

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

**In the Matter of Application of Enbridge Energy,  
Limited Partnership and Enbridge Pipelines  
(Southern Lights) LLC for a Certificate  
Of Need for the LSr Pipeline Project**

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY  
POST-HEARING REPLY COMMENTS;  
AND PROPOSED FINDINGS OF FACT;  
CERTIFICATE OF NEED**

**POST-HEARING REPLY**

This post-hearing reply and proposed findings of fact are filed on behalf of the Minnesota Center for Environmental Advocacy (“MCEA”). MCEA has made its primary points in its initial post-hearing comments. A few items in the post-hearing briefs of the applicant Enbridge Energy Limited Partnership and Enbridge Pipelines LLC (hereinafter collectively “Enbridge”) and the Department of Commerce (“DOC”) require a response. The Enbridge and DOC post-hearing briefs largely restate various conclusory statements made in the applications and testimony, but fail, as set forth in MCEA’s initial post-hearing comments, to address the items presented on cross-examination and fail to address the length and breadth of the legal requirements for a Certificate of Need (“CON”) for the LSr pipeline project. (the “LSr”).

The DOC brief in particular continues to rely on conclusory assertions with little to no supporting detail evidence. DOC and Enbridge also admit to important facts of petroleum supply and demand that weigh against granting a CON to the LSr. For example, DOC claims that considering the increase in population, petroleum demand will “likely” increase. There is no evidence except Mr. Heinen’s testimony. As set forth in MCEA’s initial post-hearing comments, Mr. Heinen’s testimony was not well-supported on these points. Even assuming population

increase predictions<sup>1</sup> are accurate, the connection to increased demand is tenuous and possibly nonexistent, given Mr. Heinen's failure to investigate and consider evidence at the Minnesota Department of Transportation ("MnDOT") that Minnesotans are driving less and will likely be driving less,<sup>2</sup> will be driving more fuel efficient cars, burning more ethanol or biofuels as opposed to conventional petroleum, and will be the subject of ongoing policy efforts at the state and federal level to reduce greenhouse gas emissions in transportation.

Similarly, the DOC's brief, page 12, makes a conclusory statement that the LSr will increase reliability and efficiency of oil supply for Minnesotans. As set forth in MCEA's post-hearing comments, the evidence does not support this statement. DOC acknowledges in its testimony and in its brief on page 7 that LSr is simply a small part of a much larger network of petroleum pipelines, including lines owned by the applicant Enbridge. Petroleum moving through LSr is not reserved to Minnesota. (*See also*, T. 22-24; 57). Enbridge's brief also notes on page 5 multiple expansions of Enbridge's systems throughout Canada and the U.S. Petroleum moving through the LSr is not even necessarily reserved for the Midwest or the U.S. Rather, Enbridge will move petroleum for and to the buyers or markets where prices are the highest and those prices will be driven by a world market. (Exhibit 208, p. 35; T. 55-58). *See also*, Illinois testimony and graph exhibits of Dr. Durkin, attached to MCEA's initial post-hearing comments.

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<sup>1</sup> Again, much of the evidence regarding increased demand is based upon estimates and predictions stretching into the future built on a series of assumptions. The heavy reliance on such estimates and uncertain predictions is in sharp contrast to the refusal to consider actual government policies, goals, and objectives regarding the environment and reduced petroleum use.

<sup>2</sup> Yet more information of decreasing vehicle miles traveled has come to light since the initial briefs were filed in this matter. The Star Tribune reported on February 5, 2008 that Metro Transit ridership is up significantly and continues to climb, across the Twin Cities Metro area, including the fast-growing suburbs of the Minnesota Valley. Star Tribune, *Among Suburban Commuters, Riding the Bus is Catching On*", 2/5/08, copy enclosed.

The Enbridge brief cites to an unpublished decision of the Minnesota Court of Appeals, *In the Matter of City of Hutchinson*, 2003 WL 22234703 (Minn. Ct. App. 2003) (attached as Exhibit A to Enbridge's Post-Hearing Brief), as apparent authority that MCEA's failure to propose an alternative pipeline route or alternative method of shipping Canadian crude oil through Minnesota is an automatic grant of the CON to Enbridge. Despite Enbridge's attempt, the case is of little assistance to Enbridge or the PUC here. Unlike in this case, the actual need for the natural gas in question in the *Hutchinson* case was unquestioned, and the court reaffirmed that the language regarding alternatives does not relieve the applicant from demonstrating the actual need for the project as proposed. The *Hutchinson* case involved a dispute over a natural gas pipeline for the City of Hutchinson, proposed by the municipal utility, Hutchinson Utilities Commission. *Hutchinson*, at \*1. The City established a real need for a new pipeline because *current* demand had clearly exceeded the existing pipeline's capacity with *current* demand in summer months at 127% of current capacity. *Id.* The existing pipeline owner and provider was the opposing party---essentially a contract dispute over who would supply what magnitude of new capacity, not as in this case, whether increased capacity was even needed in the first instance. *Id.* Specifically, the case centered around whether the private party could adequately supply the agreed-upon need.<sup>3</sup> Therefore, the *Hutchinson* case has little value or instruction for the LSr matter currently under review.

Finally, the *Hutchinson* court affirmed that the burden to show need is on the applicant, even with the rule language that another party may demonstrate a more reasonable and prudent alternative to the proposed pipeline. *Hutchinson*, at \*7. Whether or not a party can and does so

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<sup>3</sup> The *Hutchinson* case also concerned, in significant part, a legal issue not relevant here regarding the pipelines character as an intrastate pipeline and the Public Utilities Commission's consideration of it in that context.

demonstrate an alternative does not relieve the applicant of the ultimate obligation to prove the underlying need for the project, something that Enbridge has not done here.

Enbridge incorrectly attempts to use the *Hutchinson* case to claim that MCEA has not carried its burden of demonstrating alternatives to the LSr and therefore MCEA's arguments must fail and a CON be granted. In doing so, Enbridge asks the Administrative Law Judge ("ALJ") and the Public Utilities Commission ("PUC") to essentially skip over the statutory requirements for demonstrating actual need for the crude oil to be carried by the LSr, a request that should be denied.

As noted in MCEA's initial post-hearing comments, MCEA challenges the very foundation of Enbridge and the DOC's need argument. Neither Enbridge nor DOC has demonstrated need for more Canadian crude oil in Minnesota or the region. The supply, pricing, and energy security arguments are not supported by the basic economics of petroleum and the DOC's expert's testimony was conflicting and muddled. Moreover, more petroleum at lower prices is contrary to all the goals and policies regarding climate change and energy use coming from other government agencies, the Minnesota Legislature, the Governor's office, and Congress. MCEA sees no need for it to propose an alternative method of delivery for Canadian crude oil, which MCEA believes is absolutely not needed and contrary to public policy and broader environmental protection. The lack of an alternative delivery method for a commodity that is not needed and not desired by various policy-makers absolutely does not mean that a CON should be automatically granted---such an interpretation is ludicrous. MCEA requests an order denying the CON for the LSr project.

## **(PROPOSED) FINDINGS OF FACT AND CONCLUSIONS**

MCEA submits the following proposed findings of fact and proposed conclusions. It should be noted that MCEA's proposed findings concern the CON and not routing, although routing has been addressed at least in part, in pleadings filed by Enbridge and DOC. MCEA's proposed findings are grouped according to relevant portions of Minn. Stat. § 216B.243 (2006) and Minn. R. 7853.0130 (2007).

**A. Minn. Stat. § 216B.243, subd. 3 (1): the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based; and**

**Minn. R. 7853.0130, A., the probable result of denial would adversely affect the future adequacy, reliability or efficiency of energy supply to the applicant, the applicant's customers, or to the people of Minnesota and neighboring states, considering: (1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility.**

#. Evidence regarding demand was primarily based upon the 2007 Annual Energy Outlook ("AEO") from the Energy Information Administration ("EIA"). (Exhibit 208, p. 18-19; T. 67).

#. DOC and Enbridge have not reviewed the draft 2008 Annual Energy Outlook which predicts slower rates of increase for demand for oil. (T. 67 and MCEA public exhibit number 601).

#. The draft 2008 AEO warns that it does not take into account recent developments regarding fuel efficiency standards and biofuels required through the Energy Independence and Security Act ("H.R. 6") signed into law in December of 2007. (Exhibit 601, p. 1).

#. The draft 2008 AEO also provides that a number of policy initiatives currently pending could significantly affect the demand predictions contained within the AEO. (Exhibit 601.)

#. Vehicle miles traveled in Minnesota have plateaued and potentially declined. (MnDOT, submitted to the Minnesota Climate Change Advisory Group (“MNCCAG”) marked as public exhibit number 602 and published in the Star Tribune).

#. The data provides that the reduced miles traveled is not necessarily an anomaly or temporary; expectations are that reduced demand will continue into the future. (*See*, graph of projections on third page of MNCCAG document).

#. Mr. Heinen testified that he has formed “no opinion” regarding the potential impact of Minnesota’s ethanol production and use on petroleum demand. (T. 85).

#. The EIA link between increased income and increased petroleum demand is subject to significant uncertainties. Changes in the various assumptions can drastically change the demand predictions. For example, predicted income/demand elasticity can be right over a long term, but be very wrong over as long as a 25 year period. (Memorandum from Dr. John Durkin, Chicago Partners, submitted as part of public comment).

#. Further, there are three factors involved in the EIA predictions and that the predictions fail to account for inaccuracies in all three, in that the predictions can move one of the factors and predict changes in outcome, but uncertainties and interactions between two or three of the factors can easily throw the entire prediction into question. (Durkin Memorandum).

#. The assumptions regarding income and increased oil demand are made in a vacuum that fails to consider real-world facts such as increases in food and other goods prices that also likely eat up a consumer’s income leaving less for spending on gasoline.

#. Predictions of increased demand for petroleum in Minnesota are weak at best given the significant uncertainties in the methods used for analysis, especially when coupled with

the failure of Enbridge or DOC to consider obvious potential impacts from a variety of regulatory or policy objectives and initiatives at the state and federal levels.

**B. Minn. Stat. § 216B.243, subd. 3 (2), the effect of existing or possible energy conservation programs under federal or state legislation on long-term energy demand; and**

**Minn. Stat. § 216B.243, subd. 3 (7), the policies, rules, and regulations of other state and federal agencies and local government; and**

**Minn. R. 7853.0130 D., it has not been demonstrated that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules and regulations of other state and federal agencies and local governments.**

#. But for a brief review of the new corporate average fuel efficiency (“CAFE”) standards in H.R. 6, Enbridge and DOC have not reviewed or considered other agencies’ policies or regulations regarding, in particular, greenhouse gas emissions, and what impact that will have on demand for oil.

#. Specifically, neither Enbridge nor DOC considered the work of the MNCCAG---a group their agency leads at the direction of their Governor and the legislature. (T. 31-32; 76).

#. Neither Enbridge nor DOC considered the recommendations and direction of the Intergovernmental Panel on Climate Change (“IPCC”) that 15-20% reductions in greenhouse gas emissions are absolutely necessary by 2020 in order to avoid the most catastrophic effects of climate change and what impact such reductions may have on the demand for oil.

#. Neither Enbridge nor DOC considered recent Minnesota legislation regarding energy efficiency and greenhouse gas reduction goals mirroring the IPCC passed during the 2007 Legislative Session,<sup>4</sup> and what impact such reductions may have on the demand for oil.

#. Neither Enbridge nor DOC considered broader implications of H.R. 6 regarding biofuels or Minnesota’s ethanol additive requirements. (T. 31-34; 70-72; 75; 85).

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<sup>4</sup> Minn. Stat. ch. 216H.

#. Overall, the record has little, if any, evidence on the CON criteria of considering policies, rules, and regulations of other state and federal agencies and local government.

**C. Minn. Stat. § 216B.243, subd. 3 (4), promotional activities that may have given rise to the demand for the facility; and**

**Minn. R. 7853.0130 A (3), the effects of the applicant’s promotional practices that may have given rise to the increase in the energy demand; and**

**Minn. R. 7853.0130 C (3) the effects of the proposed facility or a suitable modification of it, in inducing future development.**

#. The evidence in this case also indicates the possibility of induced demand, at least in part. According to information from MnDOT, higher prices appear to be playing a role in decreasing vehicle miles traveled and attendant decreasing demand for petroleum.

#. There is no acknowledgement or examination in the record of the impact that more oil might have in driving down prices and inducing at least part of the demand that Enbridge and DOC predict.

#. Enbridge testified the increased demand for pipelines is due to refinery industry requests for more tar sands petroleum, a demand driven by the industry itself, not necessarily need within the consuming community. (T. 22 and MCEA public exhibit 600).

#. Based upon the testimony regarding demand in Asia and steadily expanding pipelines throughout North America, the demand from the refining industry could just as likely be in order to sell product on the global market. (T. 55, 58-59).

**D. Minn. Stat. § 216B.243, subd. 3 (5), benefits of this facility, including its uses to protect or enhance environmental quality and to increase reliability of energy supply in Minnesota and the region.**

#. Oil is a fungible commodity, easily transported to regional, national and international markets to wherever the demand and prices are high. (T. 24; 57-58).

#. States and common carrier transporters like Enbridge cannot “reserve” capacity or oil for local refineries nor would they if they could receive a higher price elsewhere. (T. 22-24; 57).

#. Current high oil prices are driven in large part by the increasing demand in fast-developing countries like China and India. (Exhibit 208, p. 35; T. 58-59).

#. Enbridge will be able to ship the crude oil to be carried by the LSr through and past the entire Midwest market and potentially into the international market. (T. 55).

#. Enbridge is proposing a pipeline through the center of Illinois, the subject of the Illinois ICC docket cited above, and is preparing to extend their pipeline network all the way to Houston, a refining center and an international port. *See* copy of articles, news releases and Enbridge website information regarding Enbridge efforts to connect entire Enbridge system to Houston and to access Asian markets through British Columbia pipelines.

#. Oil supply and price is not insulated within a particular state or even region, but rather, oil prices in a state or region move almost in lock-step with national oil prices. Exhibits to sworn testimony of John T. Durkin, Ph.D. before the Illinois Commerce Commission (“ICC”), docket no. 07-446.

#. There is little to no insulation for Minnesota, regardless of the existence of LSr.

#. The LSr similarly will do little to insulate Minnesota or the upper Midwest from accidents or disasters and their impacts on oil supply and price, as demonstrated in the evidence regarding the November accident on the Enbridge pipeline in northwestern Minnesota and discussion during the hearing of the impact of hurricanes and other natural disasters on prices at a national level. (Exhibit 211, p. 4; T. 56; 95; 103).

#. DOC's witness notes that "we have no way of knowing" whether price spikes and recoveries are due to the November accident or not. (T. 103). Rather, oil prices are simply "extremely volatile" and the LSr will not affect that volatility. *Id.*

**E. Minn. Stat. § 216B.243, subd. 3 (6), possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy generation and transmission facilities; and**

**Minn. R. 7853.0130 A (2), the effects of the applicant's existing or expected conservation programs and state and federal conservation programs.**

#. Even assuming demand is as predicted by Enbridge and DOC, neither have addressed the ability to meet demand through increased efficiency or conservation, especially in light of recent actions by the Minnesota Legislature, Governor and Congress to pass and implement regulations and policies designed to decrease use of oil and increase conservation.

**F. Minn. R. 7853.0130 C., the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering: (2) 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; and**

**Minn. Stat. § 116D.04 (Minnesota Environmental Policy Act).**

#. Neither Enbridge nor DOC have reviewed or analyzed pipelines such as the Alberta Clipper or Southern Lights, or projects such as refineries, that are connected, phased, or related actions or that result in indirect environmental impacts.

#. Neither Enbridge nor DOC have reviewed or analyzed the environmental impacts from more and potentially less expensive petroleum available to the region from the LSr, nor weight and balanced these impacts against the potential benefits of the project.

#. The record contains no consideration or analysis of the increased refining and pollutants therefrom. (T. 22; 36-39; 44-45).

#. Enbridge testifies that the tar sands activities are driving their pipeline expansions and are connected to, and part of, the LSr project, (T. 22), but the record contains no review or analysis of the connected environmental impacts of the tar sands mines and the increased global warming pollutants from their use.

#. MEPA sets state responsibilities to “reduce the deleterious impact on air and water quality from all sources, *including the deleterious environmental impact due to operation of vehicles with internal combustion engines in urbanized areas.*” Minn. Stat. § 116D.02, subd. 2(9) and (16).

#. Environmental review must be prepared and complete prior to granting a CON to Enbridge.

#. Environmental review of the LSr is incomplete and under the requirements of MEPA, the CON cannot be granted until environmental review is complete.

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Respectfully submitted,

/s/Janette K. Brimmer

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