

**BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION  
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Dan Lipschultz	Commissioner
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In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

MPUC Docket No. PL-9/CN-14-916  
OAH Docket No. 65-2500-32764

**EXCEPTIONS OF THE MINNESOTA  
DEPARTMENT OF COMMERCE,  
DIVISION OF ENERGY RESOURCES**

**May 9, 2018**

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## INTRODUCTION

The Minnesota Department of Commerce, Division of Energy Resources, Energy Regulation and Planning Unit (DOC DER) respectfully submits to the Minnesota Public Utilities Commission (Commission) these exceptions<sup>1</sup> and clarifications to the Findings of Fact, Conclusions of Law, and Recommendation (Report) of the Administrative Law Judge (ALJ) regarding the application of Enbridge Energy, Limited Partnership's (Enbridge, Company, or Applicant) for a certificate of need (CN) for the proposed Line 3 Replacement Project (proposed Project) under the criteria set forth in Minn. Stat. § 216B.243 (2016) and Minn. R. 7853.0130 (2017).<sup>2</sup>

These exceptions focus on two of the CN criteria under Minnesota Rules 7853.0130, specifically Parts A and C. DOC DER agrees with the Report that Enbridge's failure to satisfy these criteria results in its failure to satisfy its burden of proof as to need for the Project as proposed. DOC DER also agrees with the Report's findings of fact that Enbridge's evidence is materially flawed;<sup>3</sup> that the proposed Project would benefit primarily private Canadian oil producers rather than public interests;<sup>4</sup> and that only Enbridge bears the ultimate burden to demonstrate need for its proposed Project.<sup>5</sup>

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<sup>1</sup> Although DOC DER files exceptions to certain issues, it does not waive its positions on other contested issues that the Report either did not recommend for adoption or provided a recommendation that differs from DOC DER's recommendations.

<sup>2</sup> The Report presents an impressive review of a voluminous record. The ALJ succeeded despite mammoth challenges: the many public hearings held throughout Minnesota, overwhelming public participation including tens of thousands of public comments, serial legal motions, consideration of the extensive CN and route permit requests, a three-week CN evidentiary hearing, and difficult timeframes. DOC DER appreciates the ALJ's extraordinary effort as well as the hard work of others at the Office of Administrative Hearings (OAH) regarding this matter.

<sup>3</sup> Report at 174 (Findings 584–585).

<sup>3</sup> Report at 174 (Findings 584–585).

<sup>4</sup> See Report at 194 (Findings 664).

<sup>5</sup> Report at 160 (Finding 528).

DOC DER respectfully disagrees with legal conclusions drawn from these important facts. Examples of conclusions with which DOC DER disagrees include that Enbridge’s “materially flawed” analyses of need is sufficient to satisfy Enbridge’s burden of proof.<sup>6</sup> DOC DER also disagrees with the Report’s findings that include the following conclusions: that even though it is a “bitter pill to swallow,” the existence of current apportionment is sufficient to meet the requirements of Minn. R. 7853.0130 A, when Enbridge has not satisfied its burden of proof in this case;<sup>7</sup> that Enbridge’s flawed apportionment forecasts, which heavily relied on its materially flawed pipeline utilization forecasts, without a showing of future harm to Canadian crude producers at least until 2035, may provide sufficient evidence of future apportionment on its Mainline System without a new Line 3;<sup>8</sup> and that the CN legal criteria can be met based on specific routing considerations. These conclusions are inconsistent with the Report’s key factual findings.

DOC DER urges the Commission to find, consistent with Minnesota law, that Enbridge failed to meet its burden of proof and its materially flawed evidence failed to prove its claimed need by a preponderance of the evidence.<sup>9</sup> It also asks the Commission to find that Canadian crude oil producers’ statements of future harm due to apportionment are not supported in the record because Enbridge did not cure its materially flawed apportionment forecasts, and that no other party cured those flaws. Finally, DOC DER requests the Commission to find under Minnesota CN legal requirements that when an Applicant fails to demonstrate need, the CN request is denied, and therefore, the Commission does not select a route for the “not needed”

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<sup>6</sup> See Report at 174, 193–94, 199 (Findings 584, 585, 658–667, 690).

<sup>7</sup> See Report at 194 (Finding 667).

<sup>8</sup> Report at 194 (Findings 664).

<sup>9</sup> See Minn. Stat. § 216B.243, subd. 3; Minn. R. 1400.7300, subps. 1, 5 (2017).

project.<sup>10</sup> DOC DER continues to recommend that the Commission deny Enbridge's requested CN for the proposed Project.

Finally, if the Commission grants the CN request, DOC DER provides clarifications to the Report regarding DOC DER's recommended conditions integral to a finding of need. The Report found, and DOC DER agrees, that the DOC DER's recommended conditions should be integral components to granting a CN.<sup>11</sup> DOC DER identifies two conditions that were discussed in the Report and should be added to the Commission's findings.

## **EXCEPTIONS**

### **I. LEGAL STANDARD**

The Report appropriately discussed legal guidelines for the Commission to consider in determining whether to grant a CN for a crude oil pipeline.<sup>12</sup> It correctly stated that Enbridge bears the ultimate burden of demonstrating by a preponderance of the evidence that it satisfied Minnesota legal criteria for a CN.<sup>13</sup> Neither DOC DER nor any other intervenor has the burden of demonstrating need, or lack of need, for the proposed Project.<sup>14</sup>

Nevertheless, the Report, at times, appeared to shift Enbridge's burden of proof to DOC DER and other parties by suggesting that parties other than Enbridge needed to have provided more information or to provide particular types of information as evidence. This is not, however, the legal standard. DOC DER's principal role in CN proceedings is to examine the evidence that an Applicant provides in support of its request for a CN, just as DOC DER witnesses did in this

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<sup>10</sup> See generally Minn. Stat. § 216B.243 (2016).

<sup>11</sup> Report at 362, 364 (Conclusions 30, 43).

<sup>12</sup> Report at 160–62 (Findings 526–531).

<sup>13</sup> See Minn. Stat. § 243B.243, subd. 3; Minn. R. 7853.0130; Minn. R. 1400.7300, subp. 5.

<sup>14</sup> Regarding alternatives to the proposed Project, however, if Enbridge has met the need criteria, other parties have the burden to demonstrate by a preponderance of the evidence that a more reasonable and prudent alternative exists. Minn. R. 7853.0130 B.

case. While it may be understandable that the ALJ would have liked additional information from DOC DER witnesses, key findings in the Report show that DOC DER fulfilled its role of identifying weaknesses and flaws in Applicant's evidence. For example, DOC DER witnesses showed that Enbridge witnesses provided flawed pipeline utilization forecasts.<sup>15</sup> DOC DER witnesses provided important evidence, upon which the Report relied, and from which the Commission may reasonably conclude, that Enbridge failed to meet its burden of proof to demonstrate need for the proposed Project.<sup>16</sup>

Given the number of Report findings that possibly could be interpreted in a manner that would be inconsistent with the burden of proof as well as with the evidentiary record, DOC DER provides specific proposed changes to such findings in a later part of these exceptions.

## **II. ENBRIDGE DID NOT DEMONSTRATE NEED FOR THE PROPOSED PROJECT.**

### **A. The Record Shows That Enbridge Did Not Satisfy Rule Criterion 7853.130 A (1) Regarding Its Forecast Of Demand For The Type Of Energy That Would Be Supplied By The Proposed Facility.**

Minn. R. 7853.0130 states in part: "A certificate of need shall be granted to the applicant if it is determined that:

A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states, considering:

(1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility . . . ."

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<sup>15</sup> See, e.g., Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 15–18, 72, 95–100 (Fagan).

<sup>16</sup> See Report at 167–74 (Findings 561–585).

**1. Summary of the Report’s key findings and certain DOC DER exceptions to the Report’s conclusions regarding need.**

DOC DER agrees with key findings of the Report that show that based on the accuracy of Enbridge’s forecast of demand Enbridge failed to satisfy its burden to prove need for the proposed Project:

- The Report, stated that witness Mr. Neil Earnest’s modeling and resulting forecasts of pipeline utilization of the Enbridge Mainline System (with and without the proposed Project) is “materially flawed.”<sup>17</sup>
- At no point in the pre-filed or live testimony at trial, did Mr. Earnest cure all of the material flaws of his pipeline utilization projections for Enbridge’s Mainline System. For example, the ALJ correctly found that it is “commonsense” to consider global refined product demand, which Mr. Earnest never considered:<sup>18</sup>
  - In his direct testimony (the Muse Stancil Report), Mr. Earnest failed to include in his pipeline utilization modeling and its resulting projections *any* potential for changes in global demand for the products that refiners produce from oil (refined products),<sup>19</sup>
  - In his rebuttal testimony, he confirmed that he ignored potential changes in global refined product demand in his modeling of pipeline utilization.<sup>20</sup>
- Enbridge’s failure to consider potential global demand for refined products is a material failing of its burden of proof, as the Report found. Specifically, the Report cites Dr. Marie Fagan’s testimony, “[W]ith very few exceptions, nothing

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<sup>17</sup> Report at 174 (Findings 584–585).

<sup>18</sup> Report at 174 (Finding 585).

<sup>19</sup> Report at 173 (Finding 581).

<sup>20</sup> Report at 173–74 (Finding 582).

consumes crude oil directly except a refinery, and a refinery doesn't consume crude oil unless the refinery expects the refined products to be sold profitably."<sup>21</sup> Dr. Fagan emphasized that the market for refined products is global,<sup>22</sup> and that "It's a mistake to ignore global refined product demand."<sup>23</sup>

- The Report found, as the evidence reflects, that Mr. Earnest's materially flawed projections of an always-full Enbridge Mainline System into the future without a new Line 3 provide the foundation for the forecasts of other Enbridge witnesses, including those of Mr. Glanzer and Mr. Rennie:
  - Mr. Glanzer, using Mr. Earnest's materially flawed pipeline utilization projections, applied shipper nomination information to forecast future apportionment on the Enbridge Mainline System with and without the proposed Project.<sup>24</sup>
  - Mr. Rennie, wholly depended on Mr. Earnest's materially flawed pipeline utilization forecasts of the Mainline System as a basis or "input" for his projections of rail congestion in Minnesota in the event of denial of the proposed Project.<sup>25</sup>
- No other Enbridge witness, and no other party, provided evidence to cure Mr. Earnest's materially flawed pipeline utilization projections for the Mainline

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<sup>21</sup> Report at 174 (Finding 584); Ex. DER-7, Sched. MF-1 at 5 (Fagan Surrebutal).

<sup>22</sup> Ex. DER-7, Sched. MF-1 at 5 (Fagan Surrebutal).

<sup>23</sup> Report at 173-74 (Findings 581-585); Ex. DER-7 at 5 (Fagan Surrebutal); Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17 (Fagan).

<sup>24</sup> Report at 199 (Finding 690); Ex. EN-19 at 11-14 (Glanzer Direct); Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 56 (Glanzer).

<sup>25</sup> Report at 200 (Finding 693); *see also* Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17-18 (Fagan); Ex. DER-7 at 8 (Fagan Surrebutal).

System; no party provided evidence to cure the flaws embedded in Mr. Glanzer's flawed apportionment or forecasts that were built on Mr. Earnest's materially flawed projections.

DOC DER takes exception to certain conclusions in the Report that are inconsistent with its findings described above. For example:

- DOC DER takes exception to the Report's conclusion that evidence is sufficient from which to conclude that "the existence and *likely continuance* of apportionment [on Enbridge's Mainline System] establishes that there is a demand by Applicant's customers (i.e., Canadian oil producers) for the transportation of Canadian heavy crude through the Mainline that is not being fully met and will not be met in the short term (through 2035) . . . ."<sup>26</sup> The conclusion is inconsistent with the Report's key finding that Enbridge's forecasts of pipeline utilization for the Mainline System were materially flawed, that its forecasts of future apportionment on the Mainline were flawed to the extent they relied on Mr. Earnest's flawed utilization projections, and that those material flaws were not cured by Enbridge or any other party.
- DOC DER also takes exception to the Report's conclusion that Enbridge's demonstration of "the potential" for future apportionment to negatively affect Canadian oil producers (i.e., Enbridge's customers) is sufficient to satisfy rule criterion A(1).<sup>27</sup>

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<sup>26</sup> Report at 194 (Finding 664) (emphasis added).

<sup>27</sup> *Id.*

- DOC DER takes exception to the Report’s conclusion of possible “secondary” benefits to Minnesota refineries from efficiency enhancements of a new Line 3<sup>28</sup> to the extent that the recommendation suggests that Minnesota legal need criteria may be satisfied simply by stated desires of shippers like Minnesota refineries— with no showing of harm caused by denial of the proposed Project.<sup>29</sup>
- DOC DER takes exception to the Report’s proposed finding that Minnesota law is a “bitter pill,” that the existence of current apportionment is sufficient to meet the requirements of Minn. R. 7853.0130 A, when Enbridge has not satisfied its burden of proof in this case.<sup>30</sup> The record in this case would not support a finding of “need” for Canadian producers, based on the lack of record support for reliable apportionment forecasts.

**2. Detailed analysis of the Report’s key findings and certain DOC DER exceptions to the Report’s conclusions regarding need.**

The Report largely agreed with Dr. Fagan’s identification of four flawed assumptions of Mr. Earnest’s modeling of future Enbridge Mainline System pipeline utilization.<sup>31</sup>

**a. Mr. Earnest’s initial consideration of a single supply forecast as a modeling assumption**

The Report questioned the reliability of Mr. Earnest’s pipeline utilization forecasts due to the use, as an assumption, of a single forecast in his direct testimony projections.<sup>32</sup> The Report noted Dr. Fagan’s testimony, as follows:

570. According to Dr. Fagan, *an accurate analysis of need would include more than one supply forecast*, and that

<sup>28</sup> Report at 194 (Finding 665).

<sup>29</sup> Report at 194 (Findings 663–664).

<sup>30</sup> See Report at 194 (Finding 667).

<sup>31</sup> See Report at 167–179 (Findings 560–602).

<sup>32</sup> Report at 170 (Finding 570).

reliable supply forecasts would include forecasts based upon high and low oil price assumptions, not merely oil producers' expectations of what they want to supply based upon their own "private" (undisclosed) price assumptions. *Dr. Fagan testified that it is "widely recognized that current oil prices, as well as expectations for oil prices, drive future crude oil supply."* She explained that this is why energy forecasting organizations, such as the NEB in Canada and the Energy Information Administration (EIA) in the United States, provide forecasts for oil supply that are not based on a single price assumption, but are based on a range of oil price assumptions.<sup>33</sup>

The Report agreed with Dr. Fagan and other intervenor experts that "oil price assumptions – whether high or low – can and will impact supply projections."<sup>34</sup>

#### **i. Global demand for refined product**

The Report found that it was unrealistic for Mr. Earnest to omit from consideration in his forecast modeling *any* consideration of global demand for refined products; it found that Mr. Earnest's pipeline utilization modeling was "materially flawed."<sup>35</sup> The Report's findings that Mr. Earnest's modeling of pipeline utilization forecasts were materially flawed, state as follows:

584. Dr. Fagan disagrees. According to Dr. Fagan, under the economies of oil markets, demand for refined products drives refineries' demand for crude oil. Dr. Fagan explained that, with very few exceptions, no one consumes crude oil except a refinery; and a refinery does not consume crude oil unless refined products are expected to be sold profitably. It follows that demand for refined products drives demand for crude oil, and is, therefore, is a driver of the price of crude oil. This means that weak demand for refined products can lead to lower prices for refined products; lower prices of refined products can lead to lower refinery margins (lower profitability), which impacts the viability of some refineries, which, in turn, can lead to lower refinery demand for crude oil. Thus, by focusing only on crude oil supply (as reported by Canadian oil producers) and totally ignoring refined product demand (local and *global* demand), *Dr. Fagan concludes that Mr. Earnest's analysis is materially flawed.*

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<sup>33</sup> *Id.* (emphasis added) (footnotes omitted).

<sup>34</sup> Report at 173 (Finding 580).

<sup>35</sup> Report at 174 (Findings 584–585).

585. *The ALJ agrees.* It is *commonsense* that reduced demand for refined products would impact the price, supply, and profitability of crude oil. By ignoring the demand for refined products -- and focusing only on the supply of Canadian crude -- Mr. Earnest's analysis ignores an important factor in forecasting the need for additional transportation of crude.<sup>36</sup>

Dr. Fagan testified that Mr. Earnest included input assumptions, "that didn't allow for the possibility of changes to global refined product demand over time."<sup>37</sup> This means that Mr. Earnest "implicitly assumed that demand for refined products in Minnesota, in PAD[D] 2, in the United States and globally, would not change over time."<sup>38</sup> This assumption was unrealistic, as Dr. Fagan explained, because it runs counter to a basic principle of crude oil market economics that demand for refined products drives refineries' demand for crude oil:

[W]ith very few exceptions, nothing consumes crude oil directly except a refinery, and a refinery doesn't consume crude oil unless the refinery expects the refined products to be sold profitably. Weak demand for refined products can lead to low prices for refined products. Low prices of refined products can lead to lower refinery profitability. Lower profitability can lead to closure of refineries, which in turn, can lead to lower demand for crude oil and less need for pipeline capacity. This must be taken into consideration on a global basis, as it's not local to Minnesota or is it restricted to the United States. Crude oil and refined product markets are global.<sup>39</sup>

Further, Dr. Fagan explained that Mr. Earnest's model is "driven by demand for crude oil by refineries, which is used as an input for the forecast."<sup>40</sup> The problem is that Mr. Earnest did not include, as assumptions, potential changes in the driver for refinery crude oil demand, which is the global demand for refined products. For example, even if demand for refined products is

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<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 15–16 (Fagan).

<sup>38</sup> *Id.* at 16.

<sup>39</sup> *Id.*

<sup>40</sup> Ex. DER-4, MF-1 at 18 (Fagan Direct).

weak, Mr. Earnest’s model resulted in a projection that crude oil still flows at high levels through the Enbridge Mainline System.<sup>41</sup> Dr. Fagan explained the significance of Mr. Earnest’s omission of potential changes in global demand for refined products on his resulting projections of crude oil flows:

[T]his is not an issue if in the real world we can assume that any extra crude oil that’s not needed in the United States from the [forecast] period, 2019 to 2035, can be easily exported. But the real world has sometimes seen global gluts of refined products and these have led to reduced refinery operations. *It’s a mistake to ignore global refined product demand.*<sup>42</sup>

Dr. Fagan concluded that Mr. Earnest’s forecast or projection of crude oil pipeline flows is not realistic<sup>43</sup> and is a mistake<sup>44</sup> since it means that “any extra crude oil is automatically exported.”<sup>45</sup>

Dr. Fagan emphasized that the economics of oil markets mean that demand for refined products drives refineries’ demand for crude oil.<sup>46</sup> By giving no role to refined product demand, Mr. Earnest appeared to assume that refinery demand for oil, in isolation, drives oil prices and oil supply. Mr. Earnest gave no role to refined product demand by designing a model or selecting assumptions that ignore the potential for changes in global demand for refined products; rather, he implicitly assumed that such demand would be unchanged for the entire forecast period, and assumed that refiners and export countries “will automatically absorb any change in crude oil production.”<sup>47</sup> That is, he assumed “any extra crude can be exported.”<sup>48</sup>

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<sup>41</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 16–17 (Fagan).

<sup>42</sup> *Id.* at 17 (emphasis added).

<sup>43</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 95–96 (Fagan).

<sup>44</sup> *Id.* at 17.

<sup>45</sup> *Id.* at 16–17; *see also id.* at 56–57, 95–96.

<sup>46</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 95–96 (Fagan); *see also* Ex. DER-4, MF-1 at 15, 18 (Fagan Direct).

<sup>47</sup> *Id.* at 26.

<sup>48</sup> *Id.*; *see also* Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 56–57 (Fagan).

Dr. Fagan, testified that the potential for weaker refined product demand is a global, not a local, issue.<sup>49</sup> The Report agreed.<sup>50</sup> Weak demand for refined product may impact prices of refined products, with consequences that clearly apply to Mr. Earnest’s projections in this case.<sup>51</sup>

Dr. Fagan made clear that it is a mistake to ignore global refined product demand.<sup>52</sup> The Report found that because Mr. Earnest’s forecast for the supply of oil from Western Canada did not take into account global demand for refined products, his forecast was “materially flawed.”<sup>53</sup> Therefore, DOC DER agrees that proposed findings 584 and 585 reasonably summarize Dr. Fagan’s initial testimony regarding Mr. Earnest’s failure to consider refined product demand.<sup>54</sup>

## **ii. Assumption of Exportation of Crude Oil**

The Report found that, by ignoring global demand for refined products, Mr. Earnest erred in assuming implicitly in his modeling projections of future Mainline pipeline utilization that any crude oil that is not consumed in the U.S. (i.e., not refined) always can be exported to international markets.<sup>55</sup> Dr. Fagan disagreed with Mr. Earnest’s rebuttal testimony that “the possibility of a significant reduction in global demand for refined products and a resultant global overabundance of oil supply was ‘apocalyptic’ and ‘very unlikely,’ thereby not warranting

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<sup>49</sup> Ex. DER-7, MF-1 at 5 (Fagan Surrebuttal).

<sup>50</sup> Report at 174 (Findings 584–585).

<sup>51</sup> *Id.*

<sup>52</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17 (Fagan). Those model outputs include both Mr. Earnest’s forecasted use of Enbridge’s Mainline System, with and without the proposed Project, and forecasted use of rail.

<sup>53</sup> Report at 174 (Findings 584–585).<sup>54</sup> Dr. Fagan maintained her conclusion throughout this case that Mr. Earnest, as he acknowledged in his rebuttal testimony, ignored global refined product demand in his modeling assumptions. There is no evidence that he ever cured that material failing in any subsequent testimony. Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17, 95–96 (Fagan).

<sup>54</sup> Dr. Fagan maintained her conclusion throughout this case that Mr. Earnest, as he acknowledged in his rebuttal testimony, ignored global refined product demand in his modeling assumptions. There is no evidence that he ever cured that material failing in any subsequent testimony. Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 17, 95–96 (Fagan).

<sup>55</sup> Report at 176–178 (Findings 592, 595, 597).

analysis.”<sup>56</sup> The Report agreed, stating “Dr. Fagan’s point, however, is not lost. As Dr. Fagan noted, due to the high integration of the oil markets and the ease by which product can be transported from one location to another, demand for oil is a global, not a local, issue.”<sup>57</sup>

The Report also addressed the potential reduction in global refined product demand that might occur from climate change.<sup>58</sup> The Report correctly recognized the importance of considering potential climate-change-related effects as potential changes in global refined product demand, as follows, in part:

598. Given the global recognition of the dangers of climate change and the calls to reduce dependence on fossil fuels, scenarios in which demand for oil in the international marketplace is significantly reduced (thereby causing an oversupply of oil, lowering oil prices, and reducing the opportunities for U.S. export) are very real . . . .

However, the Report then suggested that parties other than Enbridge were required to quantify potential climate-change-related effects. DOC DER reiterates that Enbridge has the burden of proof in this matter.

### **iii. Additional Pipeline Availability**

The Report also agreed with Dr. Fagan’s conclusion that Mr. Earnest’s initial testimony assumptions used in his modeling of future utilization of the Mainline System assumed unrealistically that there would be no pipeline expansions or new pipelines constructed for 14 years, from 2021 to 2035.<sup>59</sup> Further, the Report agreed that the now-approved Keystone XL project is a realistic possibility for crude oil transportation in the future.<sup>60</sup> It also correctly noted

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<sup>56</sup> Report at 176 (Findings 595–596).

<sup>57</sup> Report at 178 (Finding 597).

<sup>58</sup> Report at 178 (Finding 598).

<sup>59</sup> Report at 178 (Finding 599).

<sup>60</sup> Report at 179 (Finding 602).

Dr. Fagan's testimony at trial that explained simply why Mr. Earnest's rebuttal modeling of the Keystone XL pipeline continued not to be realistic.<sup>61</sup>

However, the Report suggested that Dr. Fagan was required to disprove Mr. Earnest's testimony.<sup>62</sup> Dr. Fagan provided testimony at trial about why Mr. Earnest's rebuttal testimony assumptions regarding the proposed Keystone XL project were unrealistic.<sup>63</sup> Dr. Fagan's testimony showed that Mr. Earnest had not demonstrated the reasonableness of his modeling of the proposed Keystone XL project.

Dr. Fagan's trial testimony is important evidence that challenged Mr. Earnest's claims; her testimony provided a reasonable and rational basis to conclude that Mr. Earnest did not later cure his initial flaw of not considering the potential capacity of the Keystone XL project's potential to reduce transportation of heavy crude on the Mainline System. For example, at trial, regarding the assumptions Mr. Earnest used to model the potential impact on the Mainline of oil transported by way of the Keystone XL, she testified, "if you're going to put Keystone in your model, you have to put it in realistically."<sup>64</sup> Because the proposed Keystone XL pipeline project depends on having enough committed shippers that contract to pay for capacity on that pipeline whether they need it or not, one would need to model that project as if there were sufficient committed shippers. Dr. Fagan testified that while Keystone XL may want 90 percent of the capacity to be committed, the project may be viable with 50 or 60 percent of the pipeline committed.<sup>65</sup> She pointed out that Mr. Earnest, however, modeled the project with committed shippers shipping only a little over 100,000 barrels per day, which significantly understated the

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<sup>61</sup> Report at 178–179 (Finding 601).

<sup>62</sup> *Id.*

<sup>63</sup> Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 96–99 (Fagan).

<sup>64</sup> *Id.* at 98.

<sup>65</sup> *See id.* at 97–99.

crude oil that would be shipped on Keystone XL rather than Enbridge's Mainline System. Dr. Fagan testified, "if Keystone's going to get built, it's not going to flow at 100,000 barrels a day . . . it's not enough money to get the pipeline built."<sup>66</sup> She also testified that realistic modeling would have to assume that the project would have sufficient shippers to ensure construction and, once built that "the committed shippers would use it because they already paid for it."<sup>67</sup> If Mr. Earnest had used realistic assumptions or modeled the proposed Keystone XL project in a realistic way, then if modeling results still showed the Enbridge Mainline System flowing at full capacity, that information might show support for the proposed Project; however, Mr. Earnest's unrealistic modeling and modeling assumptions did not do so.<sup>68</sup>

**b. Mr. Glanzer's apportionment forecasts are also flawed and unreliable.**

Given the Report's findings, that Mr. Earnest's forecasts of pipeline utilization on the Enbridge Mainline was "materially flawed,"<sup>69</sup> so, too, must be Mr. Glanzer's forecast of apportionment on the Mainline System, which is based solely on Mr. Earnest's flawed utilization forecast, as seen in Report finding 690, in part:

All issues related to the reliability of Mr. Earnest's projections and analysis follow through to Mr. Glanzer in so far as Mr. Glanzer's testimony about future demand relies upon Mr. Earnest's supply and utilization projections.<sup>70</sup>

Further, the following evidentiary hearing testimony of Mr. Glanzer confirmed that Enbridge's apportionment forecasts entirely relied on data from Mr. Earnest's forecasts:

Q. That's where you start a discussion about projecting apportionment, if the Line 3 is not -- new Line 3 is not built?

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<sup>66</sup> *Id.* at 98.

<sup>67</sup> *Id.* at 99.

<sup>68</sup> *Id.*

<sup>69</sup> Report at 174 (Findings 584–585).

<sup>70</sup> Report at 199 (Finding 690).

A. Correct.

Q. It says there that you relied on the latest forecast data provided in the Muse Stancil report, correct?

A. Yes, that's correct.

Q. Did you use any other projections of crude oil supply other than the Muse Stancil report?

A. No, we did not.<sup>71</sup>

DOC DER urges the Commission to reject Report findings 610 and 611 because they are not supported by the record.

Therefore, DOC DER takes exception to the Report's conclusion that Enbridge demonstrated "the potential" for apportionment on the Enbridge Mainline in the future to negatively affect Canadian oil producers (i.e., Enbridge's customers) and that the showing is sufficient to satisfy the need requirements of rule criterion A(1).<sup>72</sup> In light of Enbridge's "materially flawed" pipeline utilization forecasts and similarly flawed apportionment forecasts there does not appear to be record evidence supporting the Report's conclusion.

Further, there appears to be no evidence in the record that would support a conclusion that the Canadian crude oil producers presented their own sufficient demonstration that forecasted apportionment (built upon pipeline utilization) of the Enbridge Mainline System is likely to "negatively affect" them if the proposed Project is denied. That is, the Canadian producers did not cure the material flaws underlying Enbridge's forecasts of such utilization or apportionment.

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<sup>71</sup> Evid. Hrg. Tr. Vol. 1B (Nov. 1, 2017) at 56 (Glanzer).

<sup>72</sup> Report at 194 (Findings 663–664).

For these reasons, DOC DER urges the Commission not to accept proposed findings 663 and 664<sup>73</sup> (“Applicant has established by a preponderance of the evidence that its forecast for demand for transportation of Canadian heavy crude on the proposed Project exists.”).<sup>74</sup> In addition, DOC DER does not agree with proposed conclusion 24, which should be modified to conclude that Enbridge has not met its burden of proof.

**c. DOC DER takes exception to the Report’s conclusion that “secondary” benefits to refiners from a new Line 3 satisfies Minn. R. 7853.0130 A(1).**

DOC DER takes exception to the Report’s conclusion of possible “secondary” benefits to Minnesota refineries from efficiency enhancements of a new Line 3<sup>75</sup> to the extent that the Report findings suggests that Minnesota CN criteria might be satisfied simply by stated desires of shippers like Minnesota refineries, absent a showing of harm caused by denial of a proposed pipeline.<sup>76</sup> If this were the legal standard, which it is not, an unreasonable result could follow that any future proposed oil pipeline from Canada that does not require committed shippers conceivably could be shown to be “needed” under Minnesota law simply by producers’ and refineries’ testimony that they desire additional pipeline capacity.

**d. DOC DER takes exception to the Report’s “Bitter Pill” conclusion.**

DOC DER takes exception to the Report’s finding that Minnesota must accept a “bitter pill.”

667. It is a bitter pill to swallow, however, that the “need” for this Project is to primarily assist foreign oil producers in transporting their products through (and mostly out of) Minnesota. However, the rule does not prioritize the needs of Applicant’s

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<sup>73</sup> *Id.*

<sup>74</sup> Report at 194 (Finding 664).

<sup>75</sup> Report at 194 (Finding 665).

<sup>76</sup> Report at 194 (Findings 663–664).

customers, the people of Minnesota, or the people of neighboring states. Each of these categories has equal priority under Rule 7853.0130(A).<sup>77</sup>

The Commission must reject this proposed finding based on the lack of record support for reliable apportionment forecasts in this case.

Notably, the following proposed findings support the conclusion that Canadian oil shippers have an economic incentive to support as many shipping options as possible, particularly if doing so does not require financial take or pay commitments:

487. It stands to reason that producers of Canadian tar sands oil want to have as many shipping options as possible to move their product to and through the United States for sale (within or outside of the U.S.). To do that, they need pipelines. The more pipelines there are, the easier and more economical it is for shippers to ship and refiners to receive oil. The more options refiners have to receive crude oil and the more type of oil there is available to them in the market, the more competitive the supply market and the most profitable their business becomes. Accordingly, there are incentives for shippers and refiners to support this Project.

488. At the same time, shippers are not obligated to use the new Line 3 if other pipelines become available that are more economically desirable. While shippers, as a whole, are responsible for a majority (75 percent) of the capital costs of the Proposed Line 3, this cost is only recouped by Applicant through the Line 3 Surcharge when shippers actually use the line. If shippers do not use the line to pay the tariff and surcharge, these costs will not get fully recouped by Applicant. (This is true even if the toll increases over the years due to unexpectedly low use).

489. Ultimately, the Line 3 Surcharge will be passed on to refiners, who then pass on the costs to consumers of refined petroleum products. In this way, the financial risk of the Project to Canadian oil producers and shippers who are supporting the new line (i.e., Applicant's "customers") is minimal. The shippers will only be responsible for the costs if they actually use the line. If they do not use the line, the shippers will not be charged. If they

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<sup>77</sup> See Report at 194 (Finding 667).

do use the line, these costs can be passed on to customers and consumers.<sup>78</sup>

**B. The Record Showed, And The Report Agrees, That Enbridge Did Not Demonstrate That The Consequences To Society Of Granting The Certificate Of Need Are More Favorable Than The Consequences Of Denying The Certificate.**

Enbridge also has the burden of demonstrating that the consequences to society of granting the CN are more favorable than the consequences of denying the CN.<sup>79</sup> Minn. R. 7853.0130 states:

“A certificate of need shall be granted to the applicant if it is determined that:

- C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering:
  - (1) the relationship of the proposed facility, or a suitable modification of it, to overall state energy needs;
  - (2) the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility;
  - (3) the effects of the proposed facility or a suitable modification of it, in inducing future development; and
  - (4) socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality.”

The Report recommends that a CN should be issued, but only if analysis of the routing criteria concludes that RA-07 is the most reasonable route for the proposed Project.<sup>80</sup> While arriving at different conclusions, neither Enbridge nor DOC DER evaluated whether consideration of a particular routing alternative under Minn. R. 7853.0130 C would produce a different outcome. The Report provided the following proposed conclusion of law regarding whether Enbridge had met the criteria under Minn. R. 7853.0130 C:

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<sup>78</sup> Report at 152 (Findings 487–489) (footnotes omitted).

<sup>79</sup> See Minn. R. 7853.0130 C.

<sup>80</sup> Report at 361, 362 (Conclusions 27, 30).

27. *Applicant has not established, however, by preponderance of the evidence, that the consequences to society of granting the certificate of need for the Project, as proposed, are more favorable than the consequences of denying the certificate so long as the Project includes Applicant's Preferred Route.* However, the cost and benefit calculation under Minnesota Rule 7853.0130(C) changes if Applicant replaces Existing Line 3 in its current location (i.e., if the Commission were to select RA-07 as the pipeline route in this case). In such a circumstance, the benefits to Minnesota and regional refiners, and the people of Minnesota, slightly outweigh the risks and impacts of a new crude oil pipeline.<sup>81</sup>

DOC DER does not address whether the record supports RA-07 as a reasonable routing alternative under the routing criteria set forth in Minn. R. 7852.1900 (2017) as compared to other routing alternatives, including Enbridge's proposed route. In this CN matter, Minnesota legal criteria include no route determination as a factor for the Commission to consider to find that need was established. As a practical matter, if an applicant fails to establish need, there is no legal requirement that the Commission determine a route. In that vein, DOC DER is not aware that any party in this matter evaluated whether consideration of RA-07, or any other routing alternative, is relevant to the analysis under the CN criteria found in Minn. R. 7853.0130 C. Therefore, DOC DER agrees with proposed finding 889. The Department also agrees with conclusion of law 27, as modified:

27. Applicant has not established, however, by preponderance of the evidence, that the consequences to society of granting the certificate of need for the Project, as proposed, are more favorable than the consequences of denying the certificate ~~so long as the Project includes Applicant's Preferred Route.~~ However, the cost and benefit calculation under Minnesota Rule 7853.0130(C) changes if Applicant replaces Existing Line 3 in its current location (i.e., if the Commission were to select RA-07 as the pipeline route in this case). In such a circumstance, the benefits to Minnesota and regional refiners, and the people of

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<sup>81</sup> Report at 361 (Conclusion 27) (emphasis added).

~~Minnesota, slightly outweigh the risks and impacts of a new crude oil pipeline.<sup>82</sup>~~

DOC DER believes that the Report accurately determined that Enbridge has not demonstrated that it has met the criteria under Minn. R. 7853.0130 C, short of conditioning approval of a CN on selecting RA-07 as the route for the proposed Project. Thus, DOC DER also does not recommend adoption of conclusion of law 30, as currently written, recommending issuing a CN based upon selection of RA-07.

~~30. The Administrative Law Judge hereby concludes that, subject expressly to the selection of RA-07 (in trench replacement) and the conditions recommended below, that the Commission GRANT Applicant's Application.~~

[New Conclusion]. The Commission concludes that the Application must be DENIED.

[New Conclusion]. When an Applicant fails to demonstrate need, the CN request is denied, and therefore, the Commission does not select a route for the “not needed” project.

### **III. CLARIFICATIONS AND CORRECTIONS TO CONDITIONS**

#### **A. Conditions Integral to Project Approval**

The Report recommended that the Commission should accept DOC DER's recommended conditions as integral to the CN.<sup>83</sup> The Commission should ensure that conditions integral to any finding of need are also part of Enbridge's operating conditions of the route permit. Proposed finding 949, in part, and conclusions of law 30 and 43 state:

949. The DOC-DER has recommended a number of conditions in the event that the Commission approves the Project. These conditions require Applicant to:<sup>84</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Report at 364–66 (Conclusion 43).

<sup>84</sup> Report at 263 (Finding 949).

30. The Administrative Law Judge hereby concludes that, subject expressly to the selection of RA-07 (in-trench replacement) and the conditions recommended below, that the Commission GRANT Applicant's Application.<sup>85</sup>

43. As an integral part of her recommendation, the Administrative Law Judge recommends that the Commission include the following conditions on any CN or RP granted in this case:<sup>86</sup>

DOC DER wishes to make clear, consistent with its testimony and post-hearing briefs, that its recommended conditions were put forward for the Commission's consideration only if the Commission concludes that, with conditions, the proposed Project meets the CN criteria, in order to ensure that Minnesotans' natural and socioeconomic environments are reasonably protected.<sup>87</sup>

In addition, DOC DER provides the following correction to Report finding 41:

41. Pursuant to Minnesota Rule ~~7849.0400~~7853.0800, subpart 1 (2017), the issuance of a CN may be made contingent upon certain conditions set by the Commission.<sup>88</sup>

**B. The Commission Should Also Approve a 34-inch Pipeline And Incorporate The Neutral Footprint Program With The Other Conditions Integral To Finding Need For The Proposed Project.**

**1. The Commission should only Approve a 34-inch pipeline.**

In its post-hearing briefs, DOC DER concluded that Enbridge had not demonstrated need for a 36-inch pipeline, as proposed. Thus, if it finds need with conditions, the Commission should permit Enbridge to install no more than a 34-inch pipeline to replace the existing 34-inch existing Line 3 pipeline.<sup>89</sup> The Report recognized the concerns DOC DER raised in findings

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<sup>85</sup> Report at 362 (Conclusion 30).

<sup>86</sup> Report at 364–66 (Conclusion 43).

<sup>87</sup> See Ex. DER-1 at 96 (O'Connell Direct).

<sup>88</sup> Report at 364 (Conclusion 41).

<sup>89</sup> See DOC DER Initial Br. at 70–72, 135–36.

712–719, but leaves it to the Commission to determine whether to approve a 36-inch or 34-inch pipeline if it approves the proposed Project:

718. Apart from the energy efficiency benefits of a 36-inch pipe, Applicant has established no other benefits of a 36-inch pipe that a 34-inch pipe could not provide in terms of reliability and adequacy. A 36-inch pipe does present a somewhat larger risk to the environment than a 34-inch pipe. However, a release from a 34-inch pipe or a 36-inch pipe could be potentially catastrophic. Therefore, if the Commission approves the Project, it must weigh the energy savings of a 36-inch pipe against the heightened environmental risk.<sup>90</sup>

DOC DER recommends the following finding related to pipeline size for the Commission’s consideration as a conditions integral to a finding of need:

[New Finding]. Enbridge has not demonstrated that a larger, 36-inch pipeline is needed.<sup>91</sup> Instead, the pipeline diameter should be based on Enbridge’s stated need to replace the original 34-inch diameter Line 3, and therefore, a new Line 3 shall be no larger than a 34-inch pipeline.<sup>92</sup>

**2. The Commission should require Enbridge to incorporate its neutral footprint program.**

DOC DER also recommends that the Commission require Enbridge to apply the Commission-approved neutral footprint policy to increased energy use implemented in the certificate of need matter regarding the Phase 2 Upgrade to Line 67 crude oil pipeline (Docket No. EL9/CN-13-153).<sup>93</sup> DOC DER encourages the Commission to similarly require Enbridge to offset all incremental nonrenewable energy usage associated with the proposed Project with renewable energy in a transparent, verifiable way. Application of the neutral footprint program

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<sup>90</sup> Report at 205 (Finding 718).

<sup>91</sup> Ex. DER-1 at 21 (O’Connell Direct).

<sup>92</sup> *Id.* at 21.

<sup>93</sup> See *In re Application of Enbridge Energy, Ltd. P’ship for a Certificate of Need for the Line 67 (Alberta Clipper) Station Upgrade Project - Phase 2 - in Marshall, Clearwater, Itasca, Kittson, Red Lake, Cass, and St. Louis Counties*, Docket No. PL-9/CN-13-153, Order Granting Certificate of Need at 32 (Nov. 7, 2014) (hereinafter “Phase 2 Order”).

would limit the proposed Project’s impacts to the natural and socioeconomic environments in a more meaningful, project-specific way. As with pipeline diameter, the Report ultimately leaves it to the Commission to determine whether to incorporate the neutral footprint program if with conditions, it approves the proposed Project:

As recommended by the DOC-DER, Applicant should be required to have a “neutral footprint” program as approved in the second upgrade to Line 67 (Docket No. EL9/CN-13-153), if the Commission determines that such a Program will advance the environmental and renewable energy policies and goals of the State.<sup>94</sup>

To assist the Commission, DOC DER provides the Commission’s order point from the Phase 2 Order, adapted for Line 3:

[New Finding]. Enbridge shall apply “neutral footprint” objectives to the environmental impacts associated with the Line 3 Replacement Project, including conserving an acre for every acre of natural habitat impacted, planting a tree for every tree that must be removed to build new facilities, and generating a kilowatt-hour of renewable energy for every kilowatt-hour the Line 3 Replacement Project energy operations consume. Within 90 days of the Line 3 Replacement Project becoming operational, Enbridge shall file a report stating –

- how Enbridge intends to implement its neutral footprint policy with respect to the Line 3 Replacement Project, and
- how it intends to document its compliance with this policy.

#### **IV. REPORT FINDINGS OR CONCLUSIONS THAT DOC DER RECOMMENDS MODIFYING, ELIMINATING OR ADDING**

Consistent with DOC DER’s exceptions, provided above, for the Commission’s convenience DOC DER recommends that the Commission consider either not adopting the following proposed findings or adopting as modified, in addition to providing new findings:

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<sup>94</sup> Report at 367 (Conclusion 43).

559. The DOC-DER retained Marie Fagan, PhD, a Lead Economist at London Economics International, LLC, to analyze Mr. Earnest's modeling methods, his report, and his conclusions. Dr. Fagan was not retained "to create an independent empirical analysis or a stand-alone report" analyzing the issue of need in this case. Rather, Dr. Fagan was solely "taxed with providing a critical review" of the Muse Stancil Report and the Oliver Wyman Report (a report discussed later related to the use of rail as an alternative to the Project). ~~Accordingly, Dr. Fagan's analysis is limited to critique, not independent analysis. As a result, Dr. Fagan does not provide forecasts for future crude oil supply or demand; and she does not provide any projections on expected demand for refined products in Minnesota or elsewhere for the ALJ or Commission to consider and contrast with Applicant's data.~~<sup>95</sup>

570. According to Dr. Fagan, an accurate analysis of need would include more than one supply forecast, and would include forecasts based upon high and low oil price assumptions, not merely oil producers' expectations of what they want to supply based upon their own "private" (undisclosed) price assumptions. Dr. Fagan testified that it is "widely recognized that current oil prices, as well as expectations for oil prices, drive future crude oil supply." She explained that this is why energy forecasting organizations, such as the NEB in Canada and the Energy Information Administration (EIA) in the United States, provide forecasts for oil supply that are not based on a single price assumption, but are based on a range of oil price assumptions. ~~Unfortunately, Dr. Fagan did not provide forecasts from the EIA for Canadian crude with which the ALJ could compare the CAPP forecasts. Such assistance would have been helpful in this case.~~<sup>96</sup>

591. In sum, it is reasonable to assume that global climate change policies, mass transition to electric vehicles, and increased use of renewable energy sources will, sometime in the future, reduce global and domestic demand for refined products and, thus, demand for crude oil by refineries. ~~However, no party has been able to quantify how or when those changes are expected to impact Canadian crude oil supply during the forecasting period (i.e., until 2035). Consequently, the ALJ is left with Applicant's forecasts of oil supply available for transport on the Project—and whether those supply forecasts justify the construction of a new pipeline. Mere statements of change, no matter how reasonable~~

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<sup>95</sup> Report at 167 (Finding 559) (emphasis added) (footnotes omitted).

<sup>96</sup> Report at 171–72 (Proposed Finding 570) (footnotes omitted).

~~those changes may be to anticipate—without quantification of how they will impact Canadian crude oil supply and demand—are not sufficient to negate Applicant’s detailed projections. While they may invite doubt as to the extent of future demand for crude oil and oil transportation services, they do not negate Applicant’s projects of future oil supply.~~<sup>97</sup>

598. Given the global recognition of the dangers of climate change and the calls to reduce dependence on fossil fuels, scenarios in which demand for oil in the international marketplace is significantly reduced (thereby causing an oversupply of oil, lowering oil prices, and reducing the opportunities for U.S. export) are very real. ~~However, no party has presented any data actually quantifying this possibility. General discussions on global and domestic climate policy changes are not sufficient to quantify the effect that these policies may have on oil prices or demand for refined product. Therefore, the raw claims alone do not negate Mr. Earnest’s assumption that (at least through 2035) surplus oil can be exported outside the U.S. (Mr. Stockman’s analysis based upon oil prices is as close as a party comes to addressing a decrease in global demand and his analysis is discussed above.)~~<sup>98</sup>

601. At trial, Dr. Fagan asserted generally that these additional pipeline scenarios were not realistically modeled by Mr. Earnest. For example, Dr. Fagan explained that Mr. Earnest’s Model has the Keystone XL pipeline transporting a little over 100 kbpd, despite the fact that the project is anticipated to run at 800 kbpd. Dr. Fagan asserts that such volume would not be sufficient to get the Keystone pipeline built because the Keystone XL project is being built on a “take or pay” basis, meaning that shippers must commit to shipping a certain amount on the line or it will not be built. ~~Dr. Fagan, however, did not provide any additional analysis to show why or how Mr. Earnest’s revised utilization projections were erroneous. Her comments were essentially afterthoughts not addressed in any of her pre-filed testimony.~~<sup>99</sup>

602. The ALJ agrees that Mr. Earnest’s initial analysis dismissing the Keystone XL pipeline as a possible means of transportation in the future was in error. The Keystone XL pipeline has now received all necessary regulatory permits and, thus, is a realistic possibility for crude oil transportation in the

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<sup>97</sup> Report at 176 (Finding 591) (emphasis added).

<sup>98</sup> Report at 178 (Finding 598).

<sup>99</sup> Report at 178–79 (Finding 601).

future. Mr. Earnest, however, updated his projections by including the Keystone XL pipeline in his Model; and ~~Dr. Fagan provided little, if any, evidence to rebut Mr. Earnest's updated projections.~~<sup>100</sup>

[New Finding]. As Dr. Fagan testified at trial that, had Mr. Earnest used realistic assumptions or modeled the proposed Keystone XL project in a realistic way, and had his modeling results still showed the Enbridge Mainline System flowing at full capacity, that information might show support for the proposed Project; Mr. Earnest did not do so. His use of unrealistic modeling and modeling scenarios of potential additions of pipeline capacity did not constitute support for the proposed Project.<sup>101</sup>

[New Finding]. Dr. Fagan testified at trial that she maintained her initial conclusion regarding Mr. Earnest's unrealistic consideration of additional pipeline expansions in the future after she had reviewed Mr. Earnest's subsequent modeling using additional assumptions and scenarios in his rebuttal testimony. Mr. Earnest's projected utilization of the Enbridge Mainline System was based on unrealistic assumptions.<sup>102</sup>

~~603. — Based upon her critique of Mr. Earnest's work, Dr. Fagan concludes that the forecast assumptions for supply, demand, and infrastructure made in the Muse Stancil Report were "unrealistic" and that she could not "conclude with confidence" that Applicant's forecasts were accurate. — Therefore, she neither rejected Applicant's forecasts as inaccurate nor endorsed them as accurate. — The DOC DER's expert's lack of confidence in the forecasts fall short of a expert declaration that the Project is not needed.~~<sup>103</sup>

~~604. — Presumably, Dr. Fagan did not have sufficient time to fully analyze the "ultimate issue" set forth by the Commission in its Order of August 12, 2015 — namely, whether the "proposed pipeline meets the need criteria set forth in Minn. Stat. § 216B.243 and Minn. Rules Chapter 7853." — The ALJ notes that the DOC DER has not been overly helpful to the ALJ and Commission in this case. — The DOC DER's expert, Dr. Fagan, was not retained~~

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<sup>100</sup> Report at 179 (Finding 602).

<sup>101</sup> See Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 99 (Fagan).

<sup>102</sup> See Evid. Hrg. Tr. Vol. 9B (Nov. 15, 2017) at 16–17, 70–71 (Fagan); Ex. DER-7, Sched. MF-1 at 5–7 (Fagan Surrebuttal).

<sup>103</sup> Report at 179 (Finding 603) (footnote omitted).

until sometime in late July 2017—approximately 45 days prior to when the DOC DER’s direct testimony was due to be filed in the case.—As a result, Dr. Fagan admits that she did not have time to conduct any stand-alone analysis of need.

605.—Instead, due to the DOC DER’s resource constraints and Dr. Fagan’s late involvement in the case, she was only able to provide a critique of Applicant’s Muse Stancil Report and the related Oliver Wyman Report.—Consequently, Dr. Fagan did not analyze whether denial of a CN would adversely affect the future adequacy, reliability, or efficiency of energy supply to the Applicant’s customers, the people of the state, or neighboring states.—Nor did Dr. Fagan examine the impact on crude oil supply in Minnesota or elsewhere if the Project was denied.

606.—Moreover, it was only after her surrebuttal had been filed that Dr. Fagan began analyzing the issue of apportionment, a major issue in this case.—Applicant’s CN Application (filed in 2014), specifically identifies apportionment as one of the three bases of need for the Project.—Despite this fact, Dr. Fagan did not address apportionment until after the deadline for filing surrebuttal testimony had expired.—As a result, the DOC DER submitted Dr. Fagan’s “Supplemental Surrebuttal” on October 27, 2017, just days before the start of the hearing on this matter.

607.—To ensure as robust a record as possible, and over Applicant’s objection, the ALJ allowed the DOC DER to submit untimely “Supplemental Surrebuttal” on the issue of apportionment.—Even then, Dr. Fagan’s ultimate analysis of apportionment was merely “inconclusive,” providing little, if any, assistance to the ALJ and Commission.

608.—Ultimately, because the DOC DER did not conduct its own analysis of the need for this Project, the Commission and the ALJ are left with Applicant’s analysis and the critiques presented by opposing parties (including the DOC DER).

609.—Despite the DOC DER’s lack of a stand-alone expert analysis of need, the DOC DER repeatedly advised the public at the public hearings that the agency found no need for the Project—statements that gave the impression that the agency had conducted its own expert analysis of need.—When, in fact, the DOC DER only provided criticism of Applicant’s methodologies, but no independent analysis of the need for the Project.—Ultimately Dr. Fagan’s conclusion were: (1) “inconclusive;” and (2) “cannot

~~conclude with confidence” with respect to apportionment and Applicant’s forecast of need, respectively.~~<sup>104</sup>

~~650. Unfortunately, the DOC DER never attempted to obtain any information from the two Minnesota refineries or any of Applicant’s shippers about the impact of apportionment on their ability to obtain supplies of crude oil. This information would have been helpful to the ALJ and Commission in assessing need.~~<sup>105</sup>

[New Finding]. Even if one were to assume that apportionment will increase in the future, the Commission finds that Enbridge did not demonstrate a level of future apportionment on the Enbridge Mainline System that may or likely would cause material harm to refiners in Minnesota, the Minnesota district or in PADD 2.

24. For these reasons, Applicant has not established, by a preponderance of the evidence, that the probable result of denial of the Certificate of Need Application would adversely affect the future adequacy, reliability, or efficiency of the transportation of crude oil supply by Applicant’s customers, particularly Canadian crude oil shippers.

~~663. While Applicant’s supply forecasts may not be entirely reliable, the fact that apportionment exists on the Mainline evidences that the demand to transport Canadian heavy crude exceeds the Mainline’s current capabilities. Even adopting the most conservative of supply forecasts (the in service and under construction figures provided by Applicant), the evidence suggests that demand to transport heavy crude from Canadian oil producers will continue in the short run (until 2035); and that apportionment will continue on the Mainline unless additional pipeline capacity to transport heavy crude is added to the system (or provided elsewhere).~~<sup>106</sup>

~~664. Despite the problems with Applicant’s supply forecast, the existence and likely continuance of apportionment establishes that there is a demand by Applicant’s customers (i.e., Canadian oil producers) for the transportation of Canadian heavy crude through the Mainline that is not being fully met and will not be met in the short term (through 2035). Accordingly, Applicant~~

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<sup>104</sup> Report at 181–82 (Findings 604–609) (footnotes omitted).

<sup>105</sup> Report at 192 (Finding 650) (footnote omitted).

<sup>106</sup> Report at 194 (Finding 663).

~~has established by a preponderance of the evidence that its forecast for demand for transportation of Canadian heavy crude on the proposed Project exists. In addition, Applicant has established that apportionment has the potential to negatively impact Applicant's customers (mostly Canadian oil producers), even if harm has not been established to Minnesota or regional refineries.~~<sup>107</sup>

~~667. — It is a bitter pill to swallow, however, that the “need” for this Project is to primarily assist foreign oil producers in transporting their products through (and mostly out of) Minnesota. However, the rule does not prioritize the needs of Applicant's customers, the people of Minnesota, or the people of neighboring states. Each of these categories has equal priority under Rule 7853.0130(A).~~<sup>108</sup>

27. Applicant has not established, however, by preponderance of the evidence, that the consequences to society of granting the certificate of need for the Project, as proposed, are more favorable than the consequences of denying the certificate so long as the Project includes Applicant's Preferred Route. However, the cost and benefit calculation under Minnesota Rule 7853.0130(C) changes if Applicant replaces Existing Line 3 in its current location (i.e., if the Commission were to select RA 07 as the pipeline route in this case). In such a circumstance, the benefits to Minnesota and regional refiners, and the people of Minnesota, slightly outweigh the risks and impacts of a new crude oil pipeline.<sup>109</sup>

~~30. — The Administrative Law Judge hereby concludes that, subject expressly to the selection of RA 07 (in trench replacement) and the conditions recommended below, that the Commission GRANT Applicant's Application.~~

[New Conclusion]. The Commission concludes that the Application must be DENIED.

[New Conclusion]. When an Applicant fails to demonstrate need, the CN request is denied, and therefore, the Commission does not select a route for the “not needed” project.

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<sup>107</sup> Report at 194 (Finding 664).

<sup>108</sup> Report at 194 (Finding 667).

<sup>109</sup> Report at 361 (Conclusion 27).

The following clarifications or new findings are part of DOC DER’s recommended conditions that the Commission could consider integral in order to find need for the proposed Project.

41. Pursuant to Minnesota Rule ~~7849.0400~~7853.0800, subpart 1 (2017), the issuance of a CN may be made contingent upon certain conditions set by the Commission.<sup>110</sup>

[New Finding]. Enbridge has not demonstrated that a larger, 36-inch pipeline is needed.<sup>111</sup> Instead, the pipeline diameter should be based on Enbridge’s stated need to replace the original 34-inch diameter Line 3, and therefore, a new Line 3 shall be no larger than a 34-inch pipeline.<sup>112</sup>

[New Finding]. Enbridge shall apply “neutral footprint” objectives to the environmental impacts associated with the Line 3 Replacement Project, including conserving an acre for every acre of natural habitat impacted, planting a tree for every tree that must be removed to build new facilities, and generating a kilowatt-hour of renewable energy for every kilowatt-hour the Line 3 Replacement Project energy operations consume. Within 90 days of the Line 3 Replacement Project becoming operational, Enbridge shall file a report stating –

- how Enbridge intends to implement its neutral footprint policy with respect to the Line 3 Replacement Project, and
- how it intends to document its compliance with this policy.

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<sup>110</sup> Report at 364 (Conclusion 41).

<sup>111</sup> Ex. DER-1 at 21 (O’Connell Direct).

<sup>112</sup> *Id.* at 21.

## CONCLUSION

For the reasons stated above, and consistent with its testimony and post-trial briefs in this matter, DOC DER respectfully requests that the Commission consider its exceptions and clarifications to the Report in order to determine whether Enbridge has met its burden of proving need for the proposed Project under the CN criteria.

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Respectfully submitted,

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