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## INTRODUCTION

Pursuant to Minnesota Statutes Section 216B.27 and Minnesota Rules 7829.3000, Minnesota Center for Environmental Advocacy (“MCEA”) respectfully requests reconsideration or rehearing of the Public Utilities Commission’s (“PUC’s”) December 29, 2008 Orders granting a certificate of need and a pipeline routing permit in the above-captioned matters.<sup>1</sup>

MCEA files this Petition because Enbridge failed to meet its statutory burden to demonstrate that the proposed pipelines are necessary and because the Commission’s decisions were made prior to completion of adequate environmental review for the projects. *See* Minn. Stat. 216B.243, subd. 3 (prohibiting construction of a pipeline unless the applicant has demonstrated increased demand to justify its need); Minn. Stat. § 116B.04, subd. 2b (prohibiting any government action approving a project until after adequate environmental review has been completed).

MCEA requests that the Commission, upon reconsideration, vacate its December 29, 2008 Orders. Alternatively, if the Commission determines that an evidentiary hearing is required to review additional information regarding demand for crude oil, MCEA requests rehearing. As a further alternative, should the Commission wish to leave its conclusions with regard to the certificate of need unchanged, but agree that the

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<sup>1</sup> Because the Administrative Law Judge (“ALJ”) and the PUC have considered the certificate of need and routing permit jointly throughout these proceedings, MCEA submits a joint request and memorandum in conjunction with both orders. MCEA wishes to make clear, however, that despite filing a single pleading in both dockets, it is requesting review and reconsideration of all decisions, each of which must be granted or denied by the Commission. Minn. Stat. § 216B.27. In addition, MCEA provides with this request additional information available from the federal Energy Information Administration that was published prior to the PUC’s Orders but after oral argument. MCEA submits that the additional documentation is highly relevant and precisely the type of evidence the PUC should take into account in determining whether to rehear or reconsider its earlier orders.

environmental review that preceded its decisions was insufficient, it could withdraw its December 20, 2008 Orders pending completion of adequate environmental review.

MCEA bases this Petition on all record materials, including any arguments, comments, briefs, or letters previously filed in the above-captioned dockets as well as Docket Nos. PL-9/CN-07-464 (LSr CON) and PL-9/ppl-07-360 (LSr routing permit), its Environmental Assessment Worksheet (“EAW”) petition and supporting materials, and this memorandum and attached affidavit and exhibits.

## **FACTUAL BACKGROUND**

### **1. Parties.**

MCEA is a Minnesota non-profit environmental organization whose mission is to use law, science, and research to protect and enhance Minnesota’s natural resources, wildlife, and the health of its people. MCEA is organized under the laws of the State of Minnesota with a principal place of business at 26 East Exchange Street, Suite 206, St. Paul, MN 55101. MCEA has a state-wide membership and works in a number of advocacy areas, including water, wetlands, and energy, which includes work regarding climate change and greenhouse gas reductions. MCEA is an intervening party in this matter, opposed to the construction and operation of the proposed pipelines.

Enbridge, Inc., a Canadian corporation, owns and operates petroleum pipelines throughout Canada and the United States through its subsidiaries and affiliates. Enbridge affiliates applied to the Minnesota Public Utilities Commission for a routing permit and certificate of need for the siting and construction of two large pipelines through northern Minnesota. The Alberta Clipper pipeline would transport heavy tar sands crude from

Alberta Canada to Superior, Wisconsin; the South Lights Diluent pipeline would transport light hydrocarbons from Superior, Wisconsin, to Clearbrook, Minnesota, where it would connect to an existing line flowing to Alberta, Canada. PUC Dec 29, 2008 CON Order, p. 1.

**2. Enbridge Pipeline Projects.**

**a. Alberta Clipper**

The Alberta Clipper is, according to Enbridge's application, a 990 mile 36-inch new pipeline running from Hardisty, Alberta, Canada, to a terminal and tank farm facility in Superior, Wisconsin. Enbridge Alberta Clipper CON App., Sect. 7853.0230, p.6. Approximately 285 miles of the proposed pipeline will cut through Minnesota's forests, prairies, farm land, wetlands, and streams. *Id.* The project, according to Enbridge, consists of the pipeline as well as "associated valves and appurtenances," and the addition of four booster pumps and five holding tanks (200,000 barrels each) at its Superior facility. *Id.*

The purpose of the proposed new Alberta Clipper pipeline is, according to Enbridge, "to serve the increasing demand for crude oil in the Midwestern U.S. markets and beyond." *Id.*, p. 8.

The Alberta Clipper is designed to carry heavy bitumen crude mined from the Alberta tar sands. Fuel derived from tar sands is considered among the most carbon-intensive fuels on Earth. It takes 3 to 5 times more energy to extract a barrel of tar sands crude as compared to conventional crude. Strip mining destroys enormous amounts of boreal forest and peatland, eliminating an important carbon sink. The result is carbon-

intensive fuel which will be much less desirable in a carbon-constrained economy. *See generally*, MCEA Dec 14, 2007 Comments to ALJ and exhibits.

The Alberta Clipper is sized with the “ultimate capacity” to transport 880,000 barrels of heavy crude per day. According to Enbridge, the “ultimate” capacity of a pipeline is the “maximum economic expansion capacity of [an] individual line.” Enbridge Alberta Clipper CON App. Sect. 7853.0230, p. 11. To reach the ultimate capacity, additional “pumping horsepower over current design” would be required. *Id.* Thus, while Enbridge does not anticipate transporting more than 450,000 barrels per day through the Alberta Clipper when it first comes on line, it could, in fact, transport double that amount without the need for additional pipelines. ALJ Report, ¶¶ 99, 100. As a result, it is appropriate for the Commission to consider the full “ultimate” capacity of the line when making its decision.

**b. Southern Lights diluent pipeline.**

The Southern Lights diluent project calls for construction of a new 20-inch pipeline between Superior, Wisconsin and Clearbrook, Minnesota. The Southern Lights pipeline proposes to transport light liquid hydrocarbons known as diluent from the Chicago, Illinois area to the Alberta tar sands. The pipeline is sized to have an “ultimate” capacity of 330,000 barrels per day. *Id.*, p. 13.

The record contains no information about how the Southern Lights diluent pipeline will benefit Minnesota refineries or Minnesota citizens. Nor does the record contain any suggestion that the diluent pipeline is needed by Minnesotans. Rather, according to Enbridge, the purpose of the Southern Lights diluent pipeline is to transport diluents to northern Alberta “where the liquid hydrocarbons will be used to facilitate the

transportation of crude oil from Alberta's oil sands." Enbridge Alberta Clipper CON App., Sect. 7853.0230, p. 8.

There is no specific information in the record about the liquid hydrocarbons Enbridge proposes to transport through Minnesota's forests, prairies, farmlands, wetlands and streams. According to Enbridge, a material safety data sheet is "not yet available since diluent is a generic name referring to a mixture of lighter hydrocarbons, either condensate or refinery grade naphtha or a mixture of both." Enbridge Alberta Clipper Routing App., Sect. 4415.0120, p. 4. The data sheet supplied on condensate makes clear that diluents pose a significant risk to both human health and the environment. They are highly flammable and explosive. *Id.* (MSDA, p. 1). In addition, "a component (benzene) is a known human cancer hazard." Indeed, benzene is "known to produce leukemia in humans" and has been listed as a human carcinogen by NTP, IARC and OSHA. *Id.* (MSDA, pp. 2,3). Leaks or breaks in the diluent pipeline will create a significant public health threat: "vapors may travel considerable distances to a source of ignition where they can ignite, flashback or explode. . . . Vapors are heavier than air and can accumulate in low areas." *Id.* (MSDA, p. 5).

**c. LSr pipeline.**

The LSr project consists of a new 20-inch pipeline that transports Western Canadian crude to Enbridge's tank farm in Clearbrook. The Commission granted a certificate of need and routing permit to Enbridge for the LSr line on June 19, 2008.

According to the Commission's findings, "the LSr project is needed to serve the increasing demand for crude oil throughout the Midwest and beyond." July 19, 2008 Routing Permit Order, p. 4. In addition, the LSr pipeline was found to allow Enbridge to

separate light from medium crude, making its system more efficient. *Id.* The LSr pipeline has an “ultimate” capacity of 300,000 barrels per day. The capacity of the line with existing pumps, however, is 186,000 barrels per day. Enbridge alleged, and the Commission and ALJ found, that with the efficiencies created by the addition of the LSr line, the “net increase in system capacity” upon completion of the LSr line would be 219,000 barrels per day. ALJ Finding, Conclusion and Recommendations, ¶ 93 (March 24, 2008; MPUC Docket Nos PL9/CN-07-464; PL9/PPL-07-360).

MCEA alleged during the LSr proceedings that the LSr pipeline was connected to the Alberta Clipper/Southern Lights diluent project, but Enbridge denied any connection, instead seeking to justify the need for the LSr pipeline based on alleged increased demand in Minnesota and the Midwest. *See, e.g.*, Enbridge Reply to Post-Hearing Comments Filed by MCEA, pp. 6 – 9 (undated, filed February 11, 2008; MPUC Docket Nos. PL9/CN-07-464; PL9/PPL-07-360). The ALJ and Commission adopted the alleged increase in demand as the justification of need for the LSr pipeline. *See* July 19, 2008 LSr CON Order.

**d. North Dakota system expansion**

Concurrent with the LSr project and the Alberta Clipper under consideration here, Enbridge is upgrading its pipeline system in North Dakota with the stated purpose of increasing the supply of crude to its Clearbrook tank farm. According to Enbridge, the upgrades will increase crude transport capacity by 51,600 barrels per day. Enbridge No. Dak. CON App., Sect. 7853.0230, p 7, MPUC Docket No. PL6668/CN-08-253. This will be accomplished by injection of a drag reducing agent and the addition of pump

horsepower to existing pipelines in connecting the Williston Basin to Enbridge's Clearbrook tank farm. *Id.*, Sect. 7853.0230, p. 3.

Enbridge maintains that the North Dakota System Expansion is necessary both because of the need for additional export capacity from the Williston Basin, and because of alleged increased demand. *Id.*, Sect. 7852.0240, pp. 1 – 4. Indeed, the application states: “Demand for crude oil in the United States has increased over the past several decades and is expected to continue increasing into the foreseeable future.” *Id.*, Sect. 7852.0240 p. 3.

**e. Enbridge's expanded capacity to supply crude oil to the Midwest without the Alberta Clipper.**

The North Dakota expansion and the new LSr pipeline flow into Enbridge's Clearbrook facility and are part of Enbridge's “Lakehead” system of pipelines serving refineries throughout the Midwest. *Id.*, Sect. 7853.0240, p. 2. This is the same system that would be served by the proposed Alberta Clipper pipeline. Enbridge Alberta Clipper CON App., Section 7853.0230, p. 4. Thus, the additional crude oil supplied by the North Dakota expansion and new LSr pipeline will all be available to meet the alleged “growing demand” of refineries and consumers in the region.

According to Enbridge's filings, its North Dakota pipelines currently transport an annual average of 110,000 barrels per day to Clearbrook and beyond. Enbridge No. Dak. CON App., Sect 7853.0230, p. 8. The pipeline system currently running from Canada to the Clearbrook facility, meanwhile, is supplying 2,147,000 barrels per day to the same region. Enbridge Alberta Clipper CON App., Sect. 7853.0230, p. 10. Thus, the existing pipeline system, based on figures reported in Enbridge's applications, has the capacity to deliver 2,257,000 barrels per day to Midwest refineries. With the completion of the LSr

pipeline (219,000 additional barrels per day) and the North Dakota expansion (51,600 barrels per day) Enbridge will have added 270,000 barrels per day of annual crude oil supply capacity to the Midwest. That represents a 12% increase in capacity over existing conditions. (This figure would be higher, of course, if one considered the “ultimate” capacity of the LSr pipeline which is 300,000 barrels per day.)

### **3. The Federal Energy Information Administration’s (EIA’s) Forecasts Of Demand For Crude Oil.**

The federal Energy Information Administration (EIA), created by Congress in 1977, describes itself as “the Nation’s premier source of unbiased energy data, analysis and forecasting.” <http://www.eia.doe.gov/neic/aboutEIA/quickfacts.html>. It’s missions is “to provide policy-neutral data, forecasts, and analyses to promote sound policy making, efficient markets, and public understanding regarding energy and its interaction with the economy and the environment.”

<http://www.eia.doe.gov/neic/aboutEIA/aboutus.html>.

The EIA provides both short-term forecasts, published monthly, and long-term forecasts, published annually. <http://www.eia.doe.gov/neic/aboutEIA/quickfacts.html>. The long-term forecasts, relevant to the issue under consideration here, are called the Annual Energy Outlook (“AEO”). *Id.* The 2007, 2008 and 2009 EIA publications forecast demand for energy resources, including crude petroleum, out to 2030. *Id.*

The EIA forecasts are the basis for Enbridge’s assertion that increased demand for petroleum in the Midwest, and the United States generally, necessitates the Alberta Clipper pipeline. *See* Enbridge Alberta Clipper CON App, Sect. 7853.0240, pp. 5 – 10;

ALJ Report, ¶ 111 – 21<sup>2</sup>. The evidence and analysis provided by the Office of Economic Security (“OES”) also relied on forecasts from the federal EIA. *See*, OES, Heinen Direct Test., pp. 18 -31; OES, Heine Rebuttal Test., p. 32 (concluding “through my analysis of the EIA’s 2008 AEO, that there will likely be increases in petroleum consumption over the economic lifespan of these proposed projects”). That the EIA’s Annual Energy Outlook forecasts are at the foundation of this case was made plain in the OES’s June 4, 2008 Reply Brief to the ALJ, where it stated: “The Energy Information Agency’s (EIA) *Annual Energy Outlook* (AEO) is the only credible forecast of petroleum demand in the record.” OES Reply Brief, p. 5. OES describes the EIA forecasts as “the most recent and realistic information available,” and as an “objective, credible, and universally known resource for data and forecasts,” and states that the forecasts are “based on a complex, thorough, and vetted economic model.” *Id.*, pp. 5-6.

The EIA forecasts are required by federal statute to incorporate and consider only those federal and state laws and regulations in effect at the time the forecast is made.

EIA makes this limitation of the forecasts very clear in its publications:

Because analyses by EIA are required to be policy-neutral, the projections in *AEO2008* are based on Federal and State laws and regulations in effect on or before December 31, 2007. **The potential impacts of pending or proposed legislation, regulations, and standards – or of sections of legislation that have been enacted but that require implementing regulations or appropriation of funds that are not provided or specified in the legislation itself -- are not reflected in the projections.**

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<sup>2</sup> While Enbridge also supplied, and the ALJ mentioned, oil sands production and market analyses conducted by the company and Canadian industry groups promoting exploitation of the tar sands, analyses of *production* and *supply* from the Canadian tar fields is not relevant to the question of whether Minnesotans or Midwesterners need the crude proposed to be supplied by the Alberta Clipper. Enbridge admits that, “on the demand side” the forecast evidence was from the Energy Information Administration’s Annual Energy Outlook. Enbridge Post-Hearing Reply to MCEA and Kingstead, p. 6.

*AEO 2008*, p. 16 (emphasis in original). In other words, the AEO's projections of future demand for crude oil out to 2030 *do not* reflect any possible or likely changes in state or federal law or regulation that may affect future demand.

On December 17, 2008, following oral argument before the Commission but prior to the Commission's Orders in these matters, the EIA issued the early release of the *Annual Energy Outlook 2009*. Reuther Aff., Exh. 1. (attached and available at <http://www.eia.doe.gov/oiaf/aeo/>). The *AEO 2009* states that "petroleum-based liquids consumption is projected to be flat" and that "net dependence on imported liquids declines dramatically over the next 20 years." *Id.*, see *infra* 19 - 26.

#### **4. Significant Environmental Effects**

A number of significant environmental effects will result, directly and indirectly, from the Alberta Clipper and Southern Lights diluent pipeline proposal and its connected actions, but these environmental impacts were not adequately studied prior to the Commission's decision.

The pipelines will affect between 3,400 and 6,800 acres of Minnesota land and resources, crossing numerous rivers, streams and wetlands in a number of Minnesota counties<sup>3</sup>. Because it extends across the length of the State, the pipeline has an enormous footprint. For purposes of comparison, for example, Northshore Mining's taconite mining pit, after decades of operation, comprises approximately 3,500 acres. Reuther Aff., Exh. 4. Despite the enormous swath of land impacted by the proposal, little specific information regarding the rivers, streams or wetlands crossed, the specific location of such crossings, the type, extent or regulatory status of the rivers, streams or

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<sup>3</sup> Enbridge sited the 3400 acre total (ALJ Report, ¶¶ 176 – 78), but DNR's ecologist maintains that the actual figure is 6800 acres. November 12, 2008 DNR Memorandum, p. 7 (MPUC Docket Nos. PL9/CN-07-465; PL9/PPL-07-361).

wetlands crossed, or the extent or type of pipeline crossings was gathered to inform the public and decision makers about these environmental impacts.

Construction and operation of the pipelines will result in permanent vegetation removal and/or alteration in the pipelines rights of way. However, no analysis was done of habitat impacts including habitat fragmentation from vegetative changes or removal along the pipeline routes or types of wildlife affected. No reports were provided detailing rare or endangered species impacted by the pipelines.

No analysis or comparison of detailed environmental effects as between the various route alternatives for the pipelines was prepared for this matter. Because of the lack of detail on specific environmental effects, there is likewise no thorough review of alternatives or mitigation measures that could reduce or eliminate the environmental consequences of the pipelines.

Additionally, no analysis was done of the cumulative, connected and/or indirect effects of the Enbridge projects and their increased, connected transport of crude or of the increased refining and fuel burning that would result from the alleged increase in demand for Enbridge-supplied crude. Increased availability and consumption of heavy tar sands crude results in the emissions of additional greenhouse gases (“GHG’s”) and other pollutants. GHG emissions are known to cause climate change which has an enormous significant impact on the environment, none of which was evaluated in environmental review prior to the Commission’s decision. According to a lifecycle analysis<sup>4</sup> of greenhouse gas emissions, 800,000 barrels per day of tar sands crude results in the emission of approximately 132 million tons of carbon dioxide equivalent. Ron Sahu

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<sup>4</sup> A lifecycle analysis computes the total emissions associated with a project. In this case, emissions from the extraction, transport, refining, and combustion of resulting fuels (e.g., “well to wheels”) are considered in sum.

Declaration (MPUC Docket Nos. PL9/CN-07-465; PL9/PPL-07-361). For purposes of comparison, the entire state of Minnesota's yearly emissions are approximately 150 million tons. ALJ Hearing, Testimony of Chuck Dayton, Exh. 6A. Thus, the yearly GHG emissions resulting from the extraction, transport, refining and burning of the crude the Alberta Clipper will ultimately deliver are only slightly fewer than all GHG emissions generated yearly in the entire state.

The Minnesota Department of Natural Resources has agreed with MCEA throughout this proceeding that the environmental review for the project has been insufficient. In his testimony to the Commission on behalf of the DNR, Randall Doneen noted that there is "natural resource information that has not been submitted or incorporated into the route permit documents" that is needed prior to making regulatory decisions. Hrg Transcript, p. 119. Such information included, for example, a report on what rare species may be affected by the pipeline. *Id.* Mr. Doneen noted that there are sections in the corridor where Enbridge has not identified where the pipeline will be and that there's still work to be done in that regard. *Id.*, p. 120.

In a November 12, 2008 memorandum, DNR staff provided a detailed description of the shortcomings of the environmental review for the project. DNR's Regional Environmental Assessment Ecologist wrote: "The ALJ report and the Enbridge documentation are extremely deficient in addressing natural resource issues and addressing our previous comments." November 12, 2008 DNR Memorandum, p. 2 (MPUC Docket Nos. PL9/CN-07-465; PL9/PPL-07-361). DNR's ecologist refers to a November 2008 meeting with U.S. Army Corps of Engineer staff in which Corps and

DNR staff “indicated that much documentation regarding wetland impacts was missing, as well as justification for route choices.” *Id.*, p. 3.

The DNR memorandum lays out multiple problems with the environmental review for the Alberta Clipper project, all of which are shared and were raised by MCEA, including but not limited to, (1) the complete deference to Enbridge and absence of PUC or other regulatory agency oversight of the review, noting that it is a “principle of environmental review in Minnesota” that the government agency control the environmental assessment, not the applicant; (2) the absence of natural resource assessment documentation, including wetlands, rare species and other natural resources; (3) the failure to identify, within the route width, where the pipeline will be located; (4) the failure of the ALJ to even acknowledge receipt of DNR comments and the ALJ’s apparent disregard for such comments; (5) the failure of Enbridge to conduct a comparative route analysis for purposes of natural resource impacts, and the ALJ’s disregard for this deficiency; (6) the absence of any environmental impact information on the ALJ-recommended alternative Fond du Lac route which is a “21.4-mile Greenfield route through high-quality fish and wildlife habitat”; (7) Enbridge’s inadequate assessment of soil separation, resulting in lower productivity and the spread of invasive species; (8) the ALJ’s reliance on “patently erroneous information about the extent and magnitude of this project” and explaining that as much as two times the amount of land as disclosed by Enbridge is likely to be disturbed; (9) the silence of the ALJ with regard to DNR’s comments on rare species; (10) specific concerns with a number of specific water crossings; and (11) the deficiencies of Enbridge’s Environmental Mitigation Plan. *Id.*, pp. 3 – 12.

The DNR memorandum repeatedly expresses the concern, shared and expressed by MCEA, that the environmental review required by the PUC rules must be an equivalent substituted to environmental review conducted under MEPA and that the review provided for the pipeline fails to meet that standard. For example, the memo explains:

DNR believes the route permit process is a substitute form of environmental review and therefore must roughly comply with normal expectations as to substantive content. Reliance on an Enbridge project acreage figure that is 50% off does not, in our opinion, constitute an acceptable assessment of impacts.

*Id.*, p. 7; *see also id.*, p. 2 (“The Route Permit process **is an alternative environmental review process, and is not a weakened environmental review process.**”) (emphasis in original).

Pipeline construction and operation creates real threats to human health and the environment. Enbridge, for example, was recently fined \$1.1 million dollars by the Wisconsin Department of Natural Resources for damage to wetlands and waterways during the construction of a crude oil pipeline through Wisconsin. Reuther Aff., Exh. 6. Leaks and explosions on the existing Enbridge pipelines in Minnesota have caused significant environmental damage and even resulted in the death of two employees. Nov. 25, 2008 Hearing Transcript and Exhibits. Just this month Greenpeace learned about a malfunction at one of Enbridge’s tank farms in Canada that “spewed out 4,000 barrels of oil.” Reuther Aff., Exh. 5. These real threats to the environment and human health were not thoroughly developed and studied and therefore could not factor into the Commission’s deliberations. Under Minnesota law, governmental decisions allowing projects that have the potential for significant environmental effects such as these pipelines must be preceded by a full review of the environmental consequences.

## ARGUMENT

The Commission should reconsider and vacate its Orders granting a Certificate of Need and Routing Permit for the Alberta Clipper and Southern Lights diluent pipelines because Enbridge has failed to meet its burden to demonstrate that the heavy tar sands crude and/or diluent transported by the pipelines is needed. The evidence does not support Enbridge's allegation of increased demand at the state, regional or national level. Moreover, the Commission has not met its obligation to conduct a thorough study of the environmental impacts, direct and indirect, of the proposed pipelines, rendering its decisions premature and in violation of the Minnesota Environmental Policy Act.

### **I. ENBRIDGE HAS NOT MET ITS BURDEN FOR A CERTIFICATE OF NEED.**

#### **A. The Certificate Of Need Statute Establishes The Threshold Requirement That The Applicant Demonstrate Need.**

Enbridge has failed to make the threshold showing that either the Alberta Clipper tar sands crude pipeline or the Southern Lights diluent pipeline is a necessity. Minnesota Statutes prohibit the construction of a pipeline in Minnesota unless the applicant has shown that demand justifies the need for a new pipeline. The statute provides:

No proposed large energy facility shall be certified for construction unless the applicant can show that demand for electricity cannot be met more cost effectively through energy conservation and load-management measures and unless the applicant has otherwise justified its need.

Minn. Stat. § 216B.243, subd. 3. The statute further provides specific criteria that the Commission "shall evaluate" in assessing whether a pipeline is needed, first among them being "the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based." *Id.*

Thus, it is clear from the statute that the Minnesota Legislature established a threshold that must be surmounted before any new large energy facility, including any pipeline, may be built in the state. That threshold is a demonstration that demand necessitates the construction of the new energy facility. While the Legislature instructed the Commission to promulgate rules with assessment of need criteria, the rules must be consistent with the statute, and any interpretation of Commission rules that circumvents the threshold showing demanded by the statute would be invalid.

**B. The Burden Is On The Applicant.**

The burden to demonstrate the threshold issue of need based on demand is squarely on the applicant. The Commission should reject Enbridge's attempt to shift its burden to MCEA or any other party based on the Commission's rule, Minn. R. 7853.0130. An interpretation that shifts the burden away from the applicant to demonstrate need, as a threshold matter to receiving a certificate of need, is plainly contrary to the clear directive in the certificate of need statute.

Enbridge has sought to escape from its burden by pointing to the Commission rule related to alternatives. Minnesota Rule 7853.0130 establishes four general criteria for granting a certificate of need for a pipeline: (1) that denial would "adversely affect" supply (in other words, that there is demand creating a need for the facility); (2) that a more reasonable alternative has not been demonstrated by someone other than the applicant; (3) that the consequences of granting are more favorable; *and* (4) that the facility will comply with all rules and regulations. As MCEA understands Enbridge's position, it reads the second condition above to mean that, if no other party demonstrates a more reasonable alternative to its proposal, it has automatically met its threshold burden

of demonstrating that its proposed pipeline is needed based on demand. *See* Enbridge Proposed Findings of Fact, Alberta Clipper CON, ¶¶ 158, 159. Enbridge’s interpretation is untenable.

The certificate of need *statute* specifically says: “No proposed large energy facility shall be certified for construction unless the *applicant can show*” that demand justifies the need for the facility. Minn.Stat. §216B.243, subd. 3 (emphasis added). The Legislature could not have been clearer in placing the burden for this threshold showing squarely on the applicant, Enbridge.

The Commission’s rule, interpreted consistent with the statute, must require Enbridge to demonstrate demand necessitating a new pipeline. A reasonable interpretation of the rule is that the first criterion, while described in the negative, maintains the applicant’s statutory threshold burden. Presumably denial of a new pipeline would only adversely affect supply if there were, in fact, a demonstrated demand for more oil. Assuming an applicant carries its burden to establish that threshold showing, other parties could still demonstrate more reasonable alternatives to address whatever demand the applicant says its pipeline is designed to meet. Thus, the statute and rule establish two sets of questions that are relevant to this and other certificate of need proceedings: First, did the applicant meet its burden to demonstrate that increasing demand justifies its proposed facility; and second, even if the applicant has shown increased demand, has another party offered a more reasonable alternative than the proposed facility to meet the established demand.

MCEA has claimed throughout this matter, and maintains still, that Enbridge has not met its threshold burden to demonstrate demand necessitating the Alberta Clipper and

Southern Lights diluent pipelines. It is not MCEA's burden to demonstrate an alternative, because Enbridge has not established a need.

**C. The Recent Publication Of The *AEO 2009* Confirms That There Is No Need For The Alberta Clipper.**

**1. *AEO 2009* long-term forecasts project *decreasing*, not increasing, demand.**

The federal agency that Enbridge, the OES, the ALJ, and the Commission relied on in concluding that there will be increasing demand for crude oil in the Midwest and beyond is now projecting that demand for petroleum-based liquids will be “flat” to 2030 and that there will be a “dramatic decline” in net crude imports, including from Canada. Reuther Aff., Exh. 1.<sup>5</sup> The Commission must reconsider and vacate the certificate of need it issued for the Alberta Clipper pipeline because the new forecasts make even clearer that there is no reasonable basis to conclude that an increase in demand for crude oil justifies the Alberta Clipper.

As explained by the OES, the Annual Energy Outlook is an “objective, credible, and universally known resource for data and forecasts” that provides “the most recent and realistic information available.” The most recent forecast from this highly-regarded source confirms what MCEA has alleged throughout – that demand for crude oil (and, in

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<sup>5</sup> The *AEO 2009*, while not available when the ALJ considered this matter or prior to the close of the contested case record at oral argument, *see* Minn. Stat. § 14.61, subd. 2, is properly before the Commission in support of MCEA's request for reconsideration or rehearing. Decisions of the Commission are not reviewable until after a party has requested reconsideration and the Commission has made a final decision on such request. Minn. Stat. § 216B.27; Minn. R. 7829.3000. The requirement mandates that the party set forth the grounds relied upon and places no constraint on the ability of the party to raise additional concerns, evidentiary or legal. A specific ground relied upon in MCEA's request that the Commission reconsider or rehear its certificate of need decision is the newly available, accurate, reliable, and credible *AEO 2009*. Therefore, it is properly before the Commission. *Trout Unlimited v. Minn. Dep't of Agriculture*, 528 NW 2d 903, 908 (Minn. App 1995) (documents available to and in possession of agency at time of decision are part of record)

particular, heavy tar sands crude oil) is *not* projected to increase and the additional supply capacity of the Alberta Clipper is not needed.

The *AEO 2009* early release reference case, like all other EIA forecasts, only considers *already-enacted* state and federal laws and regulations in its models. For the first time, however, the EIA has acknowledged that marketplace actors are taking into consideration the possibility of future greenhouse gas regulations. “Although no Federal legislation has been passed,” EIA states, “regional groups and State regulators are enacting regulations and the financial community is behaving as if they anticipate regulation.” Reuther Aff., Exh. 1, p. 22. To reflect the real behavioral change in the financial community, the *AEO 2009* reference case incorporated a 3-percentage-point cost of capital penalty for investments in GHG-intensive technologies to its model. *Id.* Thus, the *AEO 2009* still suffers from the major deficiency that it does not incorporate directly into its forecast modeling the very likely policy changes that will affect demand. It has, however, accounted for the changed behavior of marketplace actors who are making projections based on the likelihood of new laws and regulations by raising the cost of capital for some technologies.

The *AEO 2009* early release reference case forecasts **zero** increase in demand for crude oil in its forecast to 2030: “Petroleum-based liquids consumption is projected to be flat . . .” Reuther Aff., Exh. 1, p. 7. As shown in Figure 1, below, the consumption of fuels from crude oil is expected to decrease

slightly from 20.65 to 20.12 million barrels per day between 2006 and 2030.

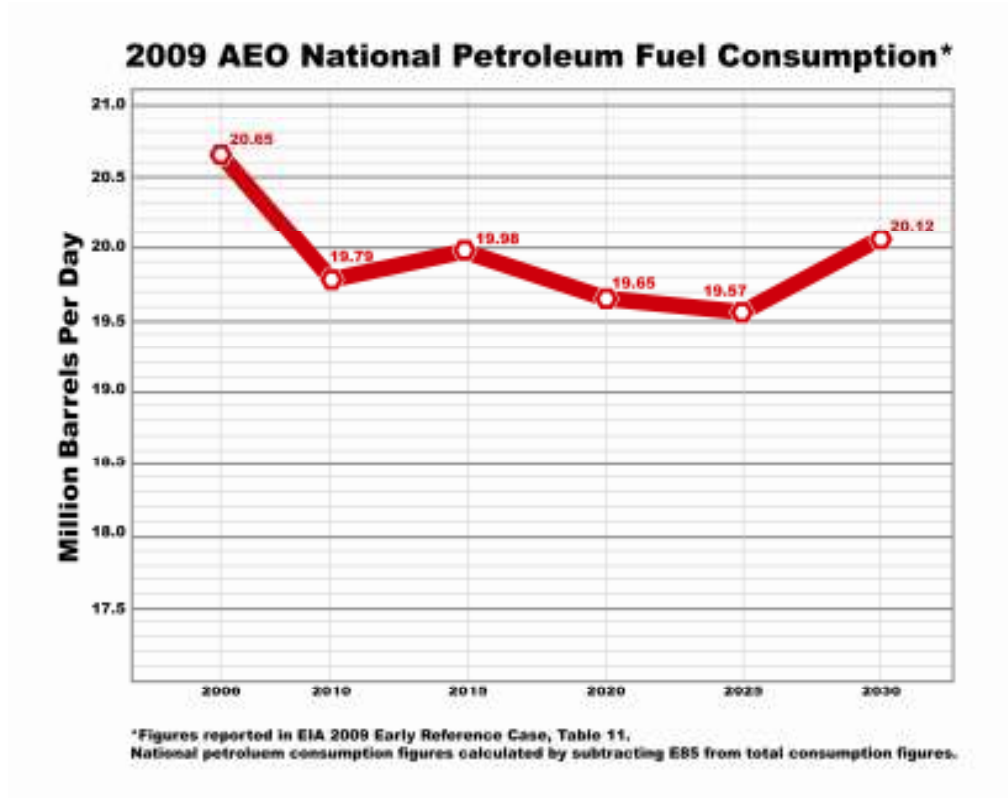


Figure 1.

By far the largest type of liquid fuel consumed in the United States is motor gasoline. Indeed, approximately 50% of the overall liquid fuel consumption, or 9.25 million barrels per day, is in the form of gasoline. Reuther Aff., Exh. 3. The amount of gasoline derived from crude oil, such as the tar sands, for example, is projected to *decrease* in the *AEO 2009* reference case by 0.7% annually. As shown in Figure 2, current consumption of 9.25 million barrels per day decreases by over a million barrels per day to 7.97 million barrels per day in 2030.

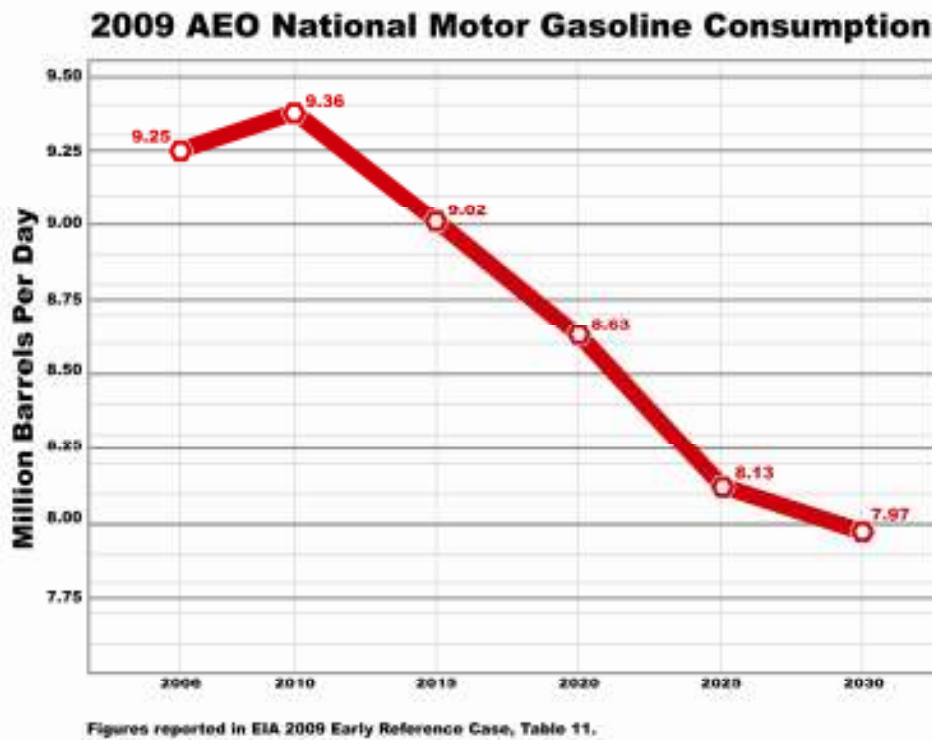


Figure 2.

In sum, the “most recent and realistic information available,” – the long-term forecasts of the EIA published in the *AEO* 2009 – project no increase in demand for the crude oil Enbridge proposes to deliver in the Alberta Clipper pipeline. Enbridge’s case for increased demand (and OES’s review of Enbridge’s showing) relied on EIA projections that have been updated and replaced. In light of these updated forecasts, the Commission cannot credibly find that Enbridge has met the threshold requirement of the certificate of need statute. The “increased demand” Enbridge alleged to justify this large new pipeline is a fallacy. MCEA urges the Commission to reconsider and vacate its earlier orders, or, at a minimum, order a new hearing on the matter.

**2. U.S. (including Minnesota and Midwest) dependence on imported petroleum *declines dramatically* over the next 20 years.**

According to the *AEO 2009* early release reference case, U.S. reliance on and need for imported petroleum greatly declines over the next 20 years. While Enbridge has sought to play on what appears to be an urban myth suggesting declining domestic production and a supposed need for increased imports, EIA's newest publication sets the record straight: "Net dependence on imported liquids declines dramatically over the next 20 years." Reuther Aff., Exh. 1, p. 6. This is true of imports from Canada as well as imports from other sources.

The 2008 Annual Energy Outlook already showed that net imports of crude oil were *decreasing* over time to 2030. Nov 25, 2008 Hearing Transcript, p. 24 and referenced exhibit. The reference case in the *AEO 2009* forecasts an even more dramatic decline in the need for imported petroleum than had been projected in 2008. Net imports have already declined from 60 percent to 58 percent, and they are projected to decline much further – to 41 percent of total U.S. consumption by 2030. *See* Reuther Aff., Exh. 1. p. 6. Figure 4 below, taken from the *AEO 2009*, shows the dramatic decrease EIA is projecting.

### Net Dependence on Imported Liquids Declines Dramatically Over the Next 20 Years

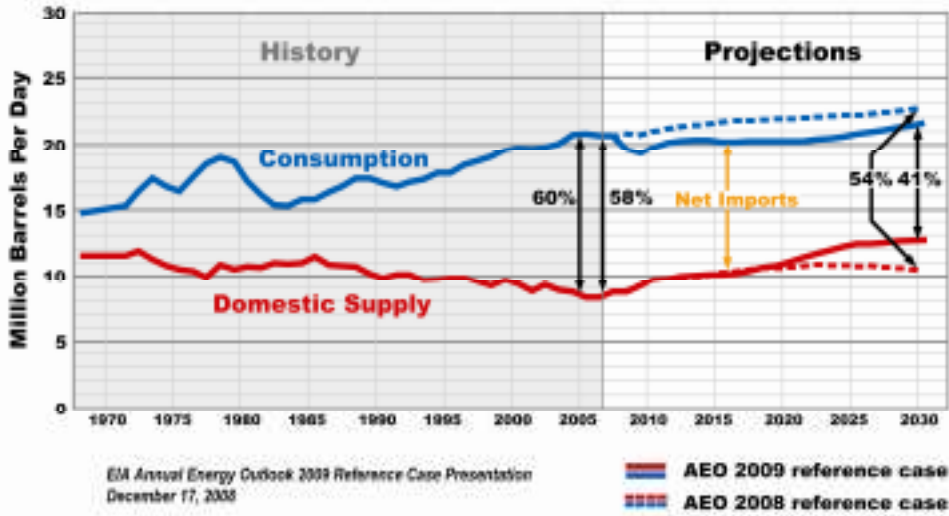


Figure 4.

In addition to analyzing and forecasting the need for imports, the EIA projections also predict the sources of petroleum to supply expected demand. Reuther Aff., Exh. 2. With regard to crude oil imports, *AEO 2009* reports that the 1.6 million barrels per day the United States imported from Canada in 2006 will *decrease* to 1.38 million barrels per day by 2030. This reduction, represented below in Figure 5, is a 0.7% annual decrease in Canadian crude oil imports according to the EIA. *Id.*

### 2009 AEO Imported Crude Oil From Canada

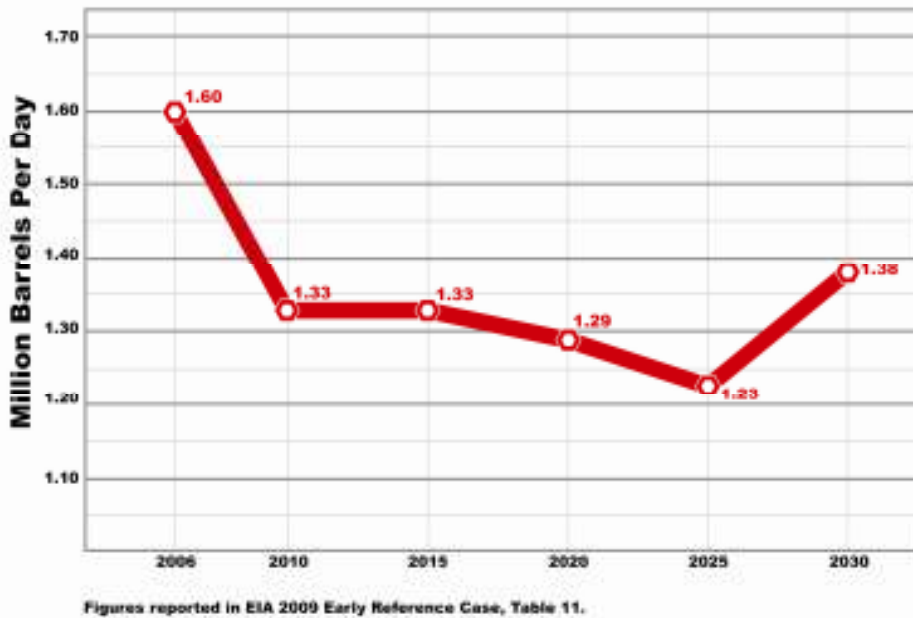


Figure 5.

The data show that the *existing* pipeline infrastructure has sufficient capacity – indeed, more than sufficient capacity – to meet U.S. demand for Canadian crude for at least the next two decades. Overall, demand for petroleum-based fuels is flat; domestic production is expected to *increase*; and the need for imports *declines dramatically*. Enbridge’s allegation that future increased U.S. demand necessitates a new large pipeline is without evidentiary support.

**D. Even In The Absence Of The New Forecasts, It Was Clear That Enbridge Failed To Carry Its Burden.**

It was not reasonable for Enbridge, OES, and the ALJ to ignore the known and very likely future policy changes affecting demand for tar sands crude when assessing

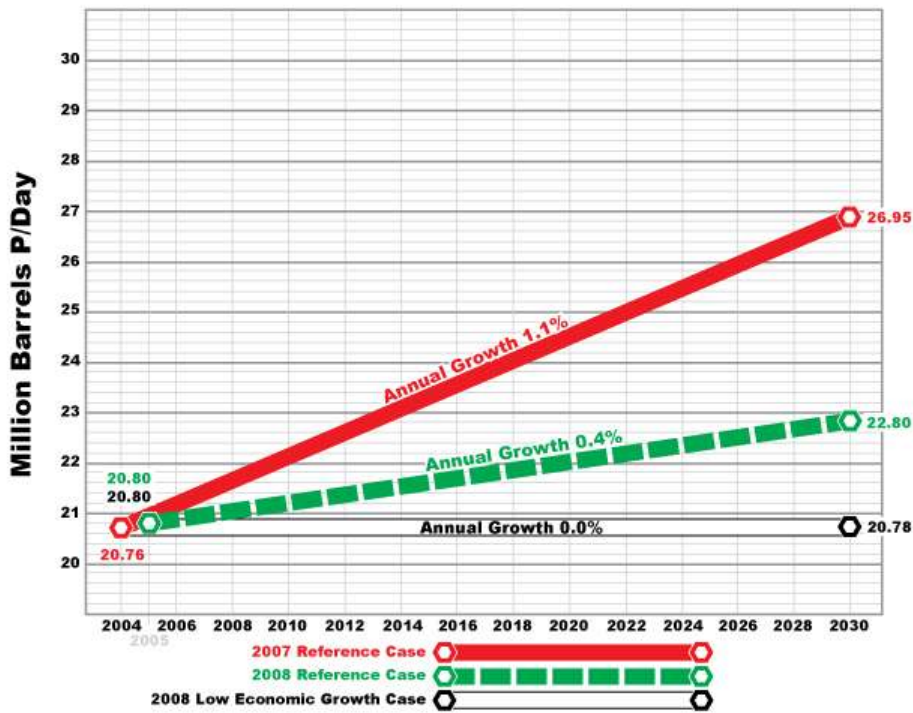
need for a new large tar sands pipeline. Indeed, this failure renders the need determination deficient even in the absence of the new EIA forecasts.

**1. The record demonstrates that statutory and regulatory policy changes have a huge impact on crude oil demand.**

The differences between the forecasts of demand in the *AEO 2007* and the *AEO 2008* make obvious that even small changes in statutes or regulations can have an enormous effect on demand for crude oil. The passage of one single bill – the 2007 Energy Independence Security Act – dramatically reduced the projected demand for crude oil between the 2007 and 2008 analyses.

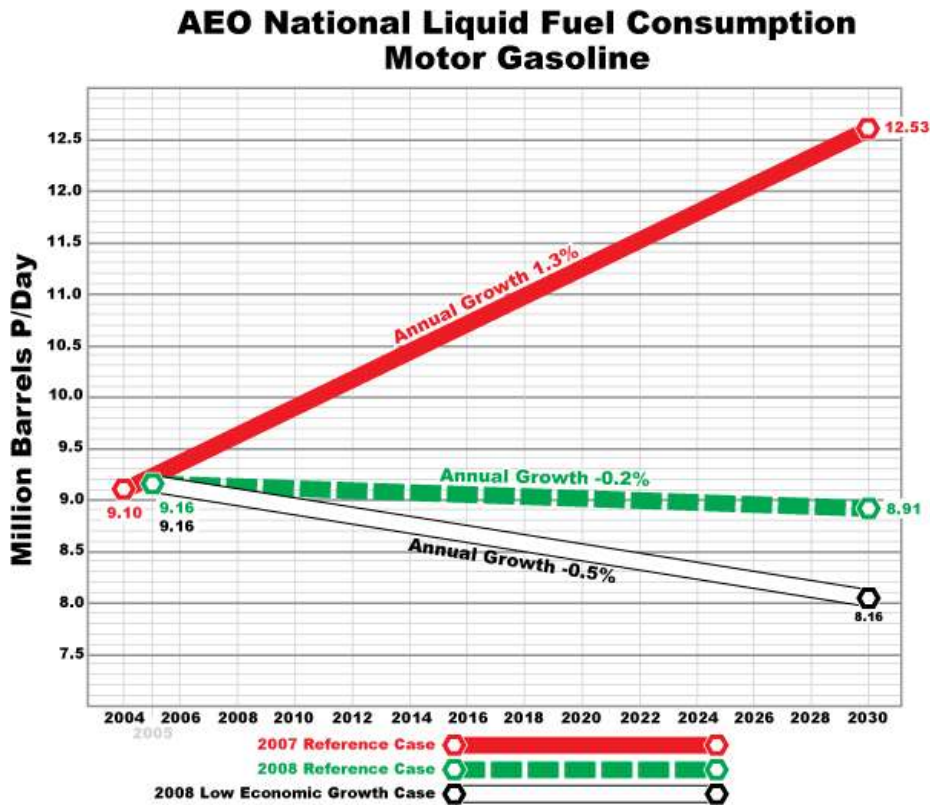
As reported in Enbridge’s certificate of need application, EIA in 2007 stated that U.S. demand for crude would grow from 21 to 27.6 million barrels per day by 2030. In the *AEO 2008*, however, demand in 2030 was forecast at 22.80 million barrels per day. *See* Figure 6, below (Nov 25, 2008 Hearing Transcript Exhibit). Thus, enactment of one federal statute changed forecasted consumption dramatically.

## AEO National Liquid Fuel Consumption



**Figure 6.**

The same dramatic change could be seen in the forecasts for consumption of motor gasoline between the 2007 and 2008 publications. In the *AEO 2007*, EIA reported it expected a 1.3% annual increase in demand; in the *AEO 2008*, that increase had become a 0.2% annual *decrease* in demand. See Figure 7, below (Nov. 25, 2008 Hearing Transcript Exh.).



**Figure 7.**

According to the EIA, these very dramatic changes in the forecasts for consumption and demand were due to former President Bush’s signing the 2007 energy legislation: “The combination of a higher CAFE standard for LDV’s (light duty vehicles) and an updated RFS (renewable fuel standard) has a substantial impact on the level and mix of liquids consumption.” *AEO 2008*, pp. 3. If one piece of federal legislation, containing only two standards that bear on the consumption of crude oil, can have such a dramatic impact on demand, it is unreasonable to base an assessment of need on forecasts for increased demand that ignore all future similar laws and regulations. It is particularly unreasonable given the global warming crisis the nation faces, the commitments elected officials in Minnesota, the region and the nation have made to address the crisis, and the election of a new administration.

**2. The record demonstrates that statutory and regulatory changes further affecting demand for crude oil are very likely, indeed, certain.**

It is undisputed that future laws regulating and requiring a reduction in GHG emissions are likely if not certain. MCEA has in its previous filings and arguments to the ALJ and the Commission provided a wealth of evidence on state and federal laws which establish *policies* and *goals* favoring GHG reductions as well as statutory and regulatory proposals which, in the future, will require reductions in GHG emissions. Rather than reiterating at length the existing policies and legislative proposals here, MCEA relies on its previous submissions and provides the Commission with the following brief outline of relevant considerations:

- Minnesota lawmakers enacted, and Governor Pawlenty signed, a statutory goal of reducing GHG emissions below 2005 levels 15% by 2015, 30% by 2025, and 80% by 2050 (Minn. Stat. 216H.02);
- Minnesota lawmakers enacted a process by which the state will develop policies to “attain the goals” which requires yearly reports on progress and the development of legislative proposals to reach the goals (Minn. Stat. § 216H.07);
- Governor Pawlenty convened a state-wide planning body to develop strategies for achieving the statutory goals. That body issued a major report with policy recommendations;
- Governor Pawlenty has committed the state to participate in the Midwest GHG Accord, which, among other things:
  - Commits Minnesota to participation in a regional regulatory program, to be in place by 2010, that will cap and lower emissions consistent with the goals of the state;
  - Requires the state to work toward meeting 50% of transportation fuel demand with bio-fuels or other low-carbon fuels by 2025;
- President Obama has placed climate change and carbon regulation among his top priorities, noting support for, among other things:

- Strong national GHG reduction targets based on science;
  - Enacting an economy-wide cap and trade regime to achieve reduction targets;
  - Reducing US consumption of oil by 35% or 10 million barrels per day by 2030;
  - Declaring CO2 a pollutant for regulation under the Clean Air Act;
  - Approving the California Clean Car waiver; and
  - Establishment of a low carbon fuel standard to speed the introduction of non-petroleum fuels.
- Both houses of Congress are now controlled by majorities from the President's party;

All of these policies and proposals will affect demand for tar sands crude and the need for the Alberta Clipper pipeline. In a carbon constrained economy, the consumption of, and demand for, petroleum-based fuels will necessarily decrease. Because crude from the tar sands is considerably more carbon intensive than crude from other sources, consumption and demand for tar sands derived fuels will decrease most precipitously. These basic facts have been wholly ignored in assessing the need for the Alberta Clipper pipeline.

**3. The failure to account for expected carbon regulation is both unreasonable and arbitrary.**

The failure to consider the effects that future carbon regulation will have on forecasts of the demand for tar sands crude is unreasonable and contrary to the certificate of need statute. The Minnesota Legislature directed the Commission to evaluate “the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based.” Minn. Stat. § 216B.243, subd. 3(1). It further mandated that the Commission evaluate “the effect of existing or possible energy conservation programs . . . or other federal or state legislation on long-term energy demand.” *Id.* Moreover, the Legislature required evaluation of “the *policies*, rules, and regulations of other state

and federal agencies and local governments.” *Id.* (emphasis added). Here, the OES, ALJ, and now the Commission, have failed to critically evaluate Enbridge’s claim that demand for tar sands crude will increase.<sup>6</sup> Enbridge’s evidence of need is based on an allegation that demand will increase according to a “business as usual” model. It is simply not rational in the current environment to adopt energy consumption forecasts based on business as usual modeling. The decision to ignore future regulation is not reasonable or consistent with the certificate of need statute.

Moreover, failing to acknowledge the effect state and federal laws regulating carbon emissions will have on demand for extremely carbon-intensive tar sands crude oil is arbitrary in light of the Commission’s other recent decisions. This Commission is on record in the Big Stone II docket as having considered and, indeed, conditioned its approval of the new coal plant based on the expectation that carbon emissions will be regulated and will affect the price of carbon-intensive energy sources such as coal. To not do so here is wholly arbitrary.

The Commission is statutorily obligated to assess Enbridge’s allegation that a new pipeline is needed based on the *accuracy* of the long-range demand forecasts, the effect of *possible* programs and legislation on demand, and the *policies* of state and federal government. The decision to ignore the likelihood of carbon regulation and its effect on demand for tar sands crude oil is unreasonable and arbitrary.

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<sup>6</sup> There is no question that Enbridge, the ALJ and OES *did not* consider any future policy or regulatory conditions that could affect demand forecasts. As discussed earlier, the allegation (and later, finding) that demand will increase was based on the EIA’s Annual Energy Outlook long-term forecasts which consider only laws that are already enacted. *See* ALJ Report, Conclusion ¶ 5; Heinen Testimony, May 13, 2008 hearing transcript, p. 243.

**E. Even If Demand For Crude Oil Were Projected To Increase, Which It Is Not, The Alberta Clipper Pipeline Would Not Be Needed To Meet Additional Demand.**

Even if one assumed, *arguendo*, that demand for crude would increase, Enbridge still has not demonstrated need for the Alberta Clipper. Enbridge is already in the process of adding additional capacity to its system, and that additional capacity could meet any increase demand without adding the capacity proposed by the Alberta Clipper.<sup>7</sup>

If demand for crude delivered through Enbridge's system were to increase, any such increase can be met with the new LSr pipeline (an additional 219,000 barrels per day) and upgrades that will increase supply from Montana and North Dakota without the necessity of laying another pipeline (51,900 barrels per day). These sources of additional capacity were not considered by the ALJ or the OES in reviewing whether Enbridge met its burden to demonstrate that the Alberta Clipper was necessary to satisfy alleged increased demand for crude oil. Together, these sources represent a 12% increase of supply capacity on Enbridge's pipeline system transporting crude to the Midwest. There is absolutely no reliable or accurate forecast that predicts demand for crude oil will increase over the near or long-term by more than 12%. Indeed, the *AEO 2008*, which was the basis for OES's analysis of need, predicted that demand in the West North Central Region would increase only 2% by 2030. *AEO 2008*, Supplemental Table 4. For the East North Central Region, *AEO 2008* predicted 0% growth in demand to 2030. *Id.*, Supplemental Table 3. The West and East North Central Regions comprise the entire

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<sup>7</sup> This Commission has already found, in the MinnCan proceeding, that Enbridge's capacity, prior to any recent upgrades or proposals, was sufficient to supply the Minnesota refineries through 2023. *See* MinnCan ALJ Report Finding ¶ 62 (noting that the existing Enbridge pipelines, without any expansion, were sufficient to supply the Minnesota refineries through 2023). Thus, the expansions and upgrades proposed by Enbridge will presumably add supply that is available for any increases in demand that may occur outside Minnesota.

Midwest and are the markets Enbridge has claimed will be in need of the crude oil it seeks to deliver.

Thus, even assuming, *arguendo*, that the *AEO 2008* forecasts are accurate and reliable in predicting a slight increase over the long-term in Midwestern demand for energy from crude oil, that increased demand – possibly 2% by 2030 – will be more than satisfied by the 12% capacity expansion Enbridge will accomplish with its North Dakota line upgrades and the completion of the LSr pipeline.

Moreover, as the Commission is aware, Enbridge is not the only pipeline company transporting Canadian crude oil to the Midwest. A competing pipeline company, TransCanada, has received approval for and is currently constructing a 590,000 barrel per day pipeline that will increase supply capacity to the same Midwestern market.

[http://www.transcanada.com/keystone/keystone\\_pipeline.html](http://www.transcanada.com/keystone/keystone_pipeline.html).

In sum, Enbridge has failed to demonstrate a need for the Alberta Clipper. No reliable forecast that takes into account future carbon regulation could possibly show increasing demand. Indeed, the *AEO 2009*, even without considering future regulation, shows that demand for petroleum-based liquid fuels is flat to 2030. Even if one assumed some increase in demand, it is more than met through increases in capacity available to Enbridge without construction of the Alberta Clipper.

**F. Enbridge Has Failed To Meet Its Burden To Demonstrate That Minnesota, Midwestern Or U.S. Demand Necessitates The Construction Of The Southern Lights Diluent Pipeline.**

The certificate of need statute requires that a certificate be obtained, and need be demonstrated, for *each* pipeline. The fact that the Commission created a combined docket for two separate pipelines does not change the statutory requirements.

A certificate of need is required for every “proposed large energy facility.” Minn. Stat. § 216B.243. No “facility” may be constructed unless the applicant has shown demand justifying its need. *Id.* A “pipeline” is a “facility.” Minn. Stat. § 216B.2421. Thus, Enbridge has actually applied to the Commission for two certificates of need, one for the Alberta Clipper and one for the Southern Lights diluent pipeline.

The record does not contain evidence that Minnesota, Midwest, or U. S. demand necessitates the Southern Lights diluent pipeline. Indeed, the only basis provided for building the Southern Lights diluent line is the expressed desire of Canadian companies to increase their ability to transport additional tar sands crude worldwide. There is absolutely no evidence that the Southern Lights diluent line will result in any benefit to Minnesota consumers, nor is there any evidence that the pipeline is needed based on U.S. demand.<sup>8</sup> The Commission’s order granting a certificate of need for the diluent pipeline saddles Minnesota with all of the burdens and risk of an enormous pipeline transporting carcinogenic materials so that Canadian companies can further exploit and transport throughout the world the “dirtiest” crude oil on Earth. The extraction, transport, refining, and burning of increasing amounts of tar sands crude *directly* adversely affects Minnesota’s environment and is contrary to Minnesota’s interests and public policy goals. In bearing the risk and burden of the diluent pipeline and assisting Canadian industry with increased exploitation of a fossil fuel source that we know is causing Minnesota’s and the world’s climate to change, the Commission’s order stands in direct conflict with Minnesota’s interests. That cannot be what the Legislature meant when it

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<sup>8</sup> In fact, if one subscribed to Enbridge’s erroneous suggestion that additional crude supply capacity will reduce Minnesota or Midwest crude oil prices as compared to other regions, then the addition of the diluent pipeline will work *against* Minnesota and Midwest interest. Providing more diluent to Canadian producers creates opportunities for *more* markets and, under Enbridge’s economic theory, Minnesota and the Midwest would pay *higher* prices for Canadian crude as producers find additional markets for their product.

prohibited construction of a pipeline unless the applicant proved that Minnesota's demand for energy necessitated the pipeline.

## **II. ENVIRONMENTAL REVIEW FOR THE PROPOSED PROJECTS WAS INADEQUATE.**

Environmental review sufficient to satisfy the requirements of the Minnesota Environmental Policy Act ("MEPA"), Minn. Stat. §116D, must be completed prior to the Commission issuing any approval or permit for Enbridge's projects. The certificate of need and routing permit in this matter were issued without adequate environmental review. Therefore, even if the Commission is not persuaded to reconsider the matter based on the assessment of need arguments presented above, it should withdraw its orders pending completion of adequate environmental review, at which point it can, based on a full record of environmental consequences of its actions, reconsider Enbridge's request.

### **A. The Basic Requirements Of Environmental Review Are Clearly Stated In Statute And Rule.**

Minnesota statutes and rules make clear by their plain language that pipeline projects must be preceded by environmental review. Minnesota Statutes Section 116D.04, subdivision 2a, requires all state agencies to prepare an EIS whenever there is the potential for significant environmental effects as a result of a major government action. Minnesota Rules 4410.2000, subpart 2, and 4410.4400, subpart 24, provide that an EIS is mandatory for pipelines. Minnesota Rules 4410.4400, subpart 24, provides that the PUC is the responsible governmental unit for preparation of pipeline EISs.

Environmental review must contain specific and detailed information about all potential environmental effects in an analytical, as opposed to encyclopedic, fashion. Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.2300. All connected and/or phased

actions, including both of the pipeline sections segregated into two dockets here as well as other connected actions from mine to refinery must be evaluated in a single environmental review document. Minn. Stat. § 116D.04; Minn. R. 4410.2000, subp. 4. Environmental review must also include analysis of the cumulative effects of related or reasonably anticipated future projects. *Id. See also*, 4410.1700, subp. 7. The direct as well as indirect effects must be addressed. Minn. R. 4410.2300(H).

In addition, in instances where a federal agency is conducting environmental review for a project that is also subject to state environmental review requirements, state agencies “shall cooperate with federal agencies to the fullest extent possible to reduce duplication.” Minn.R. 4410.3900, subp. 1. Additionally, “[i]f a federal EIS will be or has been prepared for a project, the [state agency] shall utilize the draft or final federal EIS as the draft state EIS for the project . . .” Minn. R. 4410.3900, subp. 3.

Here, in addition to the Certificate of Need and Routing Permit, Enbridge must obtain a Presidential Permit from the United States Department of State prior to constructing the Alberta Clipper. The U.S. State Department determined that the project had the potential for significant environmental effects and required a full Environmental Impact Statement (EIS).

<http://albertaclipper.state.gov/clientsite/clipper.nsf/scopecomments.pdf?OpenFileResource>. The federal draft EIS is currently available for public comment.

<http://albertaclipper.state.gov/clientsite/clipper.nsf?Open>. Despite knowing that the federal government was working on a full EIS, the Commission proceeded with permitting the Alberta Clipper without, in any way, coordinating with the federal agency responsible for the federal EIS or relying on the federal EIS. This clearly violates

Minnesota Rules *requiring* cooperation with the federal agency in such instances and the use of the federal environmental documents in the state proceedings.

Until a final federal EIS is issued and determined adequate, the Department of State may not issue a Presidential Permit. 42 U.S.C. § 4332. Thus, regardless of any approval the company may receive from the Commission, Enbridge cannot begin construction on the Alberta Clipper until the federal environmental review is finalized and approved. There is no legitimate basis for the Commission's failure to coordinate with the federal government and use the information developed in the federal EIS to inform its consideration of Enbridge's requests for a certificate of need and routing permit.

**B. "Alternative Review" Is Not An Exemption From Environmental Review.**

While MEPA allows the Environmental Quality Board ("EQB") to develop alternative environmental review processes, those alternatives must "address the same issues and utilize similar procedures as an environmental impact statement." Minn. Stat. § 116D.04, subd. 4a. Moreover, EQB's rule on alternative review requires the alternative procedure to meet certain minimal criteria which were not met here. Minn. R. 4410.3600, subp. 1.

MCEA maintains that the PUC's routing and certificate of need rules, at least as they have been interpreted and applied in this proceeding, do not satisfy the basic requirements of MEPA. While the Environmental Quality Board approved the pipeline permitting rules as alternatives pursuant to Minn. R. 4410.3600, its approval is grounded in a finding that the pipeline environmental analysis will be "the equivalent to the EIS review requirements." MCEA Exceptions to ALJ Report, Reuther Aff. Exh. 8 *In the*

*Matter of the Approval of EQB Pipeline Routing Rules*, FOF ¶ 3. Significantly, at the time the EQB approved the rules, the EQB itself was charged with determining the adequacy of the environmental review for pipeline decisions. Its Findings indicate a broad interpretation of what could be considered, quite different from the narrow approach taken by the Commission here. *See id.*, FOF ¶ 5 (stating that impacts include “but are not limited to the impacts for which criteria are specified” and noting that “other environmental effects” could be identified by citizen advisors to the Board, public hearings and public meetings). Moreover, the environmental challenges confronting the State today are different from those in 1989 when the EQB approved the routing rules as an alternative. A cramped interpretation of those rules, as has been applied here, does not satisfy the mandates of MEPA.

As MCEA and DNR have demonstrated in multiple comment letters and previous filings, the “environmental review” for these pipelines fell far short of what is required under MEPA. Among the shortcomings are: (1) no scoping was done that allowed the public (or internal agencies) to comment on the scope of the environmental review; (2) no draft environmental review document was put on public notice and made available for review and comment; (3) Enbridge’s “environmental assessment supplement,” if it is supposed to substitute for environmental review document, is wholly inadequate; (4) Enbridge’s submission lacks the level of detail necessary to evaluate natural resource impacts; (5) the range of human health and environmental impacts from leaks and breaks is unknown; (6) connected or phased actions are not considered; (7) there is no consideration of indirect effects; (8) there is no cumulative impacts analysis; (9) the scope of the review is impermissibly narrow; (10) no one from the RGU, which is the

Commission, actively participated in preparing, overseeing or reviewing the environmental review; (11) without the information required by MEPA, the Commission is unable to take the requisite “hard look” at the significant environmental effects of this project, its alternatives and mitigation measures; (12) there has been no finding by the Commission that the review was adequate as required by MEPA.

In sum, MCEA maintains that the pipeline rules, as applied by the Commission in this proceeding, do not meet the basic requirements of MEPA. Therefore, the rules are not a valid substitute for an EIS. *Minnesota Ass’n of Homes for the Aging v. Department of Human Services*, 385 N.W.2d 65 (Minn. App. 1986) (rule as applied appropriately challenged in context of contested case proceeding). The Commission, as the RGU for pipeline proceedings, has the obligation to comply with MEPA. It has not. Adequate environmental review is a condition precedent to taking any other action to further or assist a project. Until the environmental impacts of the Alberta Clipper and Southern Lights diluent pipelines are adequately studied in an EIS or other equivalent document and the Commission considers those impacts, its approvals can have no valid effect.

### **III. The Commission’s failure to provide notice violated its own rules.**

The failure to publish notice of Enbridge’s application in the State Register likely prejudiced parties who would have otherwise sought to comment on and possibly intervene in the certificate of need and permitting proceeding for the Alberta Clipper, Southern Lights diluent, and LSr lines. MCEA’s legal assistant, for example, is charged with reviewing the State Register and sending notices to MCEA program and legal staff on matters of possible interest. Other environmental organizations, energy advocacy

organizations, news outlets and concerned individuals likewise use the State Register to track projects of interest.

The Commission's rule requiring notice in the State Register is rooted in the due process rights of those potentially adversely affected by the Commission's decisions to receive notice and an opportunity to participate in its proceedings. Adequate notice is integral not only to the Commission meeting its statutory mandate but also to the public's perception of the Commission being open to consideration of and participation by all concerned Minnesotans. "The commission *shall* publish notice of the certificate of need filing in the State Register and shall solicit public comment on the application." Minn. R. 7829.2500, subp. 4 (emphasis added). The Commission is legally bound to follow its own rules. *Springborg v. Wilson & Co.*, 73 N.W.2d 433, 435 (Minn. 1955).

The Commission may grant a variance to its rules only if it finds that "enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule." Minn. R. 7829.3200. The Commission's Order states that because it determined Enbridge's proposed pipelines "are needed to serve the public interest, needless delay would burden that interest." This finding, however, does not establish that providing notice in the State Register and opportunities for the public to participate would "impose an excessive burden upon the applicant." Enbridge will not be – indeed, cannot be – burdened by delay in these proceedings because, as explained above and in MCEA's November 21, 2008 letter to the Commission, the pipelines proposed here are subject to federal approval and the federal draft environmental impact statement is just now being reviewed.

Moreover, the Commission's use of the phrase "needless delay" appears to dismiss the important role the public plays in bringing information and opinion to the decisions of elected and appointed public officials. The delay would hardly be "needless" since it would provide notice and an opportunity to comment on the pipelines to those who earlier had not received such notice and opportunity.

The Commission's recitation of other ways in which an interested person might have found out about the Alberta Clipper and Southern Lights diluent pipelines are not a substitute for publication in a state-wide document designed specifically for the purpose of providing notice. And its conclusion that the public received "adequate notice" is not relevant to the question presented. Clearly, those who read the State Register did not receive notice. Unless the Commission can show that publishing notice in the State Register would impose an "excessive burden" on the applicant, it must follow its own rule.

### **CONCLUSION**

Enbridge has failed to meet its burden to demonstrate that there is demand justifying a need for the Alberta Clipper tar sands crude oil pipeline. It has failed to meet the same burden for the Southern Lights diluent pipeline. Because it is both unreasonable and arbitrary for this Commission to defer to stale demand forecasts which do not take into account future carbon regulation, the Commission should reconsider and vacate its certificate of need orders. In the event the Commission believes its decision would benefit from further development of the record based on the *AEO 2009*, it could, alternatively, order rehearing.

Additionally, no adequate environmental review was completed prior to the Commission's action approving the certificate of need and routing permit in this matter. If the Commission declines to reconsider or rehear based on the issue of need, it should nonetheless withdraw its approvals and order an EIS or equivalent environmental study. Finally, the Commission must either explain how publication of notice and providing an opportunity for others to participate in these proceedings would create an "excessive burden" or it must follow its own rules.

Dated: January 20, 2009

RESPECTFULLY SUBMITTED:

/s/ Kevin S. Reuther

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