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June 4, 2008

The Honorable Eric L. Lipman
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
PO Box 64620
St. Paul, MN 55101

RE: In the Matter of the Application of Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC 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:

Enclosed for filing in the above referenced docket, please find the Reply Brief of the Minnesota Office of Energy Security (OES). The OES is also filing a copy of this document electronically. An affidavit of service is enclosed.

Sincerely,

/s/ VALERIE M. MEANS
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VMM/jl
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c: Attached List Service

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

In the Matter of the Application of
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REPLY BRIEF OF THE
MINNESOTA OFFICE OF ENERGY SECURITY

Dated: June 4, 2008

Respectfully submitted,

MINNESOTA OFFICE OF ENERGY
SECURITY

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**REPLY BRIEF OF THE
MINNESOTA OFFICE OF ENERGY SECURITY**

The Minnesota Office of Energy Security (OES) respectfully submits this Reply Brief in response to the Post Hearing Brief filed by the Minnesota Center for Environmental Advocacy (MCEA), and the *Amicus Curiae* Brief filed by Jon Erik Kingstad, in the matter of Enbridge Pipelines' (Enbridge or Applicant) application for a Certificate of Need (CN) for its proposed Alberta Clipper Project and Southern Lights Diluent Project (Projects) pending before the Minnesota Public Utilities Commission (Commission). Given its already extensive briefing, the OES will not repeat its analyses but rather offers targeted clarification and responses with respect to the following issues:

- Burden of Proof;
- Accuracy of Facts in the Record;
- Scope and Conclusions of OES's Reply Brief, and;
- Responses to Specific Arguments.

The OES notes by way of introduction that any silence by the OES to any issue raised in Post-Hearing Briefs or the *Amicus Curiae* Brief should not be construed as agreement. The OES offers the following discussion regarding the above noted topics.¹

I. ARGUMENT

A. BURDEN OF PROOF.

The MCEA states repeatedly that the OES has “failed to demonstrate” that the Projects have met the requirements for a CN. The MCEA erroneously implies that the burden of proof in this matter is on the OES. In a CN proceeding, the Applicant bears the burden of proving the need for the project. See Minn. Rule 7853.0030 and Minn. Rules 7853.0020 *et seq.* Since Enbridge is the Applicant, Enbridge, not OES, bears this burden. The charge of the OES is to analyze Enbridge’s application and make a recommendation to the Commission pursuant to the applicable Minnesota Statutes, Rules, and pertinent Commission Orders.

B. ACCURACY OF FACTS IN THE RECORD.

The MCEA’s Initial Post-Hearing Brief misconstrues key facts and testimony in this record. Examples of such misrepresentations are provided below. The OES notes that it is important that this record accurately reflect facts; as such, the OES recommends that the Administrative Law Judge (ALJ) and the Commission rely on the facts in this record as reflected in the testimony of OES witnesses rather than the characterization of the OES’s testimony by the MCEA.

The MCEA’s Initial Post-Hearing Brief also includes information not admitted into evidence in the record. This approach is not appropriate because there is no opportunity to cross-

¹ The OES relies on its Initial Post-Hearing Brief for comprehensive analyses of the issues.

examine this information to test its validity in this proceeding. Due to energy's importance in the economy, it is important that the information on which the Commission makes its decisions be solid, accurate, and tested. Because it was not possible to test the information which was not admitted into evidence in the record, the ALJ and Commission should give little to no weight to such statements. Due to time limitations, it is not possible to list all of the examples where arguments are made based on information not in the record. Nonetheless, the OES presents as examples the following items not properly admitted into evidence.

- MCEA Brief, page 9, Footnote 9. Excerpts from the 2005 and 2006 AEO were entered into the record. However, this footnote introduces information from the 2003 AEO that was not entered into the record.
- MCEA Brief, page 10, Footnote 10. "This exact point was recently echoed by another economist in the Anchorage Daily News, Comment, May 25, 2008. David M. Reaume pointed out that the AEO can't seem to get forecasts of oil prices right because "published forecasts remain not much more than mere extrapolations of the current situation." This information was not entered into the record.
- MCEA Brief, Page 11, lines 9-14. It is asserted that there is no margin of error for the EIA demand forecast and that the EIA model is simply an extrapolation of past actual prices or economic growth numbers. No evidence supporting these assertions is found in the record.

C. SCOPE AND CONCLUSIONS OF OES'S REPLY BRIEF.

The OES shall only respond to new arguments not previously addressed by the OES. Overall, for the reasons set forth below, the OES concludes that the MCEA's arguments contained in its Initial Post-Hearing Brief are unpersuasive and fail to negate the need for the

Alberta Clipper and Southern Lights Diluent Projects. Thus, the OES continues to conclude the following:

- denial of the projects would adversely affect the future adequacy, reliability, and efficiency of energy supply to Enbridge's customers, the people of Minnesota, and surrounding states;
- a more reasonable and prudent alternative to the projects has not been demonstrated by a preponderance of the evidence on the record in this proceeding;
- the consequences to society of granting the Certificate of Need are more favorable than the consequences of denying the certificate; and
- it has not been demonstrated in the record that the design, construction, or operation of the proposed facilities will fail to comply with those relevant policies, rules, and regulations of other local, state, and federal governments.

OES Ex. 315 at 18-19 (Minder Rebuttal).

Thus, for the reasons stated in the Initial Post-Hearing Brief and in this Reply Brief, the OES continues to recommend that the Commission approve Enbridge's request for a Certificate of Need.

D. RESPONSES TO SPECIFIC ARGUMENTS

1. Enbridge Met Its Burden of Proof and There is No Reasonable Alternative to the Proposed Projects.

Minnesota Rule 7853.0130 (B) provides that a CN for a crude oil pipeline shall be granted if it is determined that:

a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant.

As discussed throughout the OES's Initial Post-Hearing Brief, Enbridge met its burden of proof regarding the relevant legal requirements of Minnesota Statutes and Rules. By contrast, the MCEA argues for a "no-build" option, but the information provided in support of the MCEA's no-build alternative is insufficient to show that there is not a need for the proposed facility. No expert analysis and testimony was presented by the MCEA to support a no-build option. Based on a review of this evidence, the MCEA has not demonstrated by a preponderance of the evidence on the record that its no-build option is a reasonable alternative to Enbridge's proposal.

2. *The OES Demand Analysis is Supported by Ample Record Evidence.*

The MCEA claims that the OES's demand analysis conclusions are unsupported or poorly supported. MCEA Post-Hearing Brief at 13. The record establishes the contrary. The Energy Information Agency's (EIA) *Annual Energy Outlook* (AEO) is the only credible forecast of petroleum demand in the record. The MCEA did not produce its own alternative petroleum demand forecast. At the evidentiary hearing, the MCEA attempted to use the various figures and projections of the Minnesota Climate Change Advisory Group (MCCAG) as a forecast. However, MCCAG's numbers are not forecasts; most of these figures are recommendations derived to promote attaining certain goals, not figures and amounts estimated from statistical tools and other tested techniques as necessary to this case. Ev. Tr. at 246-249.

The EIA, which uses transparent methods, is a widely used resource in the energy industry. The EIA's forecasts are based on the most recent and realistic information available at the time. OES Ex. 316 at 6 (Heinen Rebuttal), Ev. Tr. at 222-223. As such, the EIA is seen as an objective, credible, and universally known resource for data and forecasts. Therefore, it is appropriate to use the information provided by the EIA relative to the forecast used in this

proceeding. Further, the EIA's AEO forecast is based on a complex, thorough, and vetted economic model that develops its demand estimates based on various inputs determined by consumer behavior and other factors. Thus, the EIA's AEO forecast is a reasonable forecast to use in this proceeding.

Additionally, the OES employed publicly available data for factors such as demand, population, and real disposable income in its analysis of what may happen to petroleum consumption over the economic lifespans of the Projects. OES Ex. 308 (Heinen Direct). The OES also examined the EIA's projections of the effects high economic growth rates, high petroleum prices, and increased rates of technology adoption may have on overall petroleum consumption forecasts. The OES limited its analysis to known and measurable factors. The OES's analysis included, but was not limited to, information from the seven-county Metropolitan Council, the U.S. Census Bureau, recent legislation (*e.g.*, Energy Independence and Security Act of 2007), and academic literature. *Id.*

3. Correction of Misrepresented Facts and Testimony

The OES would first like to correct an MCEA statement relative to its witness Mr. Charles Dayton. The MCEA states that MnDOT (Minnesota Department of Transportation) statistics indicate that vehicle miles traveled (VMT's) in Minnesota have hit a plateau and maybe even declined. The MCEA made this same misrepresentation in the LSr proceeding.² The statement by the MCEA directly contradicts the actual words of the MCEA Witnesses and MnDOT exhibits cited by the MCEA. Mr. Dayton's own testimony indicates that VMTs will likely grow by 0.9 percent annually through 2025. MCEA Ex. 351 at 10 (Dayton Direct). Based

² See Initial Post-Hearing Brief of the Minnesota Department of Commerce at 3-5, filed February 8, 2008.

on the exhibit, MnDOT is not projecting a decrease in VMT's, but rather an increase. MCEA Ex. 351 at 10 and MCEA Exs. 6E and 6G.

Next, the OES seeks to correct MCEA's misrepresentation of OES witnesses' testimony. Because the MCEA misrepresents the testimony of OES witnesses in a number of places, the OES does not attempt to list all of these misrepresentations; however, the following are a few examples. First, the MCEA states that the OES "did nothing to bolster, double-check, or independently analyze the strength or reliability of the AEO predictions." MCEA Initial Post-Hearing Brief at 10. However, as indicated above, the OES used a variety of publicly available sources of information to check the reasonableness of the AEO forecast.

Second, the MCEA suggests that the OES's testimony states that "if more oil is flowing through Minnesota (or the Upper Midwest) then that is more supply, so therefore prices for the final consumer will come down." However, this characterization of the OES testimony is not accurate. The OES testimony states that the pipeline would mitigate price shocks, but not that prices would be reduced. Because the MCEA does not accurately represent the OES's testimony, the OES recommends that the ALJ and the Commission rely on the testimony of the OES witnesses rather than the MCEA's representation of that testimony.

Finally, the OES seeks to correct one of the MCEA's analytical representations. In its Post-Hearing Brief, the MCEA states that its witnesses testified that new California emission laws will increase fuel efficiency. MCEA Post-Hearing Brief at 12. The MCEA asserted that the OES erred by omitting these standards from its analysis. However, this assertion is not consistent with sound technique. First, there is no evidence in the record substantiating the MCEA's claims regarding fuel efficiency. In addition, California's new standards, which regulate CO₂ emissions, are currently being challenged in court by the federal government and

thus are not operative even in that state. Further, although these standards were introduced as legislation during the recent 2008 Minnesota Legislative Session, this legislation³ did not leave committee and, as such, did not even reach the entire Senate or House bodies for consideration. It would not be appropriate to use this information at this time in this proceeding.

4. Need to Consider the Effects on the Public Interest Due to a Failure to Plan Adequately for the Future.

It is critical in this proceeding to consider the effects on the public interest of denying a CN for the Projects compared to the effect on the public interest if the Projects are built but subsequently are used at less than full capacity. In the case where the CN is denied and there is need, there may be inadequate infrastructure and resources, leading to higher prices and shortages. In the case where the CN is granted and usage is below expectations, there would be excess pipeline infrastructure.

Regarding effects on the public interest of denying this CN, the record contains ample evidence addressing the required showing that failure to build for the future would harm the public interest in Minnesota. Regarding effects on the public interest of granting this CN when usage is below expectations, there is no financial harm to the public. If the Projects are underused in the future, it would be the Enbridge shareholders who would bear the consequences. This result is different from the circumstances where there is a public utility with captive customers who likely would face the risk of paying for unused capacity if a project is built and subsequently is not needed.

³ Minnesota H.F. 863 and S.F. 481.

5. *Arguments on the Global Petroleum Market and the Effects of the Alberta Clipper and Southern Lights Diluent Projects on Minnesota Must Be Rejected.*

The MCEA makes the argument that petroleum is traded on a global market and, as such, the small capacity of the Alberta Clipper and Southern Lights Diluent Projects will have no effect on Minnesota or on regional prices. MCEA Post-Hearing Brief at 12-15. Conversely, the MCEA also asserts that construction of the pipelines will induce an increase in the quantity of petroleum demanded. *Id.* Thus, the MCEA argues on the one hand that the Projects will have no effect on Minnesota gasoline prices and on the other hand that the Projects will reduce Minnesota gasoline prices. The MCEA's arguments are internally conflicting. The MCEA's arguments actually support the OES's position since the MCEA acknowledges that the Projects will have an effect on petroleum supply and price in the Minnesota and regional markets.

6. *The OES's Analysis of the Potential Impacts on the Natural Environment Complies with the Applicable Statutes and Rules.*

The MCEA and Mr. Kingstad criticized the OES's assessment of the potential impacts on the natural environment resulting from the proposed projects as being overly constrained or failing to comply with applicable statutes and rules. These critiques are without merit.

The OES conducted its analysis of the potential impacts on the natural environment resulting from the proposed projects pursuant to Minnesota Rules 7853.0130 (C)(2) and 7853.0130 (D). The analysis comports with Commission precedent. The OES's interpretation of the directives contained in 7853.0130 (C)(2) and 7853.0130 (D) conforms to previous dockets and is a plain reading of the rules. See Minn. Rules 7853.0130 (C)(2) and Minn. Rules 7853.0130 (D). Also, please note docket numbers PL5/CN-06-02 and PL9/CN-07-464. In those dockets, the OES performed similar analyses of the proposed projects' potential effects on the

natural environment. In these proceedings, both the ALJ and the Commission accepted the OES's analyses as being consistent with Minnesota Statutes and Rules.

Moreover, in the present proceeding, other governmental agencies with jurisdiction over certain aspects of the proposed Projects chose not to submit testimony or comments regarding the OES's conclusions concerning the potential impacts on the natural environment. These agencies include the following: United States Department of State, United States Army Corps of Engineers, United States Fish and Wildlife Service, Chippewa National Forest, United States Environmental Protection Agency, Minnesota Department of Natural Resources, Minnesota Pollution Control Agency, Minnesota Historical Society, Minnesota Department of Agriculture, Minnesota Department of Transportation, Mississippi Headwaters Board, Local and County Agencies, and the Watershed Districts. OES Ex. 307, BJM-6 (Minder Direct). There is no indication in the record that these agencies will fail to require Enbridge to fulfill its obligations pursuant to any permit(s) which may be issued.

The MCEA and Mr. Kingstad further argue that an Environmental Impact Statement (EIS) or Environmental Assessment Worksheet (EAW) needs to be completed before granting a CN. However, in PL9/PPL-07-360, the ALJ stated that environmental review of this nature is part of the Pipeline Routing Permit Process. See Ordering Paragraph No. 32, p. 45 of the ALJ's March 24, 2008 *Summary of Testimony at the Public Hearings, Findings of Fact, Conclusions and Recommendations*. Thus, EIS or EAW assertions are more appropriately addressed in PL9/PPL-07-361.

In summary, relative to the Alberta Clipper and Southern Lights Projects, the OES concludes, with respect to 7853.0130 (C), that the consequences of granting the Certificate of Need are more favorable than the consequences of denying it. Specifically, with respect to the

effects of the proposed facility on the natural environment, pursuant to 7853.0130 (C)(2), the OES concludes that any detrimental effects on the natural environment associated with the Projects should be minimal compared to the effects on the natural environment of not building the facilities. Further, the OES concluded that the record in this proceeding provides no information that the final design, construction, or operation of the proposed facility will fail to comply with relevant policies, rules, and regulations of other local, state, and federal governments. OES Ex. 307 at 26, 12-19, and 27 (Minder Direct).

II. CONCLUSION

The record evidence establishes that the proposed project satisfies all of the criteria for a CN. The OES continues to recommend that the Commission approve the Applicant's request for a CN.

Dated: June 4, 2008

Respectfully submitted,

MINNESOTA OFFICE OF ENERGY SECURITY

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