B. The Projects have fully satisfied Environmental Review criteria set forth in Minnesota law.

The rules governing the MPUC’s evaluation of the Certificate of Need application are not the designated process for the review of the environmental impact of the Projects. The pipeline routing permit application is the environmental review process designated for the Projects under MEPA.¹⁰³ MEPA authorizes the Minnesota Environmental Quality Board (“MEQB”) to identify *alternative* forms of environmental review to the Environmental Assessment Worksheet (“EAW”) or Environmental Impact Statement (“EIS”) process.¹⁰⁴ The MCEA has failed to indicate how environmental review of the Projects has not complied with the pipeline routing permit rules, nor has it shown that the pipeline routing permit process is no longer an authorized alternative.¹⁰⁵

¹⁰⁰ See Minn. Stat. 116D.04, Subd. 6.

¹⁰¹ Kingstad Brief at 14-16.

¹⁰² See Transcript, Contested Case Hearing, May 13, 2008, p. 29 (Testimony of Neil Earnest).

¹⁰³ Letter from Gregg Downing, MEQB, to Janette K. Brimmer, available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4922182> (last visited June 1, 2008).

¹⁰⁴ Minn. Stat. § 116D.04, Subd. 4a.

¹⁰⁵ Even if the MEQB someday decides to revoke authorization of this alternative process, that will have no impact on the Projects because Minn. R. 4410.3600, Subp. 2 provides that projects currently under review will not be affected by withdrawal of approval.

The MPUC is to issue a Certificate of Need if four criteria, contained in Minn. R. 7853.0130, are met. These criteria all focus on economic need. The third criterion is that “the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering” four factors.¹⁰⁶

One of the four factors is a balancing test, looking at “the effect of the proposed facility, or a suitable modification of it, upon the natural *and socioeconomic* environments compared to the effect of not building the facility.”¹⁰⁷ This rule requires the MPUC consider the tremendous socio-economic benefits of the Projects along with potential impacts on the natural environment.¹⁰⁸ This is the analysis conducted by Mr. Minder.¹⁰⁹ While environmental review is a component of the Certificate of Need Process, it is predominantly the focus of the routing permit process.

Environmental review of the Projects considered all aspects required of a full EIS as required by Minnesota law and the Certificate of Need rules. The MCEA’s Post-Hearing Brief does not acknowledge the full record developed under the pipeline routing permit process in this OAH proceeding.¹¹⁰ Instead, the MCEA focuses its argument on the testimony of Bryan J. Minder, witness for the Office of Energy Security, at the contested case hearing.¹¹¹ The MPUC will have the entire record, including that of the pipeline routing permit application, before it when it makes the final determination on whether the Projects have complied with all environmental review requirements. The OES analysis under the certificate of need rules is only

¹⁰⁶ Minn. R. 7853.0130, C.

¹⁰⁷ Minn. R. 7853.0130, C(2) (emphasis added). .

¹⁰⁸ See Exhibits 300, 307, 314, 315, 317, and the testimony of witnesses at the 13 public hearings

¹⁰⁹ Ex. 307 at 14-21.

¹¹⁰ Again, the MCEA was a party to the pipeline routing permit process, yet did not attend the public hearings, did not present witnesses or file testimony, and did not file a brief on that matter. Instead, the MCEA filed arguments styled as public comments on the final day of the public comment period. The MCEA now pretends that the pipeline routing permit process did not take place.

¹¹¹ MCEA Post-Hearing Brief at 28

one component of one sub-factor of one criterion for the issuance of a Certificate of Need. Mr. Minder's analysis, as fully set out in Exhibit 307, is also much more thorough than the MCEA acknowledges.

The MCEA asserts that an EAW was required because Minn. R. 4410.4300 includes pipelines in a long list of threshold tests for when an EAW is required. The MCEA has again conveniently failed to acknowledge other portions of Chapter 4410 of the Minnesota rules that are contrary to its argument. Minn. R. 4410.3600, Subp 2 states that once an alternative environmental review process is approved, any project undergoing review through that process is exempt from preparation of an EAW¹¹² or an EIS.¹¹³

The MCEA also incorrectly implies that the record does not address all of the elements required in an EIS. This argument again ignores significant portions of the record. The Certificate of Need and Pipeline Routing Permit applications¹¹⁴ present a thorough description of the Projects, as required in an EIS.¹¹⁵ The requirement to present an analytical, not encyclopedic, review of potential impacts to the environment¹¹⁶ is fulfilled by the Environmental Assessment Supplement ("EAS") included with the Pipeline Routing Permit Application for the Projects.¹¹⁷ The Applications disclose the other governmental approvals that are required,¹¹⁸ again as required in an EIS.¹¹⁹ The record also contains a significant discussion of alternatives to the proposed pipelines,¹²⁰ as required in an EIS.¹²¹ The record also contains a thorough review

¹¹² Minn. R. parts 4410.1100 to 4410.1700.

¹¹³ Minn. R. parts 4410.2100 to 4410.3000.

¹¹⁴ Exhibits 300, 100 and 101.

¹¹⁵ Minn. Stat. § 116D.04, Subd 2a; Minn. R. 4410.2300, E.

¹¹⁶ Minn. Stat. § 116D.04, Subd. 2a.

¹¹⁷ Ex. 100, Tab C.

¹¹⁸ Ex. 300, § 7853.0230 at 17-19; Ex. 100, § 4415.0165.

¹¹⁹ Minn. R. 4410.2300, F.

¹²⁰ Ex. 300, § 7853.0540.

¹²¹ Minn. Stat. § 116D.04, Subd 2a; Minn. R. 4410.2300, G.

of the economic, employment and sociological impacts¹²² as required in an EIS.¹²³ Finally, the EAS and accompanying documents¹²⁴ discuss potential mitigation measures to reduce environmental impacts, another requirement for an EIS.¹²⁵

CONCLUSION

Giving proper consideration to the full record in this proceeding and the regulatory requirements governing the issuance of a Certificate of Need, the MPUC should grant a Certificate of Need to Enbridge for the Alberta Clipper and Southern Lights Diluent Projects. The arguments against the Projects put forth by the MCEA and Kingstad are without support in either the facts or the law. For the foregoing reasons, Enbridge requests that the MPUC issue a Certificate of Need.

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Dated: June 4, 2008

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¹²² See Ex. 300; Ex. 307; Ex. 314.

¹²³ Minn. Stat. § 116D.04, Subd 2a; Minn. R. 4410.2300, H.

¹²⁴ Ex. 100, Tab C; Ex. 101, Tab D, App. B (Environmental Mitigation Plan), App. C (Spill Prevention, Containment and Control Plan), App. E (Agriculture Mitigation Plan), App. F (Petroleum-Contaminated Soil Management Plan), App. G (Drilling Mud Containment, Response and Notification Plan).

¹²⁵ Minn. Stat. § 116D.04, Subd 2a; Minn. R. 4410.2300, H.