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ATTACHMENTS

- A    *NEB Keystone XL Proceeding*: Written Evidence of Enbridge Pipelines Inc. (filed July 30, 2009)
- B    Final Transcript, ENB.TO-Enbridge Day 2009 Analyst Meeting, October 6, 2009 (excerpts)
- C    *NEB Keystone XL Proceeding*: Transcript of Hearing September 24, 2009
- D    *NEB Keystone XL Proceeding*: Transcript of Hearing September 25, 2009
- E    *Enbridge Energy, Limited Partnership*, Docket No. OR08-1-000, Offer of Settlement (filed June 27, 2008)
- F    Affidavit of Elizabeth H. Crowe

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- I Canadian Association of Petroleum Producers, *Canadian Crude Oil Production and Supply Forecast* (May 2006) Table 3 CAPP Western Canadian Crude Oil Supply Forecast 2006 – 2020
- J Canadian Association of Petroleum Producers, *Crude Oil Forecast, Markets & Pipeline Expansions* (June 2008), Western Canadian Crude Oil Supply Forecast 2008 – 2020 Appendices B.3 and B.4
- K Deferred Oil Sands Projects
- L Canadian Association of Petroleum Producers, *Crude Oil Forecast, Markets & Pipeline Expansions* (June 2009), Western Canadian Crude Oil Supply Forecast 2007 – 2020 Appendix B.3
- M Enbridge Energy Partners, L.P. News Release (July 20, 2009): “Enbridge to Assist Enbridge Energy Partners with U.S. Alberta Clipper Funding”
- N Enbridge Energy Partners, L.P., Form 8-K (filed August 5, 2009) (Excerpts)
- O *NEB Keystone XL Proceeding*: Exhibit C-7-6d, Enbridge Responses to Keystone XL Shippers Group Information Request No. 1 to Enbridge Pipelines Inc.
- P Media Reports Regarding Changes in Enbridge Expansion Plans
- Q *Keystone XL Proceeding*: Exhibit C-7-6f, Enbridge Responses to the Alberta Department of Energy’s Information Request No. 1
- R *Keystone XL Proceeding*: Section 52 Application of TransCanada Keystone Pipeline GP Ltd., Transportation Service Agreements §5.2.



until such time as (a) Enbridge Energy, Limited Partnership<sup>2</sup> demonstrates to the Commission's satisfaction that the existing pipeline capacity on the Lakehead System (without the Alberta Clipper) is insufficient to transport oil from the U.S./Canadian border to Superior, Wisconsin and (b) the Commission determines that the approved long-term rate methodology or other rate methodology is just and reasonable under the circumstances prevailing at the time. Suncor's proposed near-term rate treatment is described hereinafter.

## **I. INTRODUCTION**

[C]ircumstances today are not the same as they were in the summer of 2008.... The economic environment has changed. There is now a much lower outlook for Western Canadian crude oil supply growth and ample take-away capacity from Western Canada to U.S. markets can now be expected for several years post 2012.<sup>3</sup>

[D]ue to the recent slowdown in projections for expected crude supply, it has probably led to a surplus capacity out of the Western Canada

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<sup>2</sup> Enbridge Energy, Limited Partnership ("EELP") is a wholly owned subsidiary of Enbridge Energy Partners, L.P. ("EEP"), a publicly-traded master limited partnership based in Houston, Texas. EELP operates the Lakehead System, which is the portion of the Enbridge Oil Pipeline System ("Enbridge System") that transmits oil from the Canadian border to markets in the Midwest, Eastern U.S., and Eastern Canada. EELP is regulated by the Commission as a common carrier under the ICA and is the developer of the Alberta Clipper. The Lakehead System is owned by EEP. The Canadian portion of the Enbridge System, which is known as the Mainline System, is owned and operated by Enbridge Pipelines Inc., a wholly owned subsidiary of Enbridge Inc. Enbridge Inc. holds an approximate 27 percent interest in EEP through its U.S. subsidiary Enbridge Energy Company, Inc., which is EEP's general partner. For the purposes of this Petition, these affiliated entities will be referred to collectively as "Enbridge."

<sup>3</sup> *Transcanada Keystone Pipeline GP LTD., Keystone XL Pipeline Application*, Hearing Order OH-1-2009 (before the National Energy Board of Canada), Written Evidence of Enbridge Pipelines Inc. (filed July 30, 2009) (attached hereto as Attachment A), p. 12 lines 16-20. This proceeding will be referred to hereinafter as the "Keystone XL Proceeding."

Sedimentary Basin to markets in the United States well into the middle of the next – the middle half [sic] of the next decade.<sup>4</sup>

Suncor agrees with Enbridge -- the sponsor of these statements: circumstances are not the same today as they were in summer, 2008 when the Commission approved an Offer of Settlement intended to establish the Alberta Clipper's long-term rate methodology. That methodology, which was premised upon the realization of the Clipper Benefits (defined hereinafter) by all shippers on the Enbridge System, included a system-wide surcharge ("Alberta Clipper Surcharge") that would be effectuated when the Alberta Clipper went into service.

As Enbridge acknowledges, however, the economic environment has changed in dramatic and unexpected ways during the intervening time period, with a number of important ramifications. There is now a surplus of oil pipeline capacity from Western Canada into markets in the United States that will continue, as Enbridge notes, well into the current decade. These and other changed circumstances mean that Lakehead shippers will not realize the Clipper Benefits when the Alberta Clipper is expected to be ready for service, and most likely will not realize them, at a minimum, until the middle of the current decade. Moreover, Enbridge itself has admitted that it will not be able to operate the Enbridge System as it anticipated when the Commission approved the Offer of Settlement. Shippers may actually experience deterioration in shipment quality upon startup of the Alberta Clipper, as well as longer transit times on the Lakehead System as a whole. The potential benefits of the Alberta Clipper have been neutralized and the factual predicate of the Alberta Clipper Surcharge has been wholly vitiated.

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<sup>4</sup> Final Transcript, ENB.TO-Enbridge Day 2009 Analyst Meeting October 6, 2009 (excerpts from which are attached hereto as Attachment B), p. 7.

Circumstances are still changing and the excess capacity situation could become much worse. Enbridge has acknowledged that if the Keystone XL Pipeline is approved by the National Energy Board of Canada (“NEB”), 326,000 barrels per day (“bpd”) will be diverted from the Enbridge System.<sup>5</sup> Enbridge opposed the Keystone XL Pipeline as it was proposed, but took the extraordinary additional step of advocating for a proposal (the so-called “Gretna Option”) that, if approved by the NEB, would preserve volumes on the Canadian portion of the Enbridge System, while diverting 326,000 bpd in crude oil supply away from the Lakehead System on a long-term basis and effectively postponing the full Clipper Benefits for many years. Enbridge also offered to commit up to 700,000 bpd on its Canadian system to serving Keystone XL shippers, which would increase volumes diverted from the Lakehead System to 606,000 bpd (135% of the Alberta Clipper’s capacity) and postpone the Clipper Benefits even further into the future.<sup>6</sup>

Why would the sponsor of a major project to add new pipeline capacity submit a proposal that affirmatively undermines the very purpose of that project, taking a bad situation and making it worse? Enbridge apparently took this extraordinary step because it considers Lakehead shippers to be the commercial insurers of the Alberta Clipper’s cash flow under all circumstances. One of Enbridge’s senior officers, in a recent presentation to financial analysts, went so far as to claim with regard to various new capital projects (including the Alberta Clipper): “We have no volume risk. We have no operating costs or interest expense risk and no, or very limited, capital cost risk.”<sup>7</sup>

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<sup>5</sup> See Section IV-F *post*. The NEB conducted hearings in the Keystone XL Proceeding in September and October, 2009. A decision is expected in early 2010.

<sup>6</sup> See Section IV-F *post*.

<sup>7</sup> Attachment B, Statement of G. Jarvis, p. 7.

Enbridge has it wrong. The Commission has a continuing obligation under Sections 1(5) and 1(6) of the ICA to ensure that pipeline rates, practices, and procedures are just and reasonable. When, as here, circumstances change substantially from those upon which the Commission acted, and the Commission is made aware of these changes by being presented with new evidence, the Commission is required to re-examine its prior determination to make certain that the result continues to comply with the ICA and serve the public interest.<sup>8</sup>

Suncor wishes to make clear that it does not dispute either the Alberta Clipper Surcharge *per se* or the use of the Facilities Surcharge Mechanism to recover the cost of constructing, operating, and maintaining new facilities.<sup>9</sup> The issue instead is one of timing. The Commission-approved long-term rate methodology would work in the factual context for which it was developed, but facts have changed materially, resulting in shippers being charged a premium rate for transmission services that differ substantially from those identified when the Commission considered Enbridge's proposal. If and when the benefits identified by Enbridge can be realized, the approved rate methodology will apply. Until then, however, a different rate treatment is required.

Suncor therefore requests the Commission to declare that due to dramatically changed circumstances based on new evidence, the Alberta Clipper Surcharge will not result in just and reasonable rates in the near-term and cannot be put into effect. Suncor also requests the Commission to:

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<sup>8</sup> See Section V-B *post*.

<sup>9</sup> The Facilities Surcharge Mechanism was approved by the Commission in *Enbridge Energy, Limited Partnership*, 107 FERC ¶61,336 (2004). It allows Enbridge to recover the costs associated with certain capital projects on the Lakehead System through an incremental surcharge added to existing base rates and other Commission-approved surcharges.

1. Declare that the Alberta Clipper Surcharge or any other long-term rate methodology designed to recover Alberta Clipper costs will not go into effect until the date (“Effective Date”) on which (a) Enbridge demonstrates to the Commission’s satisfaction that the existing pipeline capacity on the Lakehead System (without the Alberta Clipper) is insufficient to transport oil from the U.S./Canadian border to Superior, Wisconsin and (b) the Commission determines that Alberta Clipper Surcharge or such other rate methodology is just and reasonable under the circumstances prevailing at the time;

2. Require Enbridge to defer until the Effective Date all costs associated with the Alberta Clipper from the completion date of the pipeline’s construction to the Effective Date, except that the costs so deferred shall not include interest or other return on investment;

3. Authorize Enbridge, beginning on the Effective Date, to recover deferred Alberta Clipper costs over the Alberta Clipper’s useful life; and,

4. Defer until the Effective Date shippers’ obligation (if any) to deliver crude oil to Enbridge for operational and scheduling purposes related to the Alberta Clipper (including, but not limited to, the delivery of oil for use as retention stock, line fill, working stock, tank bottoms, and idle loopfill).

**II.  
COMMUNICATIONS AND CORRESPONDENCE**

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### **III. PETITIONER**

Suncor is one of the largest shippers on the Lakehead System. In 2008, Suncor and Petro-Canada (which are now amalgamated into Suncor Energy Inc.) shipped (either directly or indirectly through their customers) an average of 233,000 bpd (crude oil) on the Lakehead System, which represented approximately 16% of the total system throughput. Suncor, its affiliates, and their customers paid Enbridge approximately \$70 million for transporting oil on the Lakehead System in 2008.

### **IV. BACKGROUND**

#### **A. The Alberta Clipper**

1. The Alberta Clipper is a new 36-inch pipeline that upon completion will have an initial annual capacity of approximately 450,000 bpd of heavy crude oil and the capability of being expanded to an ultimate annual capacity of 800,000 bpd. It is part of a larger project (“Alberta Clipper Project”) that will run 990 miles from Hardisty, Alberta to Superior, Wisconsin and, upon completion, be fully integrated into the Enbridge System. Construction of the Canadian portion of the Alberta Clipper Project began on or about August 28, 2008 and is nearing completion. Construction in the United States

began in August 2009, immediately following the U.S. State Department's issuance of the Presidential Permit.<sup>10</sup>

2. The Alberta Clipper is one of several projects planned by Enbridge in recent years in anticipation of (a) a major increase in the supply of crude oil from Western Canada available for export to the United States; and (b) a growing demand from refineries throughout the U.S. Midwest and other, more distant markets as well. The Commission has become familiar with these projects over the past five years, beginning with Spearhead Pipeline (Docket No. OR05-1-000) in late 2004 and continuing through the Southern Access Expansion Project (Docket No. OR06-3-000) in late 2005, the Southern Lights Pipeline (Docket No. OR07-15-000) in 2007, the Southern Access Extension (Docket Nos. OR06-11-000 and OR08-1-000) in 2006 and 2008, and the Texas Access Project (Docket No. OR08-7-000) in 2008.

3. Each of these projects was predicated on the expectation of large increases in Western Canadian crude oil supply, the concomitant insufficiency of pipeline transportation infrastructure (with associated bottlenecks and market disruption), and the need for access to new markets, especially on the U.S. Gulf Coast.<sup>11</sup>

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<sup>10</sup> *Keystone XL Proceeding*, Transcript of Hearing September 24, 2009 (attached hereto as Attachment C), Testimony of G. Jarvis, ¶¶8990 - 8991. Under Executive Order No. 11423, 33 Fed. Reg. 11,741 (1968) and Executive Order No. 13337, 69 Fed. Reg. 25,299 (2004), Enbridge was required to obtain a Presidential Permit from the U.S. Department of State so that the pipeline could cross the U.S./Canadian border. The State Department issued the permit on August 20, 2009. Several environmental groups subsequently challenged the State Department's action by filing suit in the federal district court for the District of Northern California. The case was transferred to the District of Minnesota. *See Sierra Club v. Clinton*, No. 0:09-cv-02622 (DWF-RLE) (D. Minn.).

<sup>11</sup> *See, e.g., Enbridge Energy Company, Inc.*, Docket No. OR08-1-000, Joint Petition for Declaratory Order of Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership (filed October 18, 2007), pp. 5 - 8.

**B. The Clipper Benefits**

4. On June 27, 2008, Enbridge filed with the Commission an offer of settlement, which sought Commission preapproval of a long-term rate methodology for the Alberta Clipper.<sup>12</sup> This proposed rate methodology was set forth in the Alberta Clipper U.S. Term Sheet (“Term Sheet”), which did not specify a rate, but rather contained provisions explaining how the rate would be determined. The Term Sheet provided for this rate methodology to be in effect until the fifteenth anniversary of the Alberta Clipper’s in-service date.<sup>13</sup>

5. In the Offer of Settlement, Enbridge identified three benefits that all shippers on the Enbridge System would realize from the Alberta Clipper (“Clipper Benefits”): (a) increased capacity to transport increasing production and access new markets; (b) balance between upstream and downstream capacity to promote efficient utilization of total system capacity; and (c) operational efficiencies, leading to improved crude quality and reduced power costs.<sup>14</sup>

6. With regard to the first Clipper Benefit (increased capacity), Enbridge stated that the Alberta Clipper project was “prompted in large part by the projected need for significant infrastructure expansion in coming years to transport the expected increase

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<sup>12</sup> *Enbridge Energy, Limited Partnership*, Docket No. OR08-12-000, Offer of Settlement (filed June 27, 2008) (attached hereto as Attachment E) (“Offer of Settlement”). Enbridge attached the Term Sheet to the Offer Settlement as Exhibit I.

<sup>13</sup> Attachment E, Exhibit I, §2(a). The Term Sheet defined the Alberta Clipper’s In-Service Date as the date upon which Alberta Clipper Canada is able to accept oil. Attachment E, Exhibit I, p. 2.

<sup>14</sup> Attachment E, Offer of Settlement, pp. 6 – 7 and Attachment E, Exhibit IV, Affidavit of Laszlo Varsanyi (“Varsanyi Aff.”) ¶¶6 – 8.

in Canadian crude oil imports to the U.S.”<sup>15</sup> According to Enbridge, “the *principal benefit* of the Alberta Clipper project will be *increased capacity*” that would “relieve bottlenecks and avoid projected apportionment of scarce capacity.”<sup>16</sup> Enbridge also stated that “the additional capacity unlocked by Alberta Clipper” would increase access to Canadian crude for refineries in Enbridge’s traditional market area and ultimately to PADD III markets on the U.S. Gulf Coast.<sup>17</sup>

7. With regard to the second Clipper Benefit (system balancing), Enbridge represented that the Alberta Clipper would allow it to balance the increased downstream capacity of the Southern Access Expansion with the creation of new equivalent upstream capacity.<sup>18</sup> According to Enbridge, a balance between upstream and downstream capacity was “necessary to promote efficient utilization of total system capacity.”<sup>19</sup> Enbridge indicated that by promoting efficient system utilization, the Alberta Clipper would benefit all shippers “by maximizing the throughput available through existing infrastructure.”<sup>20</sup>

8. With regard to the third Clipper Benefit (operational efficiencies), Enbridge indicated that by adding an additional large capacity line between Hardisty and Superior, Enbridge would be able to reallocate crude oil streams between available

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<sup>15</sup> Attachment E, Offer of Settlement, p. 5. Unlike in other proceedings, Enbridge did not support the Offer of Settlement with specific facts as to the anticipated growth in Western Canadian crude oil supplies. Rather, it simply cited the Commission’s 2005 order in the Spearhead Pipeline case, *Enbridge Energy Co. Inc.*, 110 FERC ¶61,211 (2005), in which the Commission’s finding of an “expected significant increase” in production was based on an NEB study dated May, 2004.

<sup>16</sup> Attachment E, Offer of Settlement, p. 6 (emphasis added).

<sup>17</sup> Attachment E, Exhibit IV, Varsanyi Aff. ¶6.

<sup>18</sup> Attachment E, Offer of Settlement, p. 6.

<sup>19</sup> Attachment E, Exhibit IV, Varsanyi Aff. ¶7.

<sup>20</sup> *Id.*

pipelines “to increase crude separation (leading to improved crude quality) and to reduce power costs per barrel (which tend to be driven up when heavier crudes are moved in smaller diameter pipelines).<sup>21</sup> Enbridge stated that the addition of the Alberta Clipper would allow two larger diameter pipelines to be allocated to heavy crude oil service, which would assure that neither heavy oil line would be at the extreme end of its power curve where the per-unit cost of moving an incremental barrel of oil is highest.<sup>22</sup>

### **C. The Alberta Clipper Surcharge**

9. Enbridge estimated the Alberta Clipper’s total construction cost would be approximately \$1.1 billion in 2007 U.S. dollars.<sup>23</sup> The Term Sheet provided for the pipeline’s capital and operating costs to be recovered from all Lakehead shippers through the Alberta Clipper Surcharge component of Enbridge’s Facilities Surcharge Mechanism, which is added to Enbridge’s indexed base rates and other existing surcharges. The Term Sheet required the Alberta Clipper Surcharge to be calculated on a cost-of-service basis, subject to an annual true up, and to be filed with the Commission at the time Alberta Clipper goes into service based on the first year’s projected costs and Enbridge throughput volumes.<sup>24</sup>

10. Because the Alberta Clipper Surcharge is based on throughput volumes, any deviation from the forecasted throughput of volumes utilizing the new facilities has a direct impact on the resulting surcharge and thus, on the reasonableness of the rate charged for service on the Alberta Clipper and Lakehead System. If throughput is high,

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<sup>21</sup> Attachment E, Offer of Settlement, p. 7; Attachment E, Exhibit IV, Varsanyi Aff. ¶8.

<sup>22</sup> *Id.*

<sup>23</sup> Attachment E, Offer of Settlement, pp. 5 - 6. Enbridge projected the construction costs of the Canadian segment to be \$2.0 billion in 2007 Canadian dollars.

<sup>24</sup> Attachment E, Exhibit I, §4.

costs are spread over more barrels and the price per barrel drops. Conversely, if throughput is low, costs are spread over fewer barrels and the price per barrel rises.<sup>25</sup>

**D. The Commission's Action**

11. The Commission approved the Offer of Settlement by letter order dated August 28, 2008. The Commission summarized Enbridge's statements regarding the Clipper Benefits: (1) the substantial investment in new facilities to develop Western Canada's abundant crude oil resources required significant transportation infrastructure expansion; (2) the Alberta Clipper would improve the pipeline system's upstream capability to balance the increased capacity available from the Southern Access Expansion; and (3) the Alberta Clipper would enhance service to all shippers.<sup>26</sup> On this basis, the Commission found that the Offer of Settlement "*appears* fair, reasonable, and in the public interest."<sup>27</sup> The Commission noted, however, that its approval of the settlement did not constitute acceptance of, or precedent regarding, any principle or issue in the proceeding.<sup>28</sup>

**E. Changed Circumstances**

12. Even as the Commission was considering the Offer of Settlement, events in the North American and, indeed, world economies, were undermining the ability of the Alberta Clipper to realize the Clipper Benefits. Dramatic changes in circumstances occurred with respect to market demand, crude oil supply, Enbridge's access to new markets, and the Alberta Clipper's financing.

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<sup>25</sup> This effect is demonstrated by the impact of the drop in projected throughput on the rates paid by Lakehead shippers. See Affidavit of Elizabeth H. Crowe ("Crowe Aff.") (attached hereto as Attachment F) ¶¶7 - 9.

<sup>26</sup> *Enbridge Energy, Limited Partnership*, 124 FERC ¶61,200 at 61,975 (2008).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.*

### **Declining Crude Oil Demand by Refineries in Enbridge's Traditional Markets**

13. Markets for crude oil have declined precipitously since the Commission's approval of the Offer of Settlement. Virtually all of the refinery projects contemplated during the Alberta Clipper's planning have been deferred or canceled.<sup>29</sup>

### **Declining Crude Oil Supply Available for Export**

14. The projected supply of crude oil available for export to markets in the U.S. has declined sharply. The annual oil supply forecasts published from 2006 through 2008 by the Canadian Association of Petroleum Producers ("CAPP") reflect a dramatic decline in projected production. In 2006, when the Alberta Clipper was being planned, CAPP estimated Western Canadian production of crude oil would be 3.708 million bpd in 2011 (the first full calendar year of the Alberta Clipper's operation).<sup>30</sup> CAPP's 2008 forecasts (which were published just before Enbridge filed the Offer of Settlement) were lower than the 2006 forecast by 800,000 bpd.<sup>31</sup>

15. Beginning in October, 2008, numerous Canadian oil sands projects were deferred. These projects together represent over 1.2 million bpd of supply.<sup>32</sup>

16. CAPP's 2009 forecasts for 2011 were lower than its 2006 forecasts by 900,000 bpd (twice the capacity of the Alberta Clipper).<sup>33</sup> According to the 2009

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<sup>29</sup> Affidavit of David D. Armstrong ("Armstrong Aff.") (attached hereto as Attachment G) ¶8 and Exhibit \_\_ (DDA-3).

<sup>30</sup> Canadian Association of Petroleum Producers, *Canadian Crude Oil Production and Supply Forecast* (May 2006), Table 3 CAPP Western Canadian Crude Oil Supply Forecast 2006 – 2020 (attached hereto as Attachment I).

<sup>31</sup> Canadian Association of Petroleum Producers, *Crude Oil Forecast, Markets & Pipeline Expansions* (June 2008), Western Canadian Crude Oil Supply Forecast 2008 – 2020 Appendices B.3 and B.4 (attached hereto as Attachment J). In this report, the Moderate Growth Case shows 2.906 million bpd in 2011. The Pipeline Planning Case shows 3.036 million bpd in 2011.

<sup>32</sup> Deferred Oil Sands Projects (attached hereto as Attachment K).

forecast, production will not reach the level projected in 2006 for the first calendar year of the Alberta Clipper's operation until 2018 or later, assuming the current investment climate improves over time.<sup>34</sup> Enbridge's latest internal forecast is very similar to CAPP's 2009 forecast.<sup>35</sup>

### **Changes in the Availability of Capital**

17. According to Enbridge, the availability of capital changed during the summer of 2008.<sup>36</sup> The original plan for financing the Alberta Clipper with public issuances has been replaced by an approach in which Enbridge Inc. will provide most of the financing.<sup>37</sup>

### **Collapse of Enbridge's Plans to Access New Markets**

18. On May 7, 2008, the Commission for a second time denied Enbridge's request to approve the proposed tariff structure for the Southern Access Extension

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<sup>33</sup> Canadian Association of Petroleum Producers, *Crude Oil Forecast, Markets & Pipeline Expansions* (June 2009), Western Canadian Crude Oil Supply Forecast 2007 – 2020 Appendix B.3 (attached hereto as Attachment L). In this report, the Moderate Growth Case shows 2.808 million bpd in 2011.

<sup>34</sup> See Attachment L, Appendix B.3. Under CAPP's 2009 Moderate Growth Case, production reaches 3.680 million bpd in 2018 and 3.820 million bpd in 2019.

<sup>35</sup> Attachment B, Statement of G. Jarvis, p. 6.

<sup>36</sup> Attachment C, Testimony of G. Jarvis, ¶¶8997 – 8998.

<sup>37</sup> On July 20, 2009, Enbridge Inc. and EEP announced that they had concluded a joint funding agreement under which Enbridge Inc. would effectively fund two-thirds of the cost of the Alberta Clipper. Enbridge Inc. agreed to participate in the debt financing that EEP raises for the project and to fund two-thirds of the project's equity requirements directly into EELP. In return, EEP agreed that Enbridge Inc. would be entitled to two-thirds of the earnings and cash flow that EELP generates from the initial phase of the project. The agreement granted Enbridge Inc. and EEP a right of first refusal on each other's investment in the project and gave EEP the right to fund up to 100% of any expansion. The news release describing the agreement is attached hereto as Attachment M. On August 5, 2009, EEP filed a Form 8-K with the Securities Exchange Commission describing the agreement. Excerpts from this report are attached as Attachment N hereto.

(“Extension”),<sup>38</sup> a pipeline that Enbridge had explicitly linked to the upstream elements of the Lakehead System, characterizing it as a “key element in the development of infrastructure to bring the expanding Canadian oil production to U.S. markets” that would “help to unleash the full benefit of Line 61 [the main component of the Southern Access Expansion].”<sup>39</sup> Despite Enbridge’s assertion that the Extension would enable it to develop new markets and to use its system more efficiently, the Commission rejected its proposal to recover the cost of the additional facilities. According to the Commission, the project’s potential benefits for Lakehead shippers were “too speculative and otherwise inadequate” to allow Enbridge to shift the financial risk of the project to Lakehead shippers, especially given evidence of the pipeline’s likely underutilization due to potentially competing pipelines and the uncertainty surrounding the construction of a pipeline from Patoka, Illinois to the U.S. Gulf Coast.<sup>40</sup>

19. Enbridge responded to the Commission’s denial of the Extension tariff by attempting to “reposition” the project,<sup>41</sup> effectively postponing a “key element” of its plans to bring expanding Canadian production to U.S. markets and preventing the full utilization of the Southern Access Expansion.

20. On or about July 9, 2008, Enbridge announced it was delaying the proposed Texas Access Project, citing declining projections for Canadian oil sands

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<sup>38</sup> *Enbridge Energy Company, Inc.*, 123 FERC ¶61,130 (2008).

<sup>39</sup> *Enbridge Energy Company, Inc.*, Docket No. OR08-1-000, Joint Petition for Declaratory Order of Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership (filed October 18, 2007), p. 7.

<sup>40</sup> *Enbridge Energy Company, Inc.*, 123 FERC ¶61,130 at 61,866 and 61,869 - 61,870 (2008).

<sup>41</sup> *Keystone XL Proceeding*, Exhibit C-7-6d, Enbridge Responses to Keystone XL Shippers Group Information Request No. 1 to Enbridge Pipelines Inc. (attached hereto as Attachment O), pp. 3 – 4.

production and the absence of sufficient interest by prospective shippers.<sup>42</sup> As proposed, the project consisted of a mainline from Patoka to Nederland, Texas with an estimated monthly capacity of 445,000 bpd and a lateral line from Nederland to Houston with an estimated monthly capacity of approximately 169,000 bpd.<sup>43</sup> Its purpose was to “significantly increase the volume of crude oil from the western Canadian oil sands and the Williston Basin area of Montana and North Dakota that can reach the Gulf Coast refinery market, which is the nation’s largest and most complex.”<sup>44</sup> According to an Enbridge officer, by mid-2008 (at virtually the same time as Enbridge was filing the Offer of Settlement for the Alberta Clipper), it became apparent to Enbridge that due to changed circumstances, the Texas Access Project was a large volume solution that the oil industry would not be needing for some time.<sup>45</sup>

21. Following its postponement of the Texas Access Project, Enbridge proposed the Trailbreaker Project to transport Canadian crude oil from the U.S. Midwest through eastern Canada to Portland, Maine where it would be loaded onto tankers for shipment to the U.S. Gulf Coast. On or about January 19, 2009, Enbridge announced that it would not proceed with Trailbreaker, citing recent changes in the marketplace which

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<sup>42</sup> “Enbridge Pushes Back Plans for Texas Oil Pipeline,” Reuters News Service (July 9, 2008) (included in Attachment P hereto).

<sup>43</sup> *Enbridge (U.S.) Inc. and ExxonMobil Pipeline Co.*, Docket No. OR08-7-000, Joint Petition for Declaratory Order of Enbridge (U.S.) Inc. and ExxonMobil Pipeline Company Regarding the Texas Access Pipeline Project (filed February 7, 2008), pp. 5 - 6.

<sup>44</sup> *Id.*, p. 2.

<sup>45</sup> Attachment C, Testimony of G. Jarvis, ¶¶10179 and 10185.

were causing shippers to evaluate the project's economics based on updated supply/demand forecasts.<sup>46</sup>

22. In late August, 2008, Enbridge and BP Pipelines (North America) announced initial plans for the Vantage Pipeline, a crude oil pipeline project that would connect Chicago with the U.S. Gulf Coast by way of Cushing, Oklahoma. Enbridge subsequently announced that it had suspended discussions for this project pending resolution of the Gretna Option.<sup>47</sup>

#### **F. The Gretna Option**

23. On July 16, 2008 -- while the Commission was considering the Offer of Settlement and before Enbridge began constructing the Canadian portion of the Alberta Clipper -- TransCanada Corporation ("TransCanada") announced that it had received long-term firm commitments for transporting 300,000 bpd on its proposed Keystone XL Pipeline, a 1,980-mile, 36-inch diameter pipeline that would run from Hardisty, Alberta to a delivery point near Port Arthur, Texas to serve the U.S. Gulf Coast markets.<sup>48</sup> This announcement was followed on October 28, 2008 by the announcement that long-term commitments for the Keystone XL Pipeline had increased to 380,000 bpd.<sup>49</sup> On February 27, 2009, TransCanada filed an application with the NEB for a certificate of public convenience and necessity for the Keystone XL Pipeline. Enbridge intervened in the Keystone XL Proceeding to oppose the project.

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<sup>46</sup> "Enbridge Delays Sarnia-Maine Pipeline Project," Canadian Broadcasting Corporation (January 19, 2009) (included in Attachment P hereto).

<sup>47</sup> Attachment C, Testimony of G. Jarvis, ¶¶9882 – 9896.

<sup>48</sup> "Keystone Pipeline to Expand to Serve the U.S. Gulf Coast," TransCanada Corporation News Release (July 16, 2008) (included in Attachment P hereto).

<sup>49</sup> "TransCanada Announces Third Quarter Net Income of \$390 Million Comparable Earnings Per Share Increase 11 Percent," TransCanada Corporation News Release (October 28, 2008) (included in Attachment P hereto), p. 2.

24. By March, 2009, construction of the Canadian portion of the Alberta Clipper was well underway, but construction of the U.S. portion had not yet begun. During that month, CAPP expressed concern that economic conditions warranted a reevaluation of industry expansion plans, and asked Enbridge to accommodate the rapidly changing conditions and avert growing inefficiency and excess costs by utilizing existing pipeline capacity in conjunction with the proposed Keystone XL Pipeline project. According to CAPP, doing so would achieve greater economic efficiency and improved benefits for all crude oil shippers.<sup>50</sup> CAPP proposed a plan that became known as the Gretna Option, which entailed (1) using the Canadian portion of the Alberta Clipper Project from Hardisty, Alberta to Gretna, Manitoba to transport crude oil nominated for the Keystone XL Pipeline; (2) constructing an interconnection between the Enbridge pipeline system and the Keystone XL Pipeline in the Gretna area; and (3) utilizing the newly-constructed Keystone XL Pipeline to transport oil south from Gretna to Cushing and the U.S. Gulf Coast.<sup>51</sup>

25. Building on its discussions with CAPP, Enbridge sponsored its own version of the Gretna Option in the Keystone XL Proceeding in written testimony submitted on July 30, 2009 (less than a month before Enbridge began construction in the U.S.). Enbridge not only advocated strongly for the NEB to adopt the Gretna Option, but also expressed its willingness to give Keystone shippers “unapportioned access” to capacity on the entire Enbridge System in Canada for at least the duration of the

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<sup>50</sup> Attachment A, Written Evidence of Enbridge Pipelines, Inc., p. 8, lines 21 – 25; Attachment O, Enbridge Response to Information Request No. 1.06(a) and referenced Meeting Summary Notes of the CAPP Markets and Transportation EPG Subgroup (March 31, 2009).

<sup>51</sup> Attachment A, Written Evidence of Enbridge Pipelines, Inc., p. 9, lines 1 – 6.

Keystone XL Transportation Service Agreements.<sup>52</sup> (The average term of the Keystone XL TSAs for committed volumes is 17 years.<sup>53</sup>) Enbridge indicated that it would commit up to 700,000 bpd on its system to serve these shippers.<sup>54</sup>

26. Enbridge testified that implementation of its Gretna Option would divert 326,000 bpd from the Enbridge System onto Keystone XL Pipeline at Gretna.<sup>55</sup> During the hearings in the Keystone XL Proceeding, Enbridge explicitly acknowledged that if this course of action were pursued, the diminution in southbound volumes on the Lakehead System would result in underutilized capacity on its system south of the border.<sup>56</sup> Enbridge also testified that if it transported 700,000 bpd on behalf of Keystone shippers, 606,000 bpd would be diverted away from the Lakehead System.<sup>57</sup> This represents 135% of the Alberta Clipper's capacity.

#### **G. Impact of Changed Circumstances on Realization of Clipper Benefits**

27. As a result of dramatically changed circumstances, shippers will not realize the Clipper Benefits in the near term if the project is made operational in 2010 as originally conceived. Increased capacity (the first Clipper Benefit) is simply not needed and this can no longer credibly be characterized as a "benefit" to Lakehead shippers. The Lakehead System is not experiencing bottlenecks, contrary to the situation Enbridge

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<sup>52</sup> *Keystone XL Proceeding*, Exhibit C-7-6f, Enbridge Responses to the Alberta Department of Energy's Information Request No. 1 (attached hereto as Attachment Q), Response 1(f).

<sup>53</sup> *Keystone XL Proceeding*, Section 52 Application of TransCanada Keystone Pipeline GP Ltd., Transportation Service Agreements §5.2 (attached hereto as Attachment R), p. 3.

<sup>54</sup> Attachment C, Testimony of G. Jarvis, ¶¶9444 – 9458.

<sup>55</sup> Attachment C, Testimony of G. Jarvis, ¶¶9540 – 9551; Attachment C, Testimony of R. Fischer, ¶¶9668 – 9672.

<sup>56</sup> Attachment C, Testimony of G. Jarvis, ¶¶10229 – 10231.

<sup>57</sup> *Id.* ¶¶10390 - 10393.

described in the Offer of Settlement. In fact, Enbridge submitted evidence to the NEB in the Keystone XL Proceeding estimating that in 2013, 1,536,000 bpd would enter the Lakehead System at Gretna, a volume far below the system's annual capacity of 2,055,000 bpd *before the Alberta Clipper's addition*.<sup>58</sup> In other words, Enbridge's own projections show that there will be 471,000 bpd in excess capacity on the Lakehead System in 2013 even if Alberta Clipper is not placed into service.<sup>59</sup> Adding the Alberta Clipper increases the excess capacity to 921,000 bpd.<sup>60</sup> If the Keystone XL Pipeline proceeds as proposed, there will be 1,247,000 bpd in excess capacity<sup>61</sup> and if the Gretna Option is approved and Enbridge makes good on its commitment to transport volumes on behalf of Keystone XL shippers, excess capacity on the Lakehead System could reach 1,527,000 bpd – *over three times* the Alberta Clipper's capacity.<sup>62</sup>

28. System balancing (the second Clipper Benefit) is no longer a "benefit." As previously noted, the Alberta Clipper was only one component of a comprehensive

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<sup>58</sup> Attachment Q, Enbridge Response to Information Request No. 1(h), p. 3. Enbridge indicated that this capacity will increase to 2,500,000 bpd in 2012 with the addition of the Alberta Clipper Project, the retirement of Line 13, and the conversion of Line 3 from heavy to light service. Attachment C, Testimony of G. Jarvis, ¶¶10369 – 10372 *as corrected by Keystone XL Proceeding*, Transcript of Hearing September 25, 2009 (attached hereto as Attachment D), Testimony of G. Jarvis, ¶10539.

<sup>59</sup> Attachment G, Armstrong Aff. ¶7.

<sup>60</sup> *Id.*

<sup>61</sup> Enbridge testified in the Keystone XL Proceeding that implementation of its Gretna Option would divert 326,000 bpd from the Enbridge System onto Keystone XL Pipeline at Gretna. Attachment C, Testimony of G. Jarvis, ¶¶9540 – 9551; Attachment C, Testimony of R. Fischer, ¶¶9668 – 9672. Adding 326,000 bpd to the 921,000 bpd excess capacity on the Lakehead System following the addition of the Alberta Clipper results in total excess capacity of 1,247,000 bpd.

<sup>62</sup> Enbridge testified in the Keystone XL Proceeding that if it transported 700,000 bpd on behalf of Keystone shippers, 606,000 bpd would be diverted away from the Lakehead System. Attachment C, Testimony of G. Jarvis, ¶¶10390 - 10393. Adding 606,000 bpd to the 921,000 bpd excess capacity on the Lakehead System following the addition of the Alberta Clipper results in total excess capacity of 1,527,000 bpd.

plan devised by Enbridge and its affiliates to transport substantially increased volumes of Western Canadian crude oil to new markets. This plan has unraveled and fallen apart due to the dramatically changed circumstances described above. The various components of the plan (the unsuccessful Southern Access Extension, Texas Access, and other projects) have failed or have been delayed indefinitely and production has not reached previously-forecasted levels. Without these components and in the factual context that has emerged, the Alberta Clipper is nothing more than surplus capacity. Current Lakehead System capacity upstream from Superior, Wisconsin balances capacity downstream.<sup>63</sup> When the Alberta Clipper goes into service, it will add 450,000 bpd upstream without equivalent takeaway capacity to deliver the volumes further downstream.<sup>64</sup> Only the diminished level of crude oil shipments on the Lakehead System prevents the Alberta Clipper from creating bottlenecks and forcing apportionment on downstream pipelines. To be able to transport volumes delivered by the Alberta Clipper, the Southern Access pipeline would need further expansion and new pipeline capacity would be needed from Flanagan, Illinois to refinery markets.<sup>65</sup> None of this construction has been proposed and even if it had, there is not enough take away capacity leaving Flanagan to reach markets and provide the “balancing benefit.”<sup>66</sup> System balancing could actually be more challenging *with* the Alberta Clipper than without -- a situation diametrically opposite to the situation presented by Enbridge to the Commission in June, 2008.<sup>67</sup>

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<sup>63</sup> Attachment G, Armstrong Aff. ¶10.

<sup>64</sup> *Id.* ¶11.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

29. With regard to the third Clipper Benefit (operational efficiencies), the need to integrate the Alberta Clipper into the Lakehead System at a time of insufficient crude volumes has created a wide range of operational issues. In both October and November, 2009, Enbridge presented its “Near Term System Optimization” Plans to CAPP’s Enbridge Committee.<sup>68</sup> Each of these presentations reflected Enbridge’s struggle to accommodate the substantial excess capacity on the Lakehead System created by changed circumstances and the addition of the Alberta Clipper. Enbridge’s optimization plans, however, come with a cost to shippers. Transit times will be longer.<sup>69</sup> Crude oil on the Alberta Clipper may see material mixing.<sup>70</sup> Power savings from the Alberta Clipper Project as a whole will be \$35 million annually – far less than the \$62 million worst-case scenario savings that Enbridge forecasted when the Project was being planned.<sup>71</sup> Those diminished savings would be completely offset by shippers’ costs. Shippers will be called upon to bear approximately \$40 million annually for the cost of capital related to the Alberta Clipper Project’s line fill.<sup>72</sup> Moreover, shippers will experience annual rate increases on the Lakehead System (through implementation of the Alberta Clipper Surcharge) of 23% to 30% (based on 2009 rates), which will result in a total additional payment to Enbridge of \$965 million over the first five years of the

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<sup>68</sup> Attachment G, Armstrong Aff. ¶13 and Exhibit \_\_ (DDA-4) (Enbridge Near Term System Optimization Plan, October 2009) and Exhibit \_\_ (DDA-5) (Enbridge Response to CAPP Near Term System Optimization Plan, November, 2009).

<sup>69</sup> Attachment G, Armstrong Aff. ¶13 and Exhibit \_\_ (DDA-4), p. 8; Exhibit \_\_ (DDA-5) p. 6.

<sup>70</sup> Attachment G, Armstrong Aff. ¶13 and Exhibit \_\_ (DDA-5) p. 7.

<sup>71</sup> Attachment G, Armstrong Aff. ¶13. *See also* Enbridge Line 3 Conversion to Light Service – Stage 2: Enbridge Response to CAPP (attached hereto as Attachment H), p. 4 (“The combined power cost benefit for converting Line 3 to light service and placing Alberta Clipper into service is \$35MM (total for Canada and US).”)

<sup>72</sup> Attachment G, Armstrong Aff. ¶14.

Alberta Clipper's operation.<sup>73</sup> Over \$428 million of these payments represent Enbridge's embedded profit.<sup>74</sup> Shippers will have paid Enbridge hundreds of millions of dollars before they reach the point (if ever) where the operational benefits of the Alberta Clipper justify their cost.

#### **H. Attempted Resolution**

30. On several occasions prior to the August 2008 commencement of construction of the Alberta Clipper in Canada, CAPP and other industry participants sought information from, and negotiations with, Enbridge and its affiliates to discuss delaying the project.<sup>75</sup> In June, 2008, CAPP posed a series of questions to Enbridge, seeking information regarding the rate impacts of implementing the Alberta Clipper Surcharge. CAPP's efforts met with resistance from Enbridge, which, despite growing evidence of the total lack of justification for adding the Alberta Clipper's capacity and repeated expressions of concern by Lakehead shippers, waited for over two months -- until after construction in Canada had begun -- to respond and then provided information that, at best, could be described as incomplete.<sup>76</sup>

31. From September, 2008 through May, 2009, Suncor, CAPP, and others continued to raise concerns about the lack of expected volumes for the Alberta Clipper, the level of potential rate increases, and the impact of the Alberta Clipper on transit time and oil quality.<sup>77</sup> Some of these discussions occurred at the most senior executive

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<sup>73</sup> Attachment F, Crowe Aff. ¶¶5 and 9.

<sup>74</sup> *Id.* ¶¶4 and 9.

<sup>75</sup> Attachment C, Testimony of G. Jarvis, ¶¶10021 – 10027.

<sup>76</sup> Attachment G, Armstrong Aff. ¶¶16 - 17.

<sup>77</sup> *Id.* ¶18.

levels.<sup>78</sup> In February, 2009, CAPP asked Enbridge to provide deferral costs for the Alberta Clipper. Enbridge did not respond to this request. Ultimately, Enbridge disregarded shippers' concerns and began construction in the U.S. in August, 2009, even though at that point, it had known for over a year about shippers' concerns and the changed circumstances that were creating excess capacity on the Lakehead System.<sup>79</sup>

**V.  
BASIS FOR REQUESTED DECLARATORY RELIEF**

**A. A Declaratory Order is an Appropriate Vehicle for Addressing the Rate Implications of Changed Circumstances.**

1. A Declaratory Order Allows the Commission to Provide Guidance to the Parties and Mitigate Adverse Impacts to a Degree That Will Not Be Possible Later.

Section 554(e) of the Administrative Procedure Act permits an agency, in its sound discretion, to issue a declaratory order to “terminate a controversy or remove uncertainty.”<sup>80</sup> Rule 207 of the Commission’s Rules of Practice and Procedure echoes this provision.<sup>81</sup>

Pursuant to this authority, the Commission has issued declaratory orders to remove pre-construction uncertainty for both new oil pipeline projects and large-scale system expansions, implicating a host of rate findings and advanced tariff approvals.<sup>82</sup>

The issues addressed have included:

requests for approval of specific cost of service approvals, such as use of an acquisition premium; the use of joint rate structures; advance assurance

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 5 U.S.C. §554(e) (2006).

<sup>81</sup> 18 C.F.R. §385.207(a)(2) (2009) (A person must file a petition when seeking a declaratory order or rule “to terminate a controversy or remove uncertainty.”)

<sup>82</sup> Barr, *Growing Pains: FERC’s Responses to Challenges to the Development of Oil Pipeline Infrastructure*, 28 ENERGY L. J. 43, 53-54 (2007).

that a new project would not disturb the "grandfathered rate" status of certain rates protected under Section 1803 of the EPCRA 1992; findings that line and service abandonment in connection with new replacement services [are appropriate]; approval of proposed rate discounts; whether expansion rates should be rolled-in or incremental; use of supplemental revenues from surcharges on Canadian affiliated pipeline to defray the costs of a U.S. project; and the use of a system-wide surcharge to base rates to fund an expansion.<sup>83</sup>

The Commission has recognized, of course, that each of these issues could be raised as protests after construction is completed and the tariff for the new facilities is filed. It has chosen, however, as a general matter, to provide definitive guidance for all interested parties in advance by addressing ratemaking issues through issuance of a declaratory order before new facilities are constructed. As the Commission stated in *Express Pipeline Partnership*, the first of these cases:

It is better to address these issues in advance of an actual tariff filing than to defer. . . until the rate filing is made, when the decisionmaking [sic] process would be constrained by the deadlines inherent in the statutory filing procedures. *The public interest is better served by a review of the issues presented before a filing to put the rates into effect.*<sup>84</sup>

The same considerations apply in the case at hand. The Commission has a continuing obligation under Section 1(5) of the Interstate Commerce Act to ensure that pipeline rates are just and reasonable.<sup>85</sup> Its approval of the Offer of Settlement under Rule 602 of its Rules of Practice and Procedure, 18 C.F.R. §385.602 (2009), does not preclude Suncor from protesting the Alberta Clipper Surcharge when a subsequent change of facts makes the Commission's approval obsolete or erroneous, especially when Suncor was not a signatory to the settlement. A rate order must be modified where new

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<sup>83</sup> *Id.* (footnotes omitted).

<sup>84</sup> *Express Pipeline Partnership*, 75 F.E.R.C. ¶61,303 at 61,967 (1996) (emphasis added).

<sup>85</sup> *OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995).

evidence warrants the change.<sup>86</sup> Indeed, a regulatory agency has the obligation to institute a new proceeding when, as in this case, it is presented with new evidence.<sup>87</sup>

Therefore, the question is not *whether* the Commission must address the rate implications of changed circumstances, but *when*. Suncor submits that given the importance of the issues involved, the public interest is better served by the Commission's acting to resolve the uncertainty presented by the situation now rather than waiting until the initial Alberta Clipper Surcharge has been filed. Moreover, the declaratory order process provides a more deliberative review opportunity than a rate proceeding, given the short 30-day review period available to the Commission before a rate typically goes into effect. By acting now, the Commission can provide guidance to the parties and facilitate the decision making process to a degree that will not be possible later.

2. A Declaratory Order is Necessary to Make Certain That Pre-Construction Forecasts Actually Align with Current Reality.

This request for declaratory order is the only vehicle available to Suncor at this time for making certain that pre-construction forecasts actually align with current reality. If this matter involved the construction of new interstate natural gas pipeline facilities, a well-recognized procedural safeguard exists to validate forecasted benefits and protect customers from the financial consequences of a disparity between facts presented in initial regulatory proceedings and events as they actually transpire. Suncor's request for

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<sup>86</sup> *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1288 (D.C. Cir. 2000) (quoting *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445, 74 L.Ed. 524, 50 S. Ct. 220 (1930)).

<sup>87</sup> *Id.* at 1290.

a declaratory order seeks similar procedural protection with respect to the rates for the Alberta Clipper.

For example, a pipeline may request rolled-in rate treatment for new facilities in connection with a request for certificate authority to commence construction under the Natural Gas Act. Under the appropriate circumstances, the Commission will issue an order granting a certificate of public convenience and necessity that carries a presumption in favor of such treatment.<sup>88</sup> This approval, however, is conditioned on the proviso that there is no “significant change in the relevant facts and circumstances” at the time of the actual rate filing.<sup>89</sup> In this way, customers are protected against overbuilding and the rate treatment of new construction projects is based on actual, rather than projected, facts.<sup>90</sup>

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<sup>88</sup> *Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)*, 88 FERC ¶61,227 at 61,746 - 61,747 (1999), *order clarifying statement of policy*, 90 FERC ¶61,128 (2000); *order further clarifying statement of policy*, 92 FERC ¶61,094 (2000).

<sup>89</sup> *See, e.g., Maritimes & Northeast Pipeline, L.L.C.*, 118 FERC ¶61,137 at 61,704 (2007) (“Maritimes’ request for a presumption of rolled-in rate treatment for the Phase IV facilities is granted unless there is a significant change in the relevant facts and circumstances.”). *See also Rockies Express Pipeline LLC*, 119 FERC ¶61,069 at 61,409 (2007).

<sup>90</sup> As the Commission observed:

The Policy Statement changed the Commission's previous policy of giving a presumption for rolled-in rate treatment for pipeline expansions. The Commission found that rolled-in pricing sends the wrong price signals by masking the true cost of capacity expansions to the shippers seeking the additional capacity. Sending the wrong price signals to the market can lead to inefficient investment and contracting decisions which can cause pipelines to build capacity for which there is not a demonstrated market need. Such overbuilding, in turn, can exacerbate adverse environmental impacts, distort competition between pipelines for new customers, and financially penalize existing customers of expanding pipelines and customers of the pipelines affected by the expansion.

*Order Clarifying Statement of Policy*, 90 FERC ¶61,128 at 61,391 (2000).

There is no parallel certificate process for the oil pipeline industry or any analogous means of ensuring that the rate treatment of new construction projects will be based on actual, rather than projected, facts. Nevertheless, the principle applies.<sup>91</sup> As is abundantly apparent, the facts and representations underlying the Commission's prior approval of the Alberta Clipper surcharge mechanism have been superseded in fundamental ways. Accordingly, Suncor is compelled to file this Petition in advance of actual implementation of the Offer of Settlement since there is no other procedural avenue of which Suncor is aware for apprising the Commission of changed circumstances that will render the Alberta Clipper Surcharge unjust and unreasonable when it is implemented.

**B. Absent Commission Action, Implementation of the Alberta Clipper Surcharge Will Result in System Charges That Are Unjust and Unreasonable and Therefore Unlawful.**

Having obtained the Commission's approval of the Term Sheet under one set of circumstances, Enbridge is attempting to turn Lakehead shippers into insurers of its bottom line by applying the Term Sheet in a much different context without regard to the Commission's ongoing responsibilities under the ICA. This turns the regulatory framework on its head.

The Commission will reconsider a previous determination when changed circumstances warrant a different conclusion. In *Enterprise Texas Pipeline, L.P.*, for example, the Commission set aside a previous order when new evidence demonstrated

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<sup>91</sup> See *TransCanada Keystone Pipeline, LP*, 125 FERC ¶61,025 at 61,082 (2008) (Granting petition for declaratory order based upon "the facts and projections presented by the petition," but requiring the pipeline to make a new filing with the Commission if the facts or projections supporting the petition change so that the Commission can "determine whether the rulings made in this order would still be applicable.")

that a fundamental purpose for its determination would not be realized.<sup>92</sup> Similarly, in *Trans Alaska Pipeline System*, the Commission found that due to changed circumstances, a previously approved rate methodology was no longer just and reasonable and that a new methodology was required.<sup>93</sup>

It is hard to imagine a case in which circumstances have changed more than in the case at hand. Each of the Clipper Benefits, which formed the foundation for the Commission's approval of the Offer of Settlement, has been completely undermined by subsequent events. The increased capacity associated with the Alberta Clipper is not required. Bottlenecks have not occurred. New markets have not emerged. The Alberta Clipper's "principal benefit" will not be realized until the middle of the current decade at the soonest—much later if either the Keystone XL Pipeline or the Gretna Option is approved.

But that is not all. System balancing has become completely unnecessary due to the failure of Enbridge's efforts to reach new markets. Even if there were sufficient volumes of crude oil available to ship on Alberta Clipper, the takeaway capacity beyond its point of termination in Superior, Wisconsin is insufficient to transport those volumes to markets further south.<sup>94</sup> The Lakehead System achieves a better overall capacity balance *without* the Alberta Clipper – a situation totally different from that in June, 2008 when Enbridge filed the Offer of Settlement.

Moreover, shippers will not realize the operational benefits touted by Enbridge in the Offer of Settlement. As demonstrated by its development of the Near Term System

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<sup>92</sup> *Enterprise Texas Pipeline L.P.*, 117 FERC ¶61,025 (2006).

<sup>93</sup> *Trans Alaska Pipeline System*, 65 FERC ¶61,277 (1993).

<sup>94</sup> Attachment G, Armstrong Aff. ¶11.

Optimization Plans, Enbridge will not be operating the Alberta Clipper as it anticipated when it filed the Offer of Settlement. Transit times will be longer and crude oil on the Alberta Clipper may see material mixing. Moreover, power savings will be far less than was projected by Enbridge's worst case scenario and will be exceeded by higher Lakehead System rates and cost of capital for line fill volumes. Shippers will pay Enbridge nearly a billion dollars in increased Lakehead System rates over the first five years of the Alberta Clipper's operation (representing \$428 million in Enbridge's embedded profit) for poorer service and greatly diminished savings.

Even the financing for the Alberta Clipper has changed. As previously noted, Enbridge Inc. has agreed to fund two-thirds of the Alberta Clipper's cost by participating in the debt financing and funding two-thirds of the project's equity requirements.<sup>95</sup> This agreement clearly reflects the unanticipated turbulence in the credit markets that was a major component of the changed economic circumstances occurring after the summer of 2008.<sup>96</sup> The impact of Enbridge Inc.'s participation on the Term Sheet's long-term rate methodology, however, is not clear. A regulatory filing by Enbridge Energy Partners, L.P. ("EEP") indicates that it may borrow up to \$400 million from Enbridge Energy Company, Inc. (a wholly owned subsidiary of Enbridge Inc.) and then loan the proceeds to EELP to fund its two-thirds portion of the Alberta Clipper's debt financing.<sup>97</sup> This suggests that total debt financing for the Alberta Clipper may exceed the amount

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<sup>95</sup> See Section IV-E ¶17 *supra*.

<sup>96</sup> In the Keystone XL Proceeding, Enbridge identified the dramatically changed economic environment that occurred after the summer of 2008 as support for the Gretna Option. Attachment C, Testimony of G. Jarvis, ¶¶9946-9947.

<sup>97</sup> Attachment N, EEP 8-K, Item 1.01.

contemplated by the Term Sheet's stipulated capital structure (45% debt; 55% equity).<sup>98</sup> While Suncor does not dispute the Term Sheet's stipulated capital structure, a higher actual overall debt level could result in the Alberta Clipper being overleveraged. Overleveraging would likely produce a higher weighted average cost of long-term debt than if the pipeline were financed with the stipulated level of equity. Under the Term Sheet, this higher debt cost would be passed through to Lakehead shippers.<sup>99</sup> This is a much different financing outcome than contemplated when the Offer of Settlement was filed.

In this situation, application of the Alberta Clipper Surcharge upon the Alberta Clipper's completion will not result in rates that are just and reasonable. The approved rate methodology no longer jibes with the facts. In a very real sense, the Alberta Clipper approved by the Commission is not the same Alberta Clipper that is currently under construction. Benefits, anticipated throughput, and operations have all changed. Even the pipeline's financing has changed. This very different project requires a different rate treatment that will be in effect either until circumstances more closely align with those anticipated at the time of the Commission's action or the Commission determines that a new rate methodology is needed.

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<sup>98</sup> Attachment E, Exhibit I, §3(a). If EEP borrows \$400 million from Enbridge Energy Company, Inc., then total debt financing could total \$600 million. If that occurs, then the Alberta Clipper's actual capital structure would be 50% debt/50% equity (assuming a final cost of \$1.2 billion). *See* Enbridge Energy, Limited Partnership, FERC Form No. 6 (Supplemental Form 6-Q) for the Third Quarter, 2009 (filed December 9, 2009), p. 109.1. ("The joint funding arrangement also contemplates our issuance of additional term debt in one or more capital markets transactions, following the in-service date of the project, to refinance our initial debt financing of the project. Our general partner [Enbridge Energy Company, Inc.] will refinance its portion of its initial debt financing of the project on the same terms.")

<sup>99</sup> Attachment E, Exhibit I, §3(d)(i).

Consequently, Suncor respectfully requests that the Commission issue a declaratory order determining that, due to dramatically changed circumstances based on new evidence, the Commission-approved long-term rate methodology for the Alberta Clipper will not result in just and reasonable rates in the near-term and cannot be put into effect. In this way, the Commission will recognize the effect of changed circumstances while preserving the Term Sheet's methodology for implementation when circumstances may change again and enable both Enbridge and its customers to realize the Clipper Benefits.

## VI. BASIS FOR REQUESTED NEAR-TERM RATE TREATMENT

### A. **A Near-Term Rate Methodology Must Take Into Account Enbridge's Imprudence and the Substantial Excess Capacity on the Lakehead System.**

It is a fundamental ratemaking tenet that a utility is entitled to the opportunity to recover through its rates only those reasonable costs prudently incurred in the provision of service.<sup>100</sup> An asset may be included in a utility rate base "only if the asset provides *current service* to ratepayers who are asked to pay for it."<sup>101</sup>

#### 1. Enbridge Imprudently Pursued the Alberta Clipper Even As Circumstances Changed Dramatically.

The compelling evidence set forth herein demonstrates Enbridge's imprudence in commencing construction of the Alberta Clipper even as the above-described changed circumstances undermined the fundamental business assumptions that justified the

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<sup>100</sup> *Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1123 (D.C. Cir. 1979). See J. Bonbright, A. Daniels, & D. Kamerschen, *Principles of Public Utility Rates* 223 (2d ed. 1988) ("Prudent investment is the original historical cost minus any fraudulent, unwise, or extravagant outlays that should not be a burden on ratepayers."); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir. 1984) (The same general ratemaking principles that apply to gas pipelines also apply to oil pipelines.)

<sup>101</sup> *SFPP, L.P.*, 116 FERC ¶63,059 at 66,298 (2006) (emphasis added).

pipeline's existence. The Commission approved the Offer of Settlement on August 28, 2008. In the weeks following the Commission's action, numerous Western Canadian oil sands projects, totalling 1.2 million bpd of supply were deferred. Concerned shippers questioned the Alberta Clipper's timing and tried to explore the possibility of delay. Enbridge, however, would have none of it. When cross-examined before the NEB about why it did not defer or delay the project in order to manage future underutilization of the Enbridge System, an Enbridge officer simply stated that Enbridge had not thought about it.<sup>102</sup> In other words, in the midst of an economic crisis, with supply collapsing and shippers expressing concerns about the Alberta Clipper's potential rate impact, Enbridge continued to pursue a project that would add even more capacity to a system already experiencing overcapacity simply because it could – without even *considering* the possibility of delay. In effect, it ignored the dramatically changed circumstances that transformed the business environment and decided to act as if the Term Sheet made shippers the ultimate insurers of the Alberta Clipper's bottom line. This is the very essence of imprudence.

But its imprudence did not end there. In March, 2009, after construction of the Canadian portion of the Alberta Clipper Project had been underway for six months, but construction of the U.S. portion had not yet begun, CAPP proposed the Gretna Option, which would have allowed Enbridge to complete construction of the Canadian segment of the Alberta Clipper Project while deferring construction in the U.S. Enbridge strongly supported the Gretna Option in testimony filed in the Keystone XL Proceeding on July 30, 2009, but within days after announcing this support, it began construction in the U.S.

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<sup>102</sup> Attachment C, Testimony of G. Jarvis, ¶¶10107 - 10108.

even though it later admitted on the record that implementing the Gretna Option would divert 326,000 bpd (72% of the Alberta Clipper's capacity) – and possibly 606,000 bpd (135% of the Alberta Clipper's capacity) -- away from an already underutilized Lakehead System.

Time and time again over the past 16 months, Enbridge has been given the opportunity to adapt the Alberta Clipper to the dramatically changed circumstances that has overtaken the oil industry. It has chosen to bypass these opportunities and to pursue a patently imprudent path. Lakehead shippers should not be required to pay for this imprudence. Any near-term rate treatment must take this imprudence into account.

2. The Lakehead System is Experiencing Substantial Excess Capacity.

In addition to Enbridge's imprudence, the Commission must also take into account the fact that there is excess capacity on the Lakehead System that, by definition, is not currently serving Enbridge's customers. There will be over 470,000 bpd in excess capacity on the Lakehead System *before the addition of the Alberta Clipper*.<sup>103</sup> Completion of the Alberta Clipper will increase the surplus by 450,000 bpd to 921,000 bpd.<sup>104</sup> Enbridge's Near Term System Optimization Plans attempt to configure the system in a way to make it appear that the Alberta Clipper will actually serve shippers, but Enbridge's own documents demonstrate that there is substantial excess capacity for which Enbridge is being paid under the existing rate structure. No matter how Enbridge may shift volumes from one pipeline to another, the Lakehead System can transport

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<sup>103</sup> Attachment G, Armstrong Aff. ¶7.

<sup>104</sup> *Id.* As previously noted, if the Keystone XL Pipeline is constructed and Enbridge transports 606,000 bpd on behalf of the Keystone XL shippers, excess capacity on the Lakehead System soars to 1,527,000 bpd – over three times the Alberta Clipper's capacity. See Section IV-F ¶26 *supra*.

shippers' volumes without the Alberta Clipper being in service and will be able to do so for several years. Shippers should not be required to pay for such excess capacity.

**B. Suncor's Proposed Near-Term Rate Treatment Is Just and Reasonable, Given Enbridge's Imprudence and the Excess Capacity on the Lakehead System.**

As previously noted, Suncor requests the Commission to declare that due to dramatically changed circumstances, the Alberta Clipper Surcharge will not result in just and reasonable rates in the near term and cannot be put into effect. Suncor recognizes that there will likely come a point when the Alberta Clipper will be needed, at which point the Alberta Clipper Surcharge could be implemented, provided Enbridge demonstrates to the Commission's satisfaction that existing capacity on the Lakehead System (without the Alberta Clipper) is insufficient and the Commission determines that the Alberta Clipper Surcharge is just and reasonable under the circumstances prevailing at that time.

Until the Alberta Clipper is needed, Enbridge would continue to collect indexed rates and other surcharges. Any under-recovery of Alberta Clipper costs would be deferred until the Commission effectuated the Alberta Clipper Surcharge, at which point they would be amortized over the Alberta Clipper's useful life.<sup>105</sup> The deferred costs would not include interest or other return on investment.

Shippers should not have any obligation to supply crude oil to Enbridge for operational and scheduling purposes related to the Alberta Clipper until it is needed.

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<sup>105</sup> Attachment F, Crowe Aff. ¶10.

Suncor therefore proposes that the Commission defer any obligation shippers may have to deliver crude oil to Enbridge for such purposes.<sup>106</sup>

This proposal is just and reasonable because it allows shippers to pay rates that reflect the facilities actually serving them. Shippers are not required to pay for a pipeline that did not need to be placed into service (given that existing capacity is more than sufficient to move all available supply to all downstream markets).<sup>107</sup> It also allows Enbridge to recover the Alberta Clipper's costs when the pipeline actually serves Lakehead shippers.

There is precedent for this approach. In *Panhandle Eastern Pipe Line Company*,<sup>108</sup> the Commission refused to allow a pipeline to recover carrying charges on certain deferred amounts, finding that the pipeline persisted in pursuing a course of action even after events demonstrated that action to be imprudent. The court upheld the Commission's order, affirming the Commission's authority to take actions necessary to achieve the objectives of its controlling statutes.<sup>109</sup>

In *Maritimes & Northeast Pipeline L.L.C.*,<sup>110</sup> the Commission did not require ratepayers to bear certain costs of a newly-constructed pipeline when a major customer of that project decided not to accept service for the first year after the project was completed. Rather, the Commission authorized the pipeline to defer recovery of those costs and recover them after the customer began service. The Commission, however, did

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<sup>106</sup> See Enbridge Energy, Limited Partnership, Rules and Regulations Governing the Transportation of Crude Petroleum by Pipeline, FERC Tariff No. 33, IS08-254-000 (filed February 29, 2008), §6(e).

<sup>107</sup> Attachment F, Crowe Aff. ¶11.

<sup>108</sup> *Panhandle Eastern Pipe Line Co. v. FERC*, 777 F.2d 739 (D.C. Cir. 1985).

<sup>109</sup> *Id.* at 746-47.

<sup>110</sup> *Maritimes & Northeast Pipeline, L.L.C.*, 84 F.E.R.C. ¶61,130 (1998).

not allow the pipeline to defer *all* costs because the pipeline had submitted a precedent agreement that did not disclose the customer's right to defer service. Given the importance of accurate precedent agreements to the integrity of the Commission's certification process, the Commission denied the pipeline's request to defer all costs for future recovery, reasoning that pipeline needed to bear the business risk of the project not going forward as planned.<sup>111</sup>

The Commission has a continuing obligation under the ICA to ensure that pipeline rates, practices, and procedures are just and reasonable. Given the dramatically changed circumstances that have occurred since the Commission's approval of the Offer of Settlement, the Alberta Clipper Surcharge is no longer just and reasonable. Suncor's proposed rate treatment is fair to Enbridge and protects shippers from unreasonable rates, thereby achieving the objective of the ICA, both now and in the future.

## **VII. RELIEF REQUESTED**

Based upon the foregoing discussion, Suncor respectfully requests that the Commission:

1. Declare that due to dramatically changed circumstances based on new evidence, the Alberta Clipper Surcharge will not result in just and reasonable rates in the near-term and cannot be put into effect;
2. Declare that the Alberta Clipper Surcharge or any other long-term rate methodology designed to recover Alberta Clipper costs will not go into effect until the date ("Effective Date") on which (a) Enbridge demonstrates to the Commission's satisfaction that the existing pipeline capacity on the Lakehead System (without the

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<sup>111</sup> *Id.* at 61,692.

Alberta Clipper) is insufficient to transport oil from the U.S./Canadian border to Superior, Wisconsin and (b) the Commission determines that Alberta Clipper Surcharge or such other rate methodology is just and reasonable under the circumstances prevailing at the time;

3. Require Enbridge to defer until the Effective Date all costs associated with the Alberta Clipper from the completion date of the pipeline's construction to the Effective Date, except that the costs so deferred shall not include interest or other return on investment;

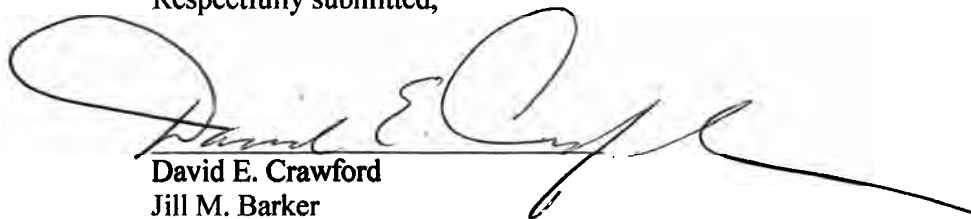
4. Authorize Enbridge, beginning on the Effective Date, to recover deferred Alberta Clipper costs over the Alberta Clipper's useful life; and,

5. Defer until the Effective Date shippers' obligation (if any) to deliver crude oil to Enbridge for operational and scheduling purposes related to the Alberta Clipper (including, but not limited to, the delivery of oil for use as retention stock, line fill, working stock, tank bottoms, and idle loopfill).

**VIII.  
CONCLUSION**

Suncor respectfully requests that the Commission determine the factual matters raised herein, resolve the legal issues, and grant the requested relief along with such other relief as is necessary and appropriate.

Respectfully submitted,



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