

## Staff Briefing Papers

Meeting Dates: June 18, 19, 26, and 27, 2018

Agenda Item \*\*1

Company: Enbridge Energy, Limited Partnership

Docket No. PL-9/CN-14-916

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

- Issues:
1. Should the Commission grant a certificate of need to Enbridge Energy, Limited Partnership's for its proposed Line 3 Replacement Project?
  2. Should the Commission adopt as is, modify, or reject the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation as they apply to its certificate of need decision?

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| ✓ Relevant Documents  | Date             |
|---|------------------|
| Enbridge Petition for Approval of Notice Plan Proposal, Request for Exemptions, Protective order, and Separate Docket and Accompanying Protective Order for Highly Sensitive Nonpublic Data | October 24, 2014 |

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

| ✓ <b>Relevant Documents</b>   | <b>Date</b>       |
|---|-------------------|
| Commission Order Approving Notice Plan, Granting Variance Request, Approving Exemption Requests, and Approving and Adopting Orders for Protection and Separate Docket | January 27, 2015  |
| Commission Protective Order   | April 13, 2015    |
| Commission Protective Order for Nonpublic Highly Sensitive Trade Secret Data  | April 13, 2015    |
| Enbridge Notice Plan  | April 20, 2015    |
| Enbridge Application for a Certificate of Need  | April 24, 2015    |
| Enbridge Application for a Route Permit   | April 24, 2015    |
| Commission Order Finding Certificate of Need Application Substantially Complete and Varying Timelines; Notice and Order for Hearing                                   | August 12, 2015   |
| Commission Order Finding Route Permit Application Substantially Complete and Varying Timelines  | August 12, 2015   |
| Commission Order Joining Need and Routing Dockets   | February 1, 2016  |
| Commission Notice of Hearing  | February 1, 2016  |
| Commission Order Denying Petitions for Reconsideration [of February 1 Order] and Motion to Amend Memorandum, and Referring Petitions for Intervention to OAH          | March 31, 2016    |
| Scoping Environmental Assessment Worksheet  | April 12, 2016    |
| Draft Scoping Decision Document   | April 12, 2016    |
| Commission Order Denying Motions, Approving Scoping Decision as Modified, and Requiring Expanded Notice   | November 30, 2016 |
| Environmental Impact Statement Scoping Decision Document  | December 5, 2016  |
| Commission Order Denying Reconsideration [of November 30 Order]   | February 10, 2017 |
| Commission Order Clarifying Process   | March 24, 2017    |
| Draft Environmental Impact Statement  | May 15, 2017      |
| Commission Order Denying Motion for Reconsideration [of March 24 Order] and Granting Authority to the Department of Commerce to Obtain Investigative Services         | May 24, 2017      |

| ✓ Relevant Documents  | Date              |
|---|-------------------|
| Commission Order Extending Deadline and Setting Procedural Schedule   | August 14, 2017   |
| Final Environmental Impact Statement  | August 17, 2017   |
| Commission Order Modifying Procedural Schedule  | August 25, 2017   |
| Commission Order Denying Reconsideration [of August 25 Order]   | October 10, 2017  |
| Report of the Administrative Law Judge on Adequacy of Final Environmental Impact Statement                                  | November 1, 2017  |
| Commission Order Finding Certain Data Public and Requiring Refiling   | November 9, 2017  |
| Commission Order Finding Environmental Impact Statement Inadequate  | December 14, 2017 |
| Commission Order Requesting ALJ Report by April 23, 2018  | January 10, 2018  |
| Revised Final Environmental Impact Statement  | February 12, 2018 |
| Commission Order Denying Reconsideration [of December 14 Order]   | March 1, 2018     |
| Administrative Law Judge Findings of Fact, Conclusions of Law, and Recommendation (ALJ Report)                              | April 23, 2018    |
| Commission Order Finding Environmental Impact Statement Adequate and Adopting ALJ Lipman’s November 2017 Report as Modified | May 1, 2018       |
| Department of Commerce Sample Route Permit  | May 7, 2018       |
| Department of Commerce Division of Energy Resources Exceptions to ALJ Report  | May 9, 2018       |
| Department of Commerce Energy Environmental Review and Analysis Exceptions to ALJ Report                                    | May 9, 2018       |
| Donovan and Anna Dyrdal Exceptions to ALJ Report  | May 9, 2018       |
| Enbridge Exceptions to ALJ Report   | May 9, 2018       |
| Fond du Lac Band of Lake Superior Chippewa Exceptions to ALJ Report   | May 9, 2018       |
| Friends of the Headwaters Exceptions to ALJ Report  | May 9, 2018       |
| Honor the Earth Exceptions to ALJ Report  | May 9, 2018       |

| <b>✓ Relevant Documents</b>  | <b>Date</b> |
|--|-------------|
| Laborers District Council of Minnesota and North Dakota Exceptions to ALJ Report   | May 9, 2018 |
| Leech Lake Band of Ojibwe Exceptions to ALJ Report   | May 9, 2018 |
| Mille Lacs Band of Ojibwe Exceptions to ALJ Report   | May 9, 2018 |
| Red Lake Band of Chippewa Exceptions to ALJ Report   | May 9, 2018 |
| Shippers for Secure, Reliable and Economic Petroleum Transportation Exceptions to ALJ Report   | May 9, 2018 |
| Sierra Club Exceptions to ALJ Report   | May 9, 2018 |
| United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO Exceptions to ALJ Report | May 9, 2018 |
| White Earth Band of Ojibwe Exceptions to ALJ Report  | May 9, 2018 |
| Youth Climate Intervenors Exceptions to ALJ Report   | May 9, 2018 |
| Minnesota Department of Natural Resources (DNR) Comment Letter on ALJ Report   | May 9, 2018 |
| Minnesota Pollution Control Agency (MPCA) Comment Letter on ALJ Report   | May 9, 2018 |
| Association of Oil Pipelines Comment Letter on ALJ Report (Non-Party)  | May 9, 2018 |
| Association of Freeborn County Landowners Comment Letter on ALJ Report (Non-Party)   | May 9, 2018 |
| Canadian Oil and Natural Gas Producers Comment Letter on ALJ Report (Non-Party)  | May 9, 2018 |
| Flint Hills Resources Comment Letter on ALJ Report (Non-Party)   | May 9, 2018 |
| Government of Alberta Canada Comment Letter on ALJ Report (Non-Party)  | May 9, 2018 |

## I. STATEMENT OF THE ISSUES

1. Should the Commission grant a certificate of need to Enbridge Energy, Limited Partnership's for its proposed Line 3 Replacement Project?
2. Should the Commission adopt as is, modify, or reject the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation as they apply to its certificate of need decision?

## II. PROJECT DESCRIPTION

Enbridge Energy, Limited Partnership (Enbridge) has filed a certificate of need application and a pipeline route permit application for its proposed Line 3 Replacement Project.<sup>1</sup> As described in the applications, the Line 3 Replacement Project would be a new 337-mile long 36-inch diameter pipeline that would replace 282 miles of the existing 34-inch Line 3 pipeline in Minnesota.<sup>2</sup> The pipeline route proposed by Enbridge would parallel the route of the existing Line 3 pipeline from the North Dakota-Minnesota border in Kittson County to the Clearbrook Terminal in Clearbrook, Minnesota, but would require a new pipeline right-of-way from the Clearbrook Terminal to the Minnesota-Wisconsin border in Carlton County. The existing Line 3 pipeline is proposed to be permanently deactivated and left in-place after the new pipeline is installed, tested, and operational. Associated facilities would include eight pumping stations, valves, metering and monitoring equipment, and related electrical facilities. Enbridge's proposed pipeline route would cross portions of Kittson, Marshall, Pennington, Polk, Red Lake, Clearwater, Hubbard, Wadena, Cass, Crow Wing, Aitkin, and Carlton counties.

As indicated in the applications, the purpose of the Line 3 Replacement Project is to replace the Minnesota portion of the existing Line 3 pipeline to: 1) address known integrity risks, 2) reduce apportionment due to decreased transport capacity related to integrity issues, and 3) restore

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<sup>1</sup> The pipeline route permit and issues related to that matter are addressed in a separate briefing paper (Docket No. PL-9/PPL-15-137).

<sup>2</sup> The existing Line 3 pipeline was originally installed between 1962 and 1969 and is part of the Enbridge Mainline System. The existing Line 3 pipeline originates in Canada and crosses the United States-Canada border near Neche, North Dakota. The pipeline runs through North Dakota entering Minnesota in Kittson County and continues to Clearbrook, Minnesota, heads east from Clearbrook and terminates at the Enbridge Superior Station and Terminal Facility near Superior, Wisconsin. The Enbridge Mainline System delivers crude oil to: 1) Minnesota Pipe Line Company's interconnecting facilities at Clearbrook for ultimate redelivery to Minnesota refineries, and 2) the Superior Terminal for ultimate delivery to other refineries in the United States and Canada.

flexibility to the Enbridge Mainline System for more efficient operation. The new Line 3 pipeline would have an annual average capacity of 760,000 barrels per day (bpd) and would serve the same markets and transport the same products as the existing Line 3 pipeline.<sup>3</sup> Operationally, the new Line 3 pipeline would continue to transport crude from Canada to the Enbridge terminal facility in Clearbrook for subsequent delivery to Minnesota refineries via interconnected pipeline facilities operated by Minnesota Pipeline Company;<sup>4</sup> and delivery of crude oil to the Superior Wisconsin terminal for subsequent delivery on the Enbridge Mainline System to refineries in the Midwest, Eastern Canada, and the Gulf Coast.

### III. STATUTES AND RULES

The proposed project is a large energy facility as defined by Minn. Stat. § 216B.2421, subd. 2(4), because it is a pipeline greater than six inches in diameter with more than 50 miles of its length in Minnesota used for the transportation of crude petroleum.<sup>5</sup> Under Minn. Stat. § 216B.243, subd. 2, no large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the Commission.

Minn. Stat. § 216B.243, subd. 1, requires the Commission to adopt rules setting forth the criteria to be used in its determination of need for such facilities. The operative rules for the review of certificate of need applications for large petroleum pipelines are found in Minnesota Rules Chapter 7853. Specifically, part 7853.0130 provides that a certificate of need shall be granted to the applicant if the Commission determines 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;
  - (2) the effects of the applicant's existing or expected conservation programs and state and federal conservation programs;

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<sup>3</sup> While it originally transported a mix of heavy and light crude, the existing Line 3 transports light crudes and its average annual capacity has been restricted to 390,000 bpd due to safety-related pressure limits.

<sup>4</sup> Enbridge currently transfers approximately 400,000 bpd to the Minnesota Pipe Line Company pipeline system (See Final EIS, Section 1.2 at 1-4).

<sup>5</sup> The project is further defined as a large petroleum pipeline under Minn. R. 7853.0010, subp. 14.

- (3) the effects of the applicant's promotional practices that may have given rise to the increase in the energy demand, particularly promotional practices that have occurred since 1974;
  - (4) the ability of current facilities and planned facilities not requiring certificates of need, and to which the applicant has access, to meet the future demand; and
  - (5) the effect of the proposed facility, or a suitable modification of it, in making efficient use of resources;
- B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant, considering:
- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
  - (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;
  - (3) the effect of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and
  - (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives;
- 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; and
- D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.

#### IV. PROCEDURAL HISTORY

On October 24, 2014, Enbridge filed a *Petition for Approval of Notice Plan Proposal, Request for Exemptions, Protective Order, and Separate Docket and Accompanying Protective Order for Highly Sensitive Nonpublic Data* (Petition) for the Line 3 Replacement Project.

On January 27, 2015, the Commission issued its *Order Approving Notice Plan, Granting Variance Request, Approving Exemption Requests, and Approving and Adopting Orders for Protection and Separate Docket* for highly sensitive nonpublic data (See Docket No. PL-9/CN-15-340).

On April 24, 2015, Enbridge filed separate applications for a certificate of need and a route permit for the Line 3 Replacement Project.

On August 12, 2015, the Commission issued separate orders finding the certificate of need and route permit applications substantially complete. The Commission referred the certificate of need application to the Office of Administrative Hearings (OAH) for contested case proceedings and requested the Department of Commerce Energy Environmental Review and Analysis unit (DOC-EERA) prepare an environmental analysis. In the routing docket, the Commission authorized DOC-EERA to administer the alternative route proposal development process but did not refer the route permit application to the OAH at that time.

Between August 11 and 27, 2015, staff from the Commission and DOC-EERA conducted 15 public information meetings in 10 different counties along Enbridge's proposed route. A comment period was open from July 20, 2015 to September 30, 2015, to provide the public an opportunity to comment on potential human and environmental impacts and to suggest alternative pipeline routes to be considered in the comparative environmental analysis (CEA).



On September 14, 2015, the Minnesota Court of Appeals issued its opinion in response to an appeal of the Commission's certificate of need decision in the related, but independent Sandpiper Pipeline Project. The Court held that the Minnesota Environmental Policy Act (MEPA) requires an environmental impact statement (EIS) be completed for a pipeline project before a determination of whether or not the project is needed.

On February 1, 2016, the Commission issued an order that, among other procedural items, joined the Line 3 Project certificate of need and route permit dockets and authorized the preparation of a combined EIS by DOC-EERA following the timelines and processes set forth in Minnesota Rules Chapter 4410. On that same day, in a separate notice for hearing, the Commission referred the routing matter to the OAH for joint contested case proceedings with the related certificate of need matter.<sup>6</sup>

On April 11, 2016, DOC-EERA issued the Environmental Assessment Worksheet (EAW) and the Draft Scoping Decision Document (DSDD) for the Line 3 Replacement Project pursuant to Minnesota Rules Chapter 4410. Between April 25 and May 11, 2016, DOC-EERA conducted 12 EIS scoping meetings in 10 different counties. A comment period was open through May 26, 2016.

On November 30, 2016, the Commission issued its *Order Denying Motions, Approving Scoping Decision as Modified, and Requiring Expanded Notice* which, among other procedural items, approved the EIS Scoping Decision; and forwarded one system alternative, four route alternatives, and 24 route segment alternatives for further consideration at the public hearings.

On December 5, 2016, DOC-EERA issued the EIS Scoping Decision and published the EIS Preparation Notice for the Line 3 Replacement Project in the EQB Monitor. Publication of the notice triggered the start of a 280-day timeline under Minn. Stat. § 116D.04, subd. 2a(h), for determining the adequacy of the Final EIS, thereby making September 11, 2017, the deadline for an adequacy decision.

On May 15, 2017, the Department issued the Draft EIS. The Department identified August 10, 2017, as the anticipated issue date for the Final EIS.

Between June 6, 2017 and June 22, 2017, DOC-EERA conducted 22 Draft EIS public information meetings in 22 different counties. A comment period was open through July 10, 2017.

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<sup>6</sup> The Line 3 certificate of need and route permit proceedings were assigned to ALJ Ann C. O'Reilly.

On August 14, 2017, the Commission issued an order that: 1) extended the 280-day statutory deadline for EIS preparation under Minn. Stat. § 116D.04, subd. 2a(j) by consent of the parties; 2) referred the matter of the adequacy of the Final EIS to OAH for the appointment of a second ALJ (ALJ Eric L. Lipman) to develop a record and issue a report and recommendation; and 3) established a procedural schedule for the submission of ALJ Lipman's Report and a Commission determination on the adequacy of the Final EIS. The Commission indicated that it would decide the adequacy of the Final EIS sometime between November 30 and December 11, 2017.

On August 17, 2017, DOC-EERA issued the Final EIS.<sup>7</sup>

On November 1, 2017, ALJ Eric L. Lipman filed his Findings of Fact, Conclusions of Law, and Recommendation concerning the adequacy of the Final EIS. ALJ Lipman recommended that the Commission find the Final EIS to be adequate under Minn. R. 4410.2800, subp. 4.

On December 7, 2017 the Commission met to consider the adequacy of the FEIS and on December 14, 2017, issued its *Order Finding Environmental Impact Statement Inadequate*. The order identified four deficiencies that needed to be remedied before the Final EIS could be considered adequate. The process provided for 60 days for the DOC-EERA to address and submit the information required.

On February 12, 2018, DOC-EERA issued the revised Final EIS.

On March 15, 2018 the Commission met again to consider the adequacy of the revised FEIS and on May 1, 2018, issued its *Order Finding Environmental Impact Statement Adequate and Adopting ALJ Lipman's November 2017 Report as Modified*.

On April 23, 2018, ALJ O'Reilly issued her Findings of Fact, Conclusions of Law, and Recommendation concerning the certificate of need and route permit applications (ALJ Report or Report).<sup>8</sup> The ALJ recommended that the Commission grant a certificate of need for the proposed project but only if the Commission selects Route Alternative 07 (in-trench replacement) as the designated route. The ALJ also included several other conditions related to the recommendation.

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<sup>7</sup> On August 9, 2017, the Governor directed the Commissioner of Commerce to extend the deadline for issuing the Final EIS from August 10, 2017 to August 17, 2017.

<sup>8</sup> The ALJ Report is dated April 23, 2018, but was filed to eDockets on April 24, 2018.

On May 9, 2018, exceptions to the ALJ Report were filed by the following parties: DOC-DER, DOC-EERA, Donovan and Anna Dyrdal, Enbridge, Fond du Lac Band of Lake Superior Chippewa (Fond du Lac Band), Friends of the Headwaters (FOH), Honor the Earth, Laborers District Council of Minnesota and North Dakota (Laborers), Leech Lake Band of Ojibwe (Leech Lake Band), Mille Lacs Band of Ojibwe (Mille Lacs Band), Red Lake Band of Chippewa (Red Lake Band), Shippers for Secure, Reliable and Economical Petroleum Transportation (Shippers Group), Sierra Club, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (United Association), White Earth Band of Ojibwe (White Earth Band), and Youth Climate Intervenors (YCI). The Commission also received comment letters on the ALJ Report from the following non-party participants: Association of Oil Pipelines, Association of Freeborn County Landowners, Canadian Oil and Natural Gas Producers, Minnesota Department of Natural Resources (DNR), Flint Hills Resources, Government of Alberta (Canada), and Minnesota Pollution Control Agency (MPCA).

## **V. REPORT OF THE ADMINISTRATIVE LAW JUDGE**

On April 23, 2018, ALJ O'Reilly filed her Report concerning the certificate of need and route permit applications. The ALJ identified the issues to be addressed as follows:

1. Should Enbridge Energy's Application for a Certificate of Need for the proposed Project be granted?
2. If so, should the Commission grant a Route Permit for the Project?
3. If so, which of the proposed route or route alternatives best meets the route selection criteria set forth in Minn. R. 7852.1900, subp. 3?
4. If a Certificate of Need and Route Permit are issued in this case, what conditions or provisions should be included in the permits?

The ALJ Report includes 1,405 findings of fact, 44 conclusions of law, and a recommendation that the Commission grant a certificate of need for the proposed project but only if the Commission selects Route Alternative RA-07 (in-trench replacement) as the designated route.

The following sections provide a broad overview of the central topics of the ALJ Report, followed by a summary of the ALJ's findings and conclusions related to the certificate of need criteria of Minn. Stat. § 216B.243, subd. 3, as set forth in Minn. R. 7853.0130. Because Minn. Stat. § 216B.243, subd. 2 provides that no large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need, the Commission must first make a decision on the need of the proposed project. Therefore, this briefing paper summarizes only

those elements of the ALJ Report related to the Commission's certificate of need determination.

The ALJ's recommendation is based on three principal considerations. First, that the current Line 3 is an aging pipeline constructed in the 1960s with known integrity issues and safety risks related to external corrosion and stress corrosion cracking, its original design specifications, and the construction methods employed in building it. The Report finds that Line 3 is operating at half its original capacity and transporting only light crude oil in order to reduce pressure on the pipeline, and that the reduced volume and pressure will not alleviate future external corrosion of the pipeline. The ALJ also found that the continuing integrity issues can only be addressed through an extensive dig and repair program over the coming years, and that the dig and repair program will not restore the current Line 3 to its designed operating capacity. The ALJ concluded that these known problems are one of the reasons replacement of the current Line 3 is a reasonable and prudent action.<sup>9</sup>

The second principal consideration discussed by the ALJ is apportionment. The ALJ agreed that Enbridge has established that the Mainline System is and has been under apportionment for heavy crude oil, and that the existing and predicted on-going apportionment on the Mainline System demonstrates that there is a demand for oil to be transported that exceeds the current capacity of the system. The ALJ concluded from this that the demand of Enbridge customers (i.e., Canadian oil producers and domestic shippers, including Minnesota refineries) for the transporting of heavy crude oil on the Mainline System is not being fully met now and will not be met in the short term.<sup>10</sup>

The third principal consideration for the ALJ was the relative benefits of replacing the current Line 3 with a new pipeline located in the trench currently used by the existing line, rather than building a new Line 3 in a different route and abandoning the existing Line 3 in place. The ALJ found that the "in-trench" replacement of the old pipeline by the new pipeline would not involve the addition of a new pipeline corridor in Minnesota and would have less environmental impacts than locating the new Line 3 in any other route alternatives.

The ALJ Report also discusses the procedural history of this matter in great detail beginning with the initial notice plan filing through to the Commission's environmental impact statement adequacy determination, reaching the conclusion that the Commission and the Applicant have

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<sup>9</sup> ALJ Report, Summary of Facts and Recommendation, p. 8.

<sup>10</sup> *Id.*, pp. 8-9.

fulfilled the required notice, meeting, and other procedural requirements set forth in rule and law for the assessment of a certificate of need application.<sup>11</sup>

**A. Summary of ALJ’s Application of Certificate of Need Criteria**

The table below identifies the criteria addressed by the ALJ in her Report and whether or not the ALJ found the criteria had been satisfied beyond a preponderance of the evidence.

| Regulatory Criteria           | Findings in ALJ Report | Was Criteria Met?          |
|-------------------------------|------------------------|----------------------------|
| Minn. R. 7853.0130 (A)        | 533-546, 720-735       | Yes                        |
| Minn. R. 7853.0130 (A)(1)     | 547-667                | Yes                        |
| Minn. R. 7853.0130 (A)(2)     | 668-683                | No                         |
| Minn. R. 7853.0130 (A)(3)     | 684-686                | Exemption Granted          |
| Minn. R. 7853.0130 (A)(4)     | 687-706                | Yes                        |
| Minn. R. 7853.0130 (A)(5)     | 707-719                | Yes                        |
| Minn. R. 7853.0130 (B)(1)-(4) | 736-810                | Yes                        |
| Minn. R. 7853.0130 (C)        | 811                    | See criteria factors below |
| Minn. R. 7853.0130 (C)(1)     | 812-830                | Yes                        |
| Minn. R. 7853.0130 (C)(2)     | 831-920                | Yes, if mitigated          |
| Minn. R. 7853.0130 (C)(3)     | 921-926                | Yes                        |
| Minn. R. 7853.0130 (C)(4)     | 927-933                | Yes                        |
| Minn. R. 7853.0130 (D)        | 934-948                | Yes                        |

Commission staff provides a more detailed summary of the ALJ’s findings and conclusions related to the certificate of need criteria in subsections B through O below.

**B. Minn. R. 7853.0130 (A) - The probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states**

**1. Reliability**

With regard to reliability, the ALJ found that a new Line 3 would be more reliable than the current Line 3 and that denial of the Project could adversely impact the reliability of energy supply to the Applicant’s customers (Canadian oil producers/shippers). (ALJ Finding 724). Because of known integrity and safety issues, the current Line 3 is under pressure restrictions

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<sup>11</sup> ALJ Report, Findings 59 to 277.

which prevents the transportation of heavy crude or the transportation of more than 390,000 bpd of light crude. (ALJ Finding 697). The Applicant's customers suffer adverse impacts because the current Line 3 is not able to transport heavy crude oil to meet current customer demand. (ALJ Finding 722). A new line 3 built with modern technology and new materials would provide more reliability to the Mainline System, the Applicant, and the Applicant's customers (Canadian oil producers/shippers) over an aging line in constant need of repair. (ALJ Finding 721). Without a new Line 3, the Applicant's customers would need to rely on rail and truck transport to supplement which are more expensive, less efficient, and less desirable than pipeline transport. (ALJ Finding 723). In addition, PADD II<sup>12</sup> refiners would realize secondary benefits from a new more reliable system. (ALJ Finding 722).

Also, the approximately 6,250 integrity digs that would be necessary for the continued operation of the current Line 3 over the next 15 years (ALJ Finding 322) would adversely impact Minnesota refiners and landowners who currently have an easement on their property due to the interruptions and disruptions that can result from frequent integrity digs. (ALJ Finding 723).

## **2. Efficiency**

Similar to her findings related to reliability, the ALJ found that a new Line 3 capable of operating in a mixed service capacity would allow access to unused capacity on other Mainline pipelines, resulting in the elimination of apportionment on the System and increasing overall System efficiency. (ALJ Finding 725). Denial of a new pipeline would likely necessitate additional amounts of crude transported by rail and truck, which are both more expensive, less efficient, and less desirable than pipeline transport. As a result, the ALJ found that denial of a new pipeline would result in the Applicant's customers suffering from adverse effects in the efficient transport of crude oil. (ALJ Finding 726).

## **3. Adequacy**

The ALJ found that a new pipeline will increase adequacy on the Mainline System by providing increased capacity for heavy crude, thereby freeing up space on other Mainline pipelines resulting in the elimination of apportionment on the System. (ALJ Finding 727). The ALJ found that a new Line 3, "at this time and in the very near future, will have some benefits to Applicant's customers, Minnesota refiners, and other PADD II refiners." (ALJ Finding 734).

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<sup>12</sup> The United States is divided into five Petroleum Administration for Defense Districts (PADD). Minnesota is located in PADD II along with 14 other Midwest states. Originally created during World War II to help allocate fuels derived from petroleum products, PADDs are still used for data collection purposes and understanding the supply and demand of the domestic petroleum business.

Although the ALJ indicated concern over the Applicant's forecast of demand (See Findings 658 to 667), the ALJ ultimately concluded that near term projections (to year 2035) establish the continued supply and demand for shipment of Canadian crude oil. (ALJ Finding 730). The ALJ, however, cautioned that certain global changes in terms of timing of oil supply and demand are unknown and influx and much can change by 2035. (ALJ Finding 731).

**C. 7853.0130 (A)(1) - The accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility**

The ALJ raised four issues concerning the reliability and accuracy of Enbridge's forecast of demand:

- The forecast and analysis focused on the demand for transportation of oil, not actually demand for oil. (ALJ Finding 659).
- The analysis focused on supply or abundance of Canadian crude oil that could potentially be shipped, as opposed to the demand for refined products (ALJ Finding 660).
- The forecast of supply failed to provide independent oil price assumptions that would indicate a point where oil prices become too low for tar sands projects to remain viable. (ALJ Finding 661).

Despite identifying concerns over the reliability of the Enbridge's supply forecast, the ALJ ultimately found that its forecast did establish demand for transportation of Canadian heavy crude by the proposed project as evidenced by the following:

- "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)." (ALJ Finding 663).
- "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 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." (ALJ Finding 664).

- "While Applicant has not demonstrated that Minnesota refineries will be harmed by denial of the Project, evidence does exist as to the likely benefits of the Project to Minnesota and its refiners. These benefits include access to more and different types of oil. . . . Thus, while the Project does not primarily benefit Minnesota, there are some secondary benefits that Minnesota may reap." (ALJ Finding 665).

The ALJ pointed out that the language of Minn. R. 7853.0130 (A) does not prioritize between the "needs" of the applicant, the applicant's customers, the people of Minnesota, or the people of neighboring states. (ALJ Finding 667). The ALJ found that the evidence establishes that a new Line 3 "will increase: adequacy, reliability, and efficiency of the Mainline System because it will: (1) increase the amount and types of crude transported on the Mainline; (2) remedy the reliability issues associated with an aging line that, due to integrity issues, operates at half its original capacity; and (3) allow more operational flexibility (i.e., efficiency) to the Mainline System." (ALJ Finding 666).

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

With respect to criterion Minn. R. 7853.0130 (A) (2), the ALJ adopted the social cost of carbon and average life-cycle greenhouse gas emissions analyses in the Final EIS for the Project, which showed that the annual incremental greenhouse gas emissions associated with the Project are 193 million CO<sub>2e</sub>. (ALJ Findings 673-678). The ALJ also found that "the carbon-intensive nature of tar sands oil extraction, and the increased use and production of non-renewable fossil fuels does not further Minnesota's renewable energy and reduction of GHG emission goals . . . does not further the renewable energy goals . . . Consequently, this Project, which makes the transportation and consumption of fossil fuels easier and more economical for tar sands oil producers, does not further the renewable energy goals of this State and should be viewed as a "negative" in the application of the need criteria to this Project." (ALJ Finding 680).



**E. Minn. R. 7853.0130 (A)(3) - The effects of the applicant's promotional practices that may have given rise to the increase in the energy demand, particularly promotional practices that have occurred since 1974**

The Commission granted Enbridge an exemption from Minn. R. 7853.0130 (A) (3).<sup>13</sup>

**F. Minn. R. 7853.0130 (A)(4) - The ability of current facilities and planned facilities not requiring certificates of need, and to which the applicant has access, to meet the future demand**

With respect to Minn. R. 7853.0130 (A) (4), the ALJ considered: (1) whether the Mainline System with the current Line 3 can meet the future demand for crude oil (the “No Action” Alternative); (2) whether upgrades to Applicant’s existing Mainline facilities can meet the future demand; or (3) whether other facilities not requiring CNs, and to which Applicant has access, can meet the demand (i.e., other pipelines). The ALJ found:

- Transportation of crude oil by rail is not a reasonable alternative to a new Line 3. (ALJ Finding 695)
- There was no disagreement that the Mainline System experienced apportionment for heavy crude between two and 42 percent for 22 of the 26 months between January 2015 and February 2017 (approximately 22 percent average apportionment per month). (ALJ Finding 696).
- The current Line 3 is under pressure restrictions which prevents the transportation of heavy crude or the transportation of more than 390 kbpd of light crude. (ALJ Finding 697).
- Although Enbridge maintains that the current Line 3 can continue to be operated safely, the significant integrity issues associated with the current Line 3 raise questions about the safety of its continued operation. (ALJ Finding 697).
- Recent upgrades to Line 67 within the Mainline System would not provide the additional capacity necessary to render a new Line 3 unnecessary. The ALJ pointed to evidence that Line 67 has been operating at 95 to 98 percent utilization since the upgrades in

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<sup>13</sup> Commission Order Approving Notice Plan, Granting Variance Request, Approving Exemption Requests, and Approving and Adopting Orders for Protection and Separate Docket, January 27, 2015.

2015 while apportionment on the Mainline System has continued. (ALJ Findings 699 and 700).

In summary, the ALJ concluded that with respect to the no build alternative “current facilities are unable to meet current customer demands for heavy crude transport, and are unlikely to meet any increases in future demand should they occur.” (ALJ Finding 701).

The ALJ found that among the upgrade projects Enbridge plans to undertake (Line 4 Capacity Restoration Project, BEP Idle Project, System DRA Optimization, System Station Upgrades, and Line 3 Reversal Project), “there are no planned upgrades of the current facilities not requiring a CN that will meet the future demand asserted by Applicant in this case.” (ALJ Finding 704).

The ALJ rejected DOC-DER’s suggestion that the following planned facilities that do not require a certificate of need could potentially meet Enbridge’s defined need: Trans Mountain Expansion pipeline, Keystone XL pipeline, East Energy and Spectra pipelines. The ALJ explained that because these facilities are not available to the applicant, they do not fall under this rule and would be reviewed under Minn. R. 7853.0130 (B). (ALJ Findings 705 and 706).

**G. Minn. R. 7853.0130 (A)(5) – The effect of the proposed facility, or a suitable modification of it, in making efficient use of resources**

With respect to Minn. R. 7853.0130 (A) (5), the ALJ found:

- A new pipeline (whether it be 34-inch or 36-inch in diameter) would significantly reduce the need for the estimated 6,250 integrity digs anticipated in the next 15 years and would reduce outages and inconveniences associated with those integrity digs. (ALJ Finding 709).
- A new pipeline able to transport light and heavy crude oil (whether 34 or 36 inches in diameter) would provide flexibility and efficiency benefits to the Mainline System. (ALJ Finding 710). There are energy efficiency benefits with a 36-inch diameter line compared to a 34-inch diameter line. A 36-inch pipe is more energy efficient than a 34-inch pipe because the oil moves slower in the wider line, causing less friction, and requiring less power to pump, thereby, saving an estimated 108 GWh of energy, as compared to the same volume on a 34-inch pipe. (ALJ Finding 711).
- 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. (ALJ Finding 718).

**H. Minn. R. 7853.0130 (B) – A more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant**

With respect to Minn. R. 7853.0130 (B), the ALJ examined: (1) the appropriateness of the size, type, and timing of the proposed facility compared to those of reasonable alternatives;<sup>14</sup> (2) the cost of the proposed facility compared to the costs of reasonable alternatives;<sup>15</sup> (3) the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives;<sup>16</sup> and (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives.<sup>17</sup> (ALJ Finding 737).

The ALJ identified the following alternatives that were known and evaluated as part of the proceedings: truck, rail, System Alternative 04 (SA-04), and other pipeline projects (ALJ Finding 738).

**1. Truck and Rail**

Based on the expense of increased road and delivery system infrastructure, higher safety risks, and greater greenhouse emissions discussed in Findings 739 to 743, the ALJ found that a trucking alternative would “not be a reasonable alternative to transport the additional crude that would be provided by the Project.” (ALJ Finding 744).

Although preferable to the trucking alternative, the ALJ found that a rail alternative would also “not be a reasonable alternative to transport the additional crude that would be provided by the Project” because of the greater risk of accidents, higher probability of spills, potentially higher costs, and potential capacity restraints of the existing rail shipment system (ALJ Finding 750, 745-750).

**2. System Alternative 04 (SA-04)**

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<sup>14</sup> Minn. R. 7853.0130 (B)(1).

<sup>15</sup> Minn. R. 7853.0130 (B)(2).

<sup>16</sup> Minn. R. 7853.0130 (B)(3).

<sup>17</sup> Minn. R. 7853.0130 (B)(4).

The ALJ provided the following definition of a system alternative: a pipeline proposal that has a different origin, destination, or intermediate point of delivery than the Applicant's proposed route. SA-04 is a conceptual system alternative for pipeline service directly to the Chicago market (ALJ Finding 751). With respect to SA-04 as compared to the proposed project, the ALJ found that SA-04 is not a more reasonable and prudent alternative to the Project for the following reasons:

- Although, SA-04 would not be any more or less reliable than the Project (ALJ Finding 776), SA-04 would involve the construction of a new pipeline separate from the Mainline System and would not present the same efficiency benefits of the Project; it would not necessarily reduce apportionment on the Mainline System; it would not make use of Enbridge's existing infrastructure or maximize efficiencies within the Mainline System; it would not connect to Clearbrook, Superior, or the Minnesota Pipeline System; it would not directly serve Minnesota or Wisconsin refineries; and it would be twice as long as the proposed Project and significantly more expensive to build. (ALJ Finding 777).
- Although, SA-04 would avoid the headwaters of the Mississippi River and Minnesota's most water-rich environments, including wild rice lakes, SA-04 would, nonetheless, have environmental impacts to Minnesota and three other states; it would be approximately twice the length of the proposed Project; it cannot avoid karst topography without losing the benefits of co-location; the alternative would require permitting in three other states; and it would double the impact on GHG emissions and carbon costs in the transport/transportation of crude. (ALJ Finding 778).

### **3. Other Pipelines**

With respect to using other pipelines, specifically the Keystone XL, Spectra Pipeline, and Energy East Pipeline, the ALJ found that no party established by a preponderance of the evidence that any of these alternative pipelines were more reasonable and prudent alternatives to the Project.

- The Keystone XL "does not serve Minnesota refineries or PADD II directly. Shippers could well pay more to ship on Keystone XL than the Mainline if they do not have a shipping contract with TransCanada. While Keystone XL would not have any negative impacts on the natural and socioeconomic environment of Minnesota, the Keystone XL pipeline will have its own set of environmental and socioeconomic impacts in the U.S. Finally, as for reliability, the fate of the Keystone XL is currently unknown and, therefore,

its reliability compared to the proposed Project cannot be fully evaluated. As it stands currently, the Keystone XL continues to be a hypothetical alternative.” (ALJ Finding 791).

- The Spectra pipeline concept does not appear to be a more reasonable and prudent alternative to the proposed Project because of the undisputed increased costs, the fact that the system does not serve Minnesota’s refiners, and the acknowledgement that its use would result in underutilization of the existing Mainline System (ALJ Finding 802).
- The Energy East pipeline is no longer being considered by its proposer TransCanada; and therefore, is not a reasonable alternative to the Project. (ALJ Finding 803).

Of the alternatives evaluated, the ALJ found that, “under the facts presented, none of the parties have established that an alternative to the Project would be more reasonable and prudent.” (ALJ Finding 810).

**I. Minn. R. 7853.0130 (C) – The consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate**

With respect to Minn. R. 7853.0130 (C), the ALJ examined: (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) the socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its use to protect or enhance environmental quality.

**J. Minn. R. 7853.0130 (C)(1) – The relationship of the proposed facility, or a suitable modification of it, to overall state energy needs**

The ALJ found that “while the evidence does not show that Minnesota refineries are short on oil supply or that they are unable to meet their current oil needs, there is sufficient evidence in the record that the Project will have some positive effects on the state’s energy needs. This occurs by reducing or eliminating apportionment on the Mainline System and allowing Minnesota refineries more ample access to crude of all types. Thus, while the evidence does not establish that Minnesota refineries will be harmed by denial of the Project, the evidence does support a finding that they can benefit from approval of the Project. The increase in access to various types of crude will allow Minnesota refineries to have more security and greater reliability in their supplies. This, in turn, helps Minnesota’s refineries remain competitive in the

marketplace and reduces the cost of refined products for Minnesota consumers.” (ALJ Finding 829). “Accordingly, although the Project is not currently necessary for Minnesota to meet its current energy (i.e., crude oil) needs, the ALJ finds that the Project will provide some benefits to Minnesota’s refiners and will contribute to Minnesota refiners’ ability to meet the state’s energy needs in the future. This, in turn, should benefit Minnesotans, as consumers of petroleum products.” (ALJ Finding 830).

**K. Minn. R. 7853.0130 (C)(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**

**1. Continued Use of Current Line 3**

The ALJ found the continued use of the current Line 3 would not require a new pipeline corridor, avoids habitat fragmentation, new disturbances, and the exposure of state resources to the risk of accidental releases from a pipeline in a new corridor. (ALJ finding 833). However, the ALJ concluded that the continued operation of existing Line 3 presents significant environmental risks: (1) the disturbance and inconvenience associated with 6,250 integrity digs in the next 15 years; and (2) the heightened risk of release associated with an aging pipeline that has known integrity issues (ALJ Finding 834). The ALJ found that the integrity risks that led to the catastrophic Enbridge pipeline failure that caused the Marshall, Michigan spill are “[t]he same integrity risks [ ] present in the existing Line 3 and, according to Applicant, cannot be fully mitigated through repair or operational changes. Therefore, continuing the operation of existing Line 3 has significant risks to Minnesota.” (ALJ Finding 836).

**2. Applicants Preferred Route (APR)**

The ALJ found that the number of high quality water sources and waterbody crossings along the APR from Clearbrook-to-Superior “heightens the risk or could exacerbate the impact of an accidental release.” (ALJ Finding 844). The ALJ also found that because of the “number of high quality surface, ground, and drinking water sources within or near the APR, the impact of an accidental release on those important resources must be considered a weighty risk in approving this Project.” (ALJ Finding 850).

The ALJ discussed the following regarding the APR, primarily the Clearbrook-to-Superior segment:

- “A new pipeline corridor means new impacts to a new area of the state not currently affected or put at risk by crude oil pipelines.” (ALJ Finding 851). “The [APR] would have long-term to permanent/major impacts to 440 acres of wetlands and 2,202 acres of forests or woody wetlands. (ALJ Finding 854). “The [APR] crosses 10,959 acres of highly populated areas; 12,318 acres of unusually sensitive ecological areas; 2,443 acres of drinking water sources; 102,426 acres of biological areas of interest; and 3,704 acres of recreational/tourism areas of interest.” (ALJ Finding 855).
- “Establishing a new corridor for crude oil pipelines creates a higher probability of using the new corridor for other new or rerouted pipelines.” (ALJ Finding 856).

### **3. Climate Change**

Concerning climate change, the ALJ found that due to direct greenhouse gas emissions from operation of the Project, and the potential to increase extraction and consumption of fossil fuels, the Project has the potential to impact the global environment by contributing to climate change. (ALJ Findings 857-862).

### **4. Native American Tribes**

Concerning Native American Tribes, the ALJ found that the “potential direct effects of the Project on Minnesota’s natural resources would disproportionately impact Minnesota’s Native American population, whose culture and belief system is dependent upon the natural environment.” (ALJ Finding 863).

### **5. Abandonment of the Current Line 3**

Concerning Abandonment of the Current Line 3, the ALJ found the following (ALJ Finding 887 and 888):

- Abandonment would prevent the discovery of contamination that may be present in the corridor and prevent remediation of such contamination.
- An abandoned pipeline presents safety, subsidence, and contamination conduit risks because there is no guaranty that Applicant will remain responsible for the line.
- Abandonment results in a permanent burden and nuisance to landowners and tribal communities.

- Abandonment sets a precedent for corporations to simply discard their infrastructure waste in Minnesota when it is no longer economically useful to the company.

Ultimately, concerning Minnesota's natural resources and Native American Tribes, the ALJ found that the "effects of the Project, as proposed, upon Minnesota's natural resources and Native American people, weigh heavily against granting of a CN to a Project that would abandon an old pipeline and establish a new pipeline corridor through Minnesota. (ALJ Finding 889). However, the ALJ further found that the potential impacts on Minnesota's natural resources could be mitigated by:

- A route alternative that utilizes the existing Mainline corridor where impacts have already occurred, and the risk of contamination can be contained;
- A permit that does not allow for in-place abandonment of the current Line 3; and
- A route that does not open a new pipeline corridor through some of Minnesota's most precious water and natural resources or that could be used to locate or relocate other pipelines. (ALJ Finding 890)

## **6. Socioeconomic Effects**

Concerning the socioeconomic effect of the Project, the ALJ found:

- "With respect to economic benefit only, there are more economic benefits (primarily temporary ones) to the state in building the Project, than in not building the Project." (ALJ Finding 917).
- "The socioeconomic benefits to this Project are concentrated in the short-term economic benefits associated with the 14-to-15-month construction period for the Project, including the temporary jobs it will offer." (ALJ Finding 918).
- "The loss of property taxes from an abandoned line would need to be deducted from the property tax benefits of a new line to obtain the net property tax benefits of the Project, as proposed. Thus, because the record is silent as to the amount of property taxes that may be lost from abandonment of Existing Line 3, the ALJ cannot, on this record, find property taxes as a long-term benefit of the Project." (ALJ Finding 919).



- “Despite the temporary nature of most of the economic benefits that could be generated by the Project, these potential economic benefits are, nonetheless, important to the northern region of the state, where job growth and economic development has been slow. . . .” (ALJ Finding 920).

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

The ALJ found that because Minnesota refiners and other PADD II refiners as a whole, rely on the Mainline System and because the Project would reduce apportionment on the System, the resulting “increased reliability of the system and the accessibility to more and different mixes of oil would better allow Minnesota refiners to remain competitive in the market, which could result in benefits to Minnesota consumers in terms of price for refined products.” (ALJ Finding 923).

The ALJ cautioned that “less expensive and more efficient transport, combined with increased volume of available oil, however, has the likely result of encouraging – or [at] least not reducing -- the use and dependence on fossil fuels locally, nationally, and globally.” (ALJ Finding 922).

The ALJ also found that the Project would “provide temporary jobs and indirect and induced economic benefits to the state during the period of construction, as well as the potential for long-term property tax benefits to Northern Minnesota counties.” (ALJ Finding 926).

**M. Minn. R. 7853.0130 (C)(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 ALJ Found that the criteria of Minn. R. 7853.0130 (C)(4) was met (ALJ Finding 933) because “the oil that would be transported through the Project has beneficial uses to humans. Petroleum products are used to meet basic human needs, such as the production of food and the transportation of people and products. . . .” (ALJ Finding 928). In addition, a new pipeline “would provide some additional protection for the environment because it replaces a 50+ year old pipeline.” (ALJ Finding 929).

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

The ALJ found that no evidence was presented that would demonstrate that the Applicant could not comply with or would be in violation of state and federal laws and regulations related to the design, construction, installation, operation, and maintenance of a pipeline. (ALJ Finding 935 and 936).

The ALJ found that regardless of the route, the Applicant will be required to obtain all necessary permits, easements, and consents from the applicable tribes and federal government. (ALJ Finding 937).

The ALJ found that the “Project does not further Minnesota’s environmental policies and goals to reduce the GHG emissions across all sectors and to facilitate the use of renewable energy sources.” (ALJ Finding 948).

## O. Conditions

The following conditions recommended by DOC-DER were identified and discussed in the ALJ’s Report. (ALJ Finding 949). The report does not indicate whether the proposed conditions would be associated with a certificate of need, a route permit, or both.<sup>18</sup>

- Provide a decommissioning fund to ensure payment of all costs associated with decommissioning a new Line 3. *(The ALJ found, however, that any decommissioning fund should be funded in an amount sufficient to cover the future costs of removing a new Line 3 pipeline, not just decommissioning it. (ALJ Finding 963)).*
- Install no more than a 34-inch pipeline to replace the existing Line 3 pipeline.
- Add and maintain two pipeline maintenance shops to any route that extends east beyond Clearbook. *(The Applicant has agreed to add one pipeline maintenance shop. (ALJ Finding 951)).*
- Provide the Commission with an updated, final Field Emergency Response Plan for the Superior Region prior to commencing construction of the Project. *(The Applicant agreed to provide an updated Field Emergency Response Plan. (ALJ Finding 950)).*

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<sup>18</sup> Per Minn. Stat. 216G.02, subd. 3, the Commission may not set safety standards for the construction of a pipeline in a route permit. But the Commission may issue a certificate of need “contingent upon modifications required by the Commission.” Minn. Stat. § 216B.243, subd. 5.

- Provide periodic updates to the Commission, upon request, related to the adequacy of Applicant's cyber security systems. *(The Applicant has not contested this modification. (ALJ Finding 952)).*
- Use thicker pipeline diameter (0.750 inches) along the entire right-of-way in Minnesota. *(The DOC-DER withdrew this recommendation. (ALJ Finding 953)).*
- Demonstrate that it has adequate and reliable facilities, such as distributed generation or other back-up power available for use to provide power to valves if there is an interruption in power.
- Have and continually maintain road access or access that does not require the use of equipment or machinery, to reach all shutoff valves in Minnesota. *(The Applicant has not contested this modification. (ALJ Finding 952)).*
- Remove all exposed segments of existing Line 3 in Minnesota. *(The Applicant agreed to remove all exposed decommissioned segments of existing Line 3 pipe should a permit be issued. (ALJ Finding 950)).*
- Report annually to the Commission about each exposed pipeline segment with identification of how the Applicant will meet its Minnesota operating permit conditions, as well as federal requirements.
- Apply the neutral footprint approved in the second upgrade to Line 67 (Docket No. EL9/CN-13-153) to increased electricity use.
- Obtain a corporate guaranty from Enbridge, Inc. *(The ALJ recommended that a guaranty and indemnification/hold harmless agreement from Enbridge, Inc. be made a condition of any certificate of need or route permit issued in this case. (ALJ Finding 998)).*
- Implement the insurance requirements recommended by DOC-DER's expert witness David Dybdahl. *(The ALJ accepted Mr. Dybdahl's insurance recommendations for a new Line 3 as reasonable. (ALJ Finding 1024)).*

## VI. EXCEPTIONS

In accordance with Minn. Stat. § 14.61, subd. 1, and Minn. R. 7829.2700, exceptions to the ALJ Report were accepted into the record through May 9, 2018. Exceptions were received from the

following parties: DOC-DER, DOC-EERA, Donovan and Anna Dyrdal, Enbridge, Fond du Lac Band of Lake Superior Chippewa (Fond du Lac Band), Friends of the Headwaters (FOH), Honor the Earth, Laborers District Council of Minnesota and North Dakota (Laborers), Leech Lake Band of Ojibwe (Leech Lake Band), Mille Lacs Band of Ojibwe (Mille Lacs Band), Red Lake Band of Chippewa (Red Lake Band), Shippers for Secure, Reliable and Economical Petroleum Transportation (Shippers Group), Sierra Club, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (United Association), White Earth Band of Ojibwe (White Earth Band), and Youth Climate Intervenors (YCI).

In addition to the exceptions received from the parties, the Commission also received comment letters on the ALJ Report from the following non-party participants: Association of Oil Pipelines, Association of Freeborn County Landowners, Canadian Oil and Natural Gas Producers, Minnesota Department of Natural Resources (DNR), Flint Hills Resources, Government of Alberta (Canada), and Minnesota Pollution Control Agency (MPCA).

The exceptions and comment letters can generally be organized into the following two categories: (1) parties that do not agree with the ALJ's recommendation that a certificate of need should be granted for the Project, and (2) parties that agree with the ALJ's recommendation to grant a certificate of need for the Project, but disagree with the condition of selecting alternative RA-07 as the route for the Project.

A few of the parties, namely the Red Lake and White Earth bands, did not provide exceptions to the ALJ's recommendation of need, but rather focused specifically on what they believed were factual errors and incorrect legal interpretations of certain Treaties between the United States and Indian tribes.

#### **A. Parties that do not agree with the ALJ's recommendation to grant a certificate of need for the Project**

The following parties disagree with the ALJ's recommendation to grant a certificate of need:

- DOC-DER
- Fond du Lac
- Friends of the Headwaters
- Honor the Earth
- Mille Lacs Band
- Sierra Club

- Youth Climate Intervenors

The central argument against the ALJ's finding of need focused on the credibility of the Applicant's forecast of demand and claims of future apportionment on the Mainline System. These parties generally argued that there is a general lack of support in the record for a reliable apportionment forecast and thus insufficient evidence to support a finding of future apportionment on the Mainline System.

For instance, DOC-DER and others maintained that Enbridge's apportionment forecast was materially flawed because the underlying Mainline utilization forecasts did not consider global demand for refined product. But the DOC-DER took that argument one step further indicating that the existence of apportionment on the Mainline System alone is not sufficient to meet the criterion of 7853.0130 (A). Likewise, the Mille Lacs Band pointed to the deficiencies in the Applicant's demand forecast identified by the ALJ and argued that those deficiencies alone should have led to the conclusion that Enbridge had not demonstrated a need for the Project.

Several of the parties also took exception the ALJ's reading of certain need criteria and the resulting findings. For example, concerning Minn. R. 7853.0130 (A),<sup>19</sup> the Fond du Lac Band did not agree with the ALJ that the Applicant met the criteria because the criteria language should not be "read disjunctively." That is, although the Applicant and its customers may be adversely affected by denial, the evidence did not show adverse effects for the people of Minnesota and neighboring states. Fond du Lac maintained that the language of this rule requires a showing of impact on all the groups identified in the rule, not just any one of them. Honor the Earth had a somewhat similar interpretation, but instead argued that adverse effects "must be considered in light of what is best for society as a whole." Friends of the Headwaters argued that a new Line 3 would "provide little if any benefit to Minnesota consumers, or refiners in the region," and "the only parties likely to benefit are Enbridge and Canadian oil sands producers who want access to Gulf Coast and global markets." Based on this, Honor the Earth said the adverse-effects requirement of the rule were not met.

Following this line of argument, the DOC-DER, the Sierra Club and others argued that a negative effect on the Applicant and its customers alone is not sufficient evidence to meet criteria of

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<sup>19</sup> Rule 7853.0130 (A) provides in pertinent part: "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."

Minn. R. 7853.0130 (A). The DOC-DER further argued that any perceived secondary benefits to Minnesota refineries should not be considered a legally valid basis for meeting the criterion. Lastly, DOC-DER opined that because the ALJ recommended granting a certificate of need if a certain route (RA-07) is selected for the Project, and because Minnesota legal criteria do not include route determination as a factor in granting a certificate of need, the ALJ has, in effect, determined that the Applicant has not established need under Minn. R. 7853.0130 (C).<sup>20</sup>

It was also pointed to out that the Commission is required to evaluate whether denial would affect the future adequacy, reliability, or efficiency of the energy supply. In this case the DOC-DER, Mille Lacs Band, and others argued that the Applicant's stated need is for the transportation of crude oil and not a demand for energy supply as specified in the rule.

In summary, the primary reasons identified by parties for not granting a certificate of need are as follows:

- Applicant only provided a forecast of its oil transportation needs and thus failed to meet the need criterion requiring an accurate forecast of demand for oil.
- Applicant's forecast of demand for oil is not credible.
- Applicant's future apportionment forecast for its system is not accurate.
- Identifying adverse effects on Applicant and/or its customers alone cannot justify a certificate of need.
- No credible evidence that Minnesota refiners are adversely impacted, and perceived secondary benefits alone do not meet the adverse-effects need criterion.
- Cannot rely on a certain route being selected to meet the more-beneficial-to-society-than-not need criterion.

**B. Parties that agree with the ALJ's recommendation to grant a certificate of need for the Project, but do not agree with the selection route RA-07 as a condition to meet the certificate of need criteria**

The following parties generally agreed with the ALJ's recommendation to grant a certificate of need for the Project, but did not agree with the ALJ's conclusion that in order to meet the criteria for granting a certificate of need, a certain route must be selected, RA-07.<sup>21</sup>

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<sup>20</sup> See ALJ Report, Conclusion 27. Rule 7853.0130 (C) provides in pertinent part: "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate."

<sup>21</sup> The following non-parties provided letters in support of the need recommendation, but argued against the requirement of selecting route RA-07: Association of Oil Pipelines, Canadian Oil and Natural Gas Producers, Flint Hills Resources, and Government of Alberta.

- Enbridge
- Laborers
- Shippers Group
- United Association

These parties are in general agreement that the ALJ inappropriately and unlawfully recommended granting a certificate of need that is contingent on selection of a particular route. Enbridge pointed to Minn. Stat. § 216B.243, subd. 2, which directs that no large energy facility shall be sited or constructed in Minnesota without the issuance of a certificate of need by the Commission. Enbridge also noted that none of the criterion for a certificate of need relate to the location or the route of a pipeline.

Likewise, the United Association argued that the route cannot be a condition for determining the need for the Project, noting that Minn. R. 7853.0130 (C) requires a determination whether the consequences of building the Project are more beneficial than the consequences of not building the Project. The United Association points out that the ALJ's analysis "shows that she found the consequences of denying the CN (i.e., selection of the No Action alternative) would be worse than the consequences of granting the CN, without consideration of the route."

Enbridge and some of the other parties also presented arguments focused on the perceived defects associated with the RA-07. But these arguments are more appropriately addressed in the briefing paper on the issues the Commission will have to consider if it decides there is a need for the new Line 3 and thus a route must be selected for it.

Enbridge also took exception to a significant number of findings and conclusions on the grounds that the findings are inaccurate, speculative, and unsupported by the record of evidence. Enbridge provided a handful of notable examples in the body of its exceptions with a copy of the ALJ Report that includes all of its proposed revisions in track changes provided as an attachment. Enbridge maintained that the Commission must correct the identified findings in order to "accurately state – and confine the basis of its decision to – the record." For example:

- Whether or not Minnesota refiners are shippers on the Mainline System (ALJ Finding 629).
- Whether or not shippers on the Mainline System are predominantly Canadian crude oil producers. (ALJ Finding 657 and 722).
- Whether or not the shippers pay for the cost of a new Line if they do not use it. (ALJ Finding 488).

- Whether or not there are future plans to construct additional lines along the APR if approved.
- What the easement agreements with tribal governments or private landowners do or do not allow for. (ALJ Finding 400).

### **C. Parties that took no position on the ALJ's recommendation, but provided exceptions to specific sections of the ALJ Report**

The Red Lake and White Earth Bands provided exceptions to the sections of the ALJ Report addressing treaties between the United States and Indian tribes. These bands maintain that the interpretation of Indian treaties is a matter of federal law and the ALJ's treaty interpretation in this matter does not conform to federal law. It should be noted that Mille Lacs and Fond du Lac also had similar concerns with the treaty sections of the ALJ Report. Ultimately, all the tribal governments agreed that the Commission is not empowered to adjudicate treaties or usufructuary rights under the treaties.

On a similar note the Fond du Lac, Leech Lake and other tribes also agreed that the Commission does not have authority to make a binding interpretation of any aspect of existing easement agreements between Enbridge and landowners, including tribal governments. The easements are governed by their own terms, and federal law with respect to the easements through tribal lands.

The Leech Lake Band did not specifically object to the ALJ's recommendation to grant a certificate of need for Enbridge's new Line 3. Rather, Leech Lake explicitly objected to the ALJ's recommendation to grant a permit that placed the new Line 3 in the existing Line 3 trench (route RA-07, or in-trench replacement) that runs through the Leech Lake reservation. Therefore, Leech Lake's exceptions and arguments will be addressed in the briefing paper on the route permit.

### **D. Conditions**

As noted earlier, the ALJ identified a number of conditions in the Report that were recommended by the DOC-DER. DOC-DER and Enbridge were the only parties that filed exceptions to the certificate of need condition findings in the ALJ Report.

Although the DOC-DER recommended against a certificate of need, it anticipated the possibility of the Commission granting a certificate of need for the Project. DOC-DER explained in its exceptions 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." DOC-DER also recommended that any conditions important to a finding of need should also be part of the "operating conditions" of a route permit.

In its exceptions, DOC-DER pointed out that the ALJ did not make recommendations on two of its suggested conditions: pipeline diameter and a neutral footprint program.

### **Pipeline Diameter**

The DOC-DER noted that the ALJ did not make a recommendation on whether a new Line 3, if approved, should be constructed with 34-inch or 36-inch pipe. The DOC-DER therefore recommended the addition of a finding that recognizes its concerns about this issue and its recommendation that, if approved, a new Line 3 should be no larger than a 34-inch pipeline.

### **Neutral Footprint Program**

The DOC-DER noted that the ALJ also made no recommendation whether to require the application of a neutral footprint program to offset all incremental nonrenewable energy consumption with renewable energy. The DOC-DER recommended an additional finding to assist the Commission with the issue.

Enbridge argued that the Commission only has authority to place conditions on the approval to construct a pipeline, not the operation of a pipeline, pointing to Minn. Stat. § 216G.02, subd. 3(a). Enbridge further objected to the fact that the ALJ did not provide any analysis or discussion of the Commission's authority to impose the conditions. Specifically, Enbridge believes the ALJ's insurance recommendations put a "burden on interstate interests for the benefit of in-state interests" and are outside the Commission's authority. For this reason, Enbridge recommended in its exceptions additional findings that address the Commission's legal authority in this area. Enbridge did however agree to the following conditions as presented in the ALJ Report:

- Maintain two pipeline maintenance shops for any route that extends east beyond Clearbook, Minnesota.
- Remove all exposed segments of existing Line 3 in Minnesota provided it can be completed without unnecessary harm to the environment.

- Annually report any exposed pipeline segments on existing Line 3 that are not yet removed and identify how and when Enbridge will meet federal requirements as to exposed pipeline.
- Provide periodic updates to the Commission on the adequacy of Applicant's cyber security systems
- Provide an updated final Field Emergency Response Plan for the Superior Region prior to commencing construction of the Project.

Based on its exceptions filing, it appears that Enbridge is not in agreement with the recommendation of:

- limiting pipeline diameter to 34 inches
- neutral footprint program
- an abandonment trust
- the insurance and corporate guarantee as recommended or
- the specific details related to the recommended insurance requirements, and
- indemnification/hold harmless agreement from Enbridge, Inc.

## VII. STAFF ANALYSIS

The Commission has the following issues before it regarding the certificate need application for the proposed Line 3 Replacement Project:

- whether to grant or deny a certificate of need for the proposed Line 3 Replacement Project considering the factors listed under each of the criteria set forth in Minn. R. 7853.0130 and determining whether or not each criterion has been met.
- if a certificate of need is granted, whether there are certain modifications that should apply to the certificate of need.
- whether or not to adopt the ALJ's Findings of Fact and Conclusions of Law, and if adopted, whether or not the findings and conclusions require supplementation or amendments considering the exceptions provided by the parties.

### A. Have the criteria set forth under Minn. R. 7853.0130 been met?

1. **Would the denial of the certificate of need 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?**

Concerning this criterion, the ALJ concluded that the Applicant has established that:

- 1) there is a need to replace the current Line 3 due to known integrity issues and safety risks associated with external corrosion and stress corrosion cracking of the pipeline. As a result, Line 3 is operated at half its original capacity and transporting only light crude, which while it reduces the volume and pressure of the oil transported through the line, will not alleviate future external corrosion of the pipeline. The integrity issues will continue to persist and can only be addressed through an extensive dig and repair program that Enbridge proposes to implement over the coming years if the Commission does not grant a certificate of need for the Project, which will not restore the current Line 3 to its designed operating capacities; and
- 2) apportionment on the Enbridge Mainline System also supports a finding of need for the line. The ALJ found that (i) apportionment on the Mainline System exists and will likely continue until 2035 unless the Project or other pipeline options are available to transport Canadian crude; (ii) apportionment impacts Applicant's customers, principally the Canadian oil producers because they cannot ship as much as oil as they want efficiently or economically without the new line; but (iii) Minnesota refiners do not appear to have been harmed as a result of apportionment. (ALJ Finding 657).

The ALJ reasoned that because Rule 7853.0130(A) allows the finding of need to be based on the adverse effects of denial on either the Applicant, or Applicant's customers, or the people of Minnesota and neighboring states, Enbridge had met its burden of proof in establishing that the probable result of denial of a certificate of need for the Project would adversely affect Applicant's customers. As set forth by the ALJ in Finding 666, denial would adversely impact the crude oil supply transported by the Applicant to its customers by: (1) preventing the Mainline System from transporting **adequate** supplies and different types of crude oil; (2) allowing the **reliability** issues associated with the operation of an aging pipeline with known integrity and safety issues to persist; and (3) inhibiting greater operational flexibility (i.e., **efficiency**) to the Mainline System.

The ALJ concluded that the Applicant did not establish that denial of the Project would adversely affect the energy supply to Minnesota refiners. The ALJ determined that the evidence demonstrated that Minnesota refiners are currently receiving sufficient amounts of crude oil to meet their production needs and therefore denial of the Project would not result in harm to them. (ALJ Findings 630-31, and 657).

However, the ALJ also specifically found that approval of the Project would increase Minnesota refiners' access to more and different mixes of crude, which would allow them to remain competitive in the market and potentially lower the cost of refined petroleum products for the people of Minnesota. (ALJ Finding 923). Staff believes this finding about the benefits of the Project for Minnesota refiners is properly considered by the Commission in its Rule 7853.0130 (A) analysis, since the ALJ has found that denying the Project would adversely affect Minnesota refiner's ability to remain competitive, which in turn would adversely affect the possibility of Minnesotans enjoying lower-cost refined petroleum products.

Staff notes, however, that while the ALJ relied on the apportionment data in the record to support a finding of need, she rejected Applicant's need forecast as a basis for her need finding because it was a supply rather than a demand forecast, and she found it unreliable. (ALJ Findings 658-62).

What is required by Commission rule is a demand forecast as set forth in Minn. R. 7853.0010, subp. 8 of the rule which defines "demand" as "that quantity of a petroleum product from the applicant's facilities for which there are willing and able purchasers . . ." Subpart 9 of the rule defines "forecast" to mean "a prediction of future demand for some specified time period." Thus, Enbridge was required to provide a forecast of the quantity of crude its Mainline System facilities would transport over a certain future period of time to "willing and able purchasers" of the crude.

Enbridge provided a forecast of the quantity of oil forecasted to be shipped on its Mainline System. The forecast identified the amounts to be shipped to Minnesota refineries and other types of pipeline customers that purchase the oil transported to them, thus establishing the existence of "willing and able purchasers" for this portion of the crude petroleum product shipped on Enbridge facilities, as required by the Commission's rule. However, the forecast identified other pipeline customers, such as the Canadian oil producers, who would not be purchasing the crude they ship on the Mainline System because they already own it. There was no analysis of the types of customers that would be purchasing this crude, or the markets in which these customers operate, to confirm there are willing and able purchasers of this portion of the petroleum product projected to be shipped on Enbridge's facilities.

While the apparent purpose of the oil producers' projected shipments on the Mainline System is to get their crude to able and willing purchasers, the Commission may want to consider whether the Applicant has actually met the demand forecasting requirements of Minn. R. 7853.0130(A)(1). Staff notes that the Commission could require more detailed information on the demand of the purchasers of the oil producers' crude, as the Department argued was

required, for that goes to the issue of whether there is support for the accuracy of Enbridge's shipping forecast for the Canadian oil producers given the downward shift from a constant to increasing demand for crude oil to a projected flat to possibly decreasing global demand. Or the Commission could conclude that the record evidence on the oil producers' past and current practice of using the Mainline System to ship their crude to market is itself sufficient to show there are willing and able purchasers for the forecasted shipments of Canadian oil producer-owned crude on Enbridge's Mainline System.

**2. Has a more reasonable and prudent alternative to the proposed facility been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant?**

The following alternatives to the need for the Project were evaluated in the record: truck, rail, System Alternative 04 (SA-04), and other pipeline projects. These alternatives were evaluated with respect to: (1) the appropriateness of the size, type, and timing of the proposed facility compared to those of reasonable alternatives; (2) the cost of the proposed facility compared to the costs of reasonable alternatives; (3) the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives. The ALJ concluded that a more reasonable and prudent alternative to the Project was not demonstrated by a preponderance of the evidence by parties or persons other than Applicant.

**Truck or rail transportation:** these alternatives would require 4,000 or more trucks per day, or 10 trains with 110 tanker cars per day, new loading facilities, and result in increased/accelerated deterioration of roads and increased costs on state and local governments, increased vehicle congestion, increased capital costs to purchase trucks and tanker cars, interference with shipping of other products, and greater likelihood of small and medium spills.

**SA-04:** this hypothetical pipeline system alternative would not interconnect at Clearbrook or Superior, would not deliver oil to refineries in Minnesota and Wisconsin, and thus would not provide the type of system benefits and efficiencies to Enbridge's Mainline System that are the purpose of the Project. No company has proposed to build this alternative, no shipper expressed support for it, the total estimated capital costs would reach \$5.5 billion, with refiner transportation costs increasing by an estimated \$0.23 per barrel (\$28 million per year), and its routing over karst topography is problematic.

**Other Pipelines:** these alternatives do not directly serve Minnesota and Wisconsin refineries and would not, therefore, benefit the refineries with more and different varieties of crude, do not utilize the existing infrastructure of Enbridge's Mainline System and thus cannot reallocate transport capacity on the Mainline System to ensure greater efficiency and economic benefits, which is the purpose of the proposed Project, and would therefore impose the environmental risks associated with a new pipeline on other states without any of the countervailing benefits associated with improving the Applicant's existing Mainline System.

Staff believes the record shows that these alternatives were properly evaluated and that the Commission can make a determination that the criteria set forth under Minn. R. 7853.0130(B) have been met. *See ALJ Findings 736 to 810.*

**3. Are the consequences to society of granting a certificate of need more favorable than the consequences of denying the certificate of need?**

For this criterion the ALJ evaluated the Project regarding: (1) the State's overall energy needs, (2) effect on the natural environment, (3) effect on the socioeconomic environment, (4) effect on inducing future development, and (5) socially beneficial uses and environmental quality. This criterion specifically contemplates that the Commission may require "suitable" modifications to a proposed project to find that these five sub-criteria are met.

**Overall Energy Needs**

The record has shown that the Project will have some positive effects on the state's energy needs by reducing or eliminating apportionment on the Mainline System; allowing Minnesota refineries more ample access to crude of all types; and benefiting Minnesotans, as consumers of petroleum products.

**Natural Environment**

Concerning the natural environment, the ALJ found that the proposed Project using the APR would have a negative effect on Minnesota's natural resources. Based on this, the ALJ found that the Project did not meet this factor of the criterion of Minn. R. 7853.0130 (C), and concluded that this factor alone "weighed heavily" against granting a certificate of need. But as the ALJ noted, this factor specifically requires evaluating the effect of the proposed project on the natural environment *as compared to the effect of not building the facility.* (ALJ Finding 831). Staff notes that the ALJ found that all of the "No Action alternatives" to the Project (truck, rail,

continued operation of existing Line 3, or some combination of these),<sup>22</sup> had just as significant or worse environmental impacts.<sup>23</sup> Given this record, Staff believes that this factor could alternatively be considered by the Commission to weigh in favor of the Project, not against it.

Staff also notes that the ALJ found the Project did not meet the factor under Minn. R. 7853.0130 (A)(2) related to effects on state and federal conservation programs, but did not conclude that not meeting this factor was crucial when determining whether or not to grant a certificate of need. Staff believes this is important to note. The Commission does not necessarily have to ensure that every factor under each criterion is given equal weight, or even met. In accordance with Minn. R. 7853.0100, the Commission must evaluate the factors listed under each of the criteria set forth in part 7853.0130, but it must do so only “to the extent that the Commission deems them applicable and pertinent to each facility proposed pursuant to this chapter. The Commission shall make a specific written finding with respect to each of the criteria.” Staff believes this rule provides the Commission with the discretion to determine whether or not certain factors under the criteria apply to a particular large energy facility as defined under part 7853.0030, requiring only that the Commission explains its reasoning regarding the extent to which it deems each factor applicable and pertinent to the need determination of the specific facility being proposed.<sup>24</sup>

### **Socioeconomic Environment**

Like the effects on the natural environment, the effects of the Project on the socioeconomic environment must be compared to the effects of not building the project as provided by the Commission rule. The ALJ found that the record shows there are more economic benefits to the state in building the Project, than in not building the Project. The benefits come by the way of jobs created during construction of the pipeline. The ALJ found that long-term tax benefits from the Project could not be considered due to lack of adequate information in the record.

### **Inducing Future Development**

The record shows there would be a reduction in apportionment as a result of the Project, which would allow Minnesota refiners to remain competitive by providing access to more and different mixes of crude oil which results in benefits to Minnesota consumers in terms of price for refined products. In the negative, the increased and more economical access to crude oil is

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<sup>22</sup> ALJ Finding 501.

<sup>23</sup> See ALJ Findings 739-44 (truck), 745-50 (rail), and 834-36 (existing Line 3).

<sup>24</sup> Because of the discretion provided the Commission by Minn. Rule 7853.0100, Staff believes that the ALJ was free to evaluate the importance of the Project meeting the factor relating to state and federal conservation programs and agrees with the ALJ’s conclusion that this factor is not crucial to the need determination in this case for the reasons set forth in the ALJ Report.

not compatible with reducing dependence on fossil fuels or GHG emissions. Also, a new oil pipeline corridor in Minnesota opens up the possibility that the corridor could be expanded and used for other pipelines in the future.

### **Socially Beneficial Uses and Environmental Quality**

The record shows that the refined products created from crude oil have socially beneficial uses. In addition, the replacement of an old pipeline with safety and integrity issues provides protection to the state's environment.

### **ALJ Finding that Social Consequences Favor Granting Certificate of Need Only if Project is Located in RA-07**

The ALJ explains that this finding is based on the effect the Project would have on Minnesota natural resources and Native Americans if it is routed in the APR, "which would abandon an old pipeline [in place] and establish a new pipeline corridor through Minnesota." ALJ Finding 890. But as the ALJ noted, the question of whether the social consequences of granting a certificate of need are favorable than the consequences of denying it are to be determined by comparing the proposed project to not building the project. (ALJ Finding 831).

The ALJ's other findings that address the issue of whether existing Line 3 should be replaced consistently present the conclusion that replacing the existing Line 3 with a new pipeline would be more beneficial than not replacing it:

- "Line 3, however, is old, needs significant repair, and poses significant integrity concerns for the State. Accordingly, the Judge finds that replacement of the line is a reasonable and prudent action." Summary of Facts and Recommendation, p. 8.
- "A new Line 3 would . . . remedy the integrity issues related to the old line." *Id.*, p. 9.
- "While Applicant contends that Existing Line 3 can continue to operate safely, the significant integrity issues related to the line, which have been identified by Applicant, bring into question the safety of its continued use." (ALJ Finding 697).
- "According to Applicant, no feasible technology or operational changes can arrest or reverse the external corrosion on Existing Line 3 or remove the risks inherent with flash-weld pipe . . ." (ALJ Finding 834).
- "The cause of [Enbridge's] Marshall, Michigan, spill was "corrosion fatigue," which led to cracks and an ultimate catastrophic rupture. The same integrity risks are present in the



Existing Line 3 and, according to Applicant, cannot be fully mitigated through repair or operational changes. Therefore, continuing the operation of Existing Line 3 has significant risks to Minnesota.” (ALJ Finding 836).

A fair reading of the record would support the conclusion that, with respect to effects of the Project on the natural environment, the consequences of granting a certificate of need for the Project are more beneficial than denying it because of the risk of a catastrophic failure of the existing line, despite it being operated at reduced pressure and shipping only light crude.

Staff also believes where the Project should be routed to best avoid or minimize and mitigate adverse impacts of a new Line 3 on the natural environment is properly deliberated during consideration of a route permit for the Project if a certificate of need is granted. While the consequences-to-society criterion in the Commission’s rules contemplates that the Commission may make modifications to a proposed facility to ensure that the consequences of granting the certificate of need are more favorable than consequences of denying it does not appear to Staff to be sufficient authority to replace the entire route permit review and selection process. Staff believes the ALJ’s efforts to single out one route as a necessary condition for the Commission to find there is a need for the Project does not comply with statute, rule, the Commission’s past practice.

**4. Will the design, construction, or operation of the proposed facility comply with the relevant policies, rules, and regulations of other state and federal agencies and local governments?**

The record shows that the Project will comply with all local, state, and federal laws and regulations related to the design, construction, installation, operation, and maintenance of a pipeline. In addition, the Applicant will be required to obtain all permits, easements, and consents from Minnesota landowners, Indian tribes and the federal government, as required by law. The ALJ however found that the Project would not “further Minnesota’s environmental policies and goals to reduce the GHG emissions across all sectors and to facilitate the use of renewable energy sources.”

The Commission will need to weigh the evidence for each of the separate factors of the four criteria under Minn. R. 7853.0130. Staff believes the record evidence provides the Commission with sufficient foundation to determine that a certificate of need should be granted for the Project. As stated earlier, staff does not believe that the ALJ’s recommendation to grant a certificate of need contingent on selecting a certain route is binding. Staff believes the simple fact that a new state-of-the-art pipeline will replace a 50-year-old pipeline with significant and

known integrity issues that pose significant environmental risks is a more favorable consequence than the consequence of not replacing the line without regard to which of the four possible routes for the pipeline is best.

### **B. Should the Commission adopt the ALJ's Findings of Fact and Conclusions of Law?**

Staff believes the ALJ Report is comprehensive and thorough. Based on the record as a whole, staff believes the findings and the conclusions presented accurately represent the procedural history of the docket and a comprehensive evaluation of the Project and application of the certificate of need criteria.<sup>25</sup> There are however certain sections or individual findings that may require modification. Staff believes the Commission does not need to make any modifications related to the procedural history, but may want to modify various findings that characterize the nature of the record evidence, or the conclusions that should be drawn from that evidence with respect to the various need criteria, especially the recommendation to grant a certificate of need contingent on modifying the proposed Project to only be located in RA-07, the in-trench route alternative.

Staff agrees with those parties that pointed out in their exceptions that the Commission is not empowered to interpret treaties or usufructuary rights under the treaties. Nor does staff believe it is necessary or appropriate for the Commission to discuss or interpret the treaties or the issue of usufructuary rights in reaching its certificate of need and permit determinations in this case. Therefore, staff recommends removing such findings and conclusions from the Report.

Staff also agrees with those parties that provided exceptions to those sections of the Report that discussed easements between either the Applicant and private landowners or the Applicant and Tribal Governments. Staff does not believe the Commission has authority over existing or future easement agreements or interpretation of such agreements. In fact, the Commission must not consider easement or right-of-way agreements in making its decision on a route.<sup>26</sup> Therefore, staff recommends removing such findings and conclusions from the Report.

Staff notes that the Commission need not engage in the exercise of reviewing the ALJ Report to identify any finding, conclusion, and recommendation that may be inconsistent with its final determinations in this matter. The Commission traditionally leaves it to staff to ensure that the

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<sup>25</sup> Staff will address those findings and conclusions relative to a routing permit in separate briefing papers.

<sup>26</sup> Minn. R. 7852.0700, subp. 1.

final written order identifies the parts of an ALJ Report that have been adopted, with or without modification, and the parts have not been adopted.

**C. What modifications, if any, should the Commission require when granting a certificate of need?**

As stated earlier, the DOC-DER recommended that if the Commission decides to grant a certificate of need, the following modifications should be adopted:

- Install no more than a 34-inch pipeline to replace the current Line 3 pipeline.
- Maintain two pipeline maintenance shops between Clearbrook, Minnesota and Superior, Wisconsin.
- Remove all exposed segments of the current Line 3 in Minnesota provided it can be completed without unnecessary harm to the environment.
- Annually report any exposed pipeline segments on existing Line 3 that are not yet removed and identify how and when Enbridge will meet federal requirements as to exposed pipeline.
- Provide periodic updates to the Commission on the adequacy of Applicant's cyber security systems
- Provide an updated final Field Emergency Response Plan for the Superior Region prior to commencing construction of the Project.
- Demonstrate that it has adequate and reliable facilities, such as distributed generation or other back-up power available for use to provide power to valves if there is an interruption in power.
- Have and continually maintain road access or access that does not require the use of equipment or machinery to reach all shutoff valves in Minnesota.
- Provide a decommissioning fund to ensure the payment of issues arising with the decommissioning of a new Line 3, or as recommended by the ALJ, an abandonment trust funded in an amount sufficient to cover the future costs of removal of a new pipeline, not just decommissioning.
- Require the application of a neutral footprint program to offset all incremental nonrenewable energy consumption with renewable energy.
- Obtain a guaranty and indemnification/hold harmless agreement from Enbridge, Inc.
- Implement the insurance requirements recommended by DOC-DER's expert witness David Dybdahl.

Staff notes in the event the Commission is inclined to grant a certificate of need for the Project, "[issuance] of the certificate may be made contingent upon modifications required by the

commission.” Minn. Stat. § 216B.243, subd. 5. It is staffs understanding that Enbridge has agreed with several of the recommended modifications, which are properly referred to as modifications, with the exception of the following:

- limiting pipeline diameter to 34 inches
- neutral footprint program
- an abandonment trust
- the insurance requirements recommended by DOC-DER
- an indemnification/hold harmless agreement from Enbridge, Inc.

Staff agrees with all of the modifications recommended by the Department, with the exception of limiting the pipeline to no greater than 34 inches in diameter. Staff does not believe there is sound evidence in the record that would warrant this recommendation. In fact, the record demonstrates just the opposite:

- A 36-inch diameter pipe is more efficient and requires less energy to transport oil than does a 34-inch pipe.
- A 36-inch diameter pipe is being used in both the North Dakota and Wisconsin segments of the Line 3 replacement.
- DOC-DER asserted that Enbridge is designing the project with a 36-inch diameter pipe to obtain extra capacity although there is no evidence in the record supporting the assertion. Even if the assertion was true, any additional capacity greater than an average annual capacity of 760 kbpd requested by Enbridge in its application would require additional and separate Commission approval.<sup>27</sup>

## VIII. COMMISSION DECISION OPTIONS

### A. Certificate of Need

1. Grant a Certificate of Need to Enbridge Energy Limited, Partnership, for the Line 3 Replacement Project consisting of a pipeline from the North Dakota border in Kittson County to the Clearbrook Terminal in Clearbrook, Minnesota, and from the Clearbrook Terminal to the Wisconsin border in Carlton County, and authorizing transport of an average annual capacity of 760,000 bpd of crude oil.

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<sup>27</sup> See Minn. R. 7853.0030 (D).

2. Impose the following modifications or some combination of the modifications on the granting of a certificate of need:
  - a. Install no more than a 34-inch pipeline to replace the current Line 3 pipeline.
  - b. Maintain two pipeline maintenance shops between Clearbrook, Minnesota and Superior, Wisconsin.
  - c. Remove all exposed segments of the current Line 3 in Minnesota provided it can be completed without unnecessary harm to the environment.
  - d. Annually report any exposed pipeline segments on existing Line 3 that are not yet removed and identify how and when Enbridge will meet federal requirements as to exposed pipeline.
  - e. Provide periodic updates to the Commission on the adequacy of Applicant's cyber security systems
  - f. Provide an updated final Field Emergency Response Plan for the Superior Region prior to commencing construction of the Project.
  - g. Demonstrate that it has adequate and reliable facilities, such as distributed generation or other back-up power available for use to provide power to valves if there is an interruption in power.
  - h. Have and continually maintain road access or access that does not require the use of equipment or machinery to reach all shutoff valves in Minnesota.
  - i. Provide a decommissioning fund to ensure the payment of issues arising with a decommissioned Line 3, or as recommended by the ALJ, an abandonment trust funded in an amount sufficient to cover the future costs of removal of a new pipeline, not just decommissioning.
  - j. Require the application of a neutral footprint program to offset all incremental nonrenewable energy consumption with renewable energy.
  - k. Obtain a guaranty and indemnification/hold harmless agreement from Enbridge, Inc.
  - l. Implement the insurance requirements recommended by DOC-DER's expert witness David Dybdahl.
3. Deny a Certificate of Need to Enbridge Energy Limited, Partnership, for the Line 3 Replacement Project and provide a statement of reasons for that decision.
4. Take some other action deemed appropriate.

**B. ALJ's Findings of Fact, Conclusions of Law, and Recommendation**

1. Adopt the ALJ's Findings of Fact, Conclusions of Law, and Recommendation for the Line 3 Replacement Project.
2. Adopt the ALJ's Findings of Fact, Conclusions of Law, and Recommendation for the Line 3 Replacement Project, as modified by the Commission.
3. Do not adopt the ALJ's Findings of Fact, Conclusions of Law, and Recommendation for the Line 3 Replacement Project.
4. Take some other action deemed appropriate.